Between:

Northwood Pulp and Timber Limited ("Northwood"), and

Communications, Energy and Paperworkers' Union of Canada, Local Union No. 603 ("Local 603"), and

MacMillan Bloedel Limited (Alberni Pulp and Paper Division) ("MacMillan Bloedel"), and

Communications, Energy and Paperworkers' Union of Canada, Local Union Nos. 592 and 686 ("Locals 592 and 686"), and

Pulp, Paper and Woodworkers of Canada (the "PPWC"), and

Avenor Inc. ("Avenor"), and

British Columbia Federation of Labour (the "BC Fed")

British Columbia Labour Relations Board

S. Lanyon, Chair
J.B. Hall, Associate Chair (Adjudication)
M. Giardini, Vice-Chair

Heard: June 13 and 14, 1994 - Decision: July 15, 1994

Counsel: Norman K. Trerise, for Northwood.
Gavin H.G. Hume, for MacMillan Bloedel.
Peter F. Parsons, for Avenor.
John D. Rogers for the CEP
John Baigent for the BC Fed.
Wayne Moore, for the PPWC.

DECISION OF THE BOARD

I. NATURE OF APPLICATION AND PARTIES

This decision concerns two complaints which were consolidated for hearing as they arise on virtually identical facts and raise the same issue of law and policy under the Labour Relations Code.

The first complaint was filed by Northwood against Local 603. Northwood alleges that Local 603 has committed unfair labour practices, contrary to Sections 11 and 47 of the Code, by refusing to bargain with Northwood except on an industry-wide basis. It further complains that Local 603 has failed to bargain collectively within ten days after receiving notice to commence collective bargaining. Northwood seeks a declaration that Local 603 has acted contrary to the Code, and

an order that Local 603 cease and desist from refusing to bargain and from taking a strike vote until collective bargaining has taken place.

The second complaint was filed by MacMillan Bloedel against Locals 592 and 686 under the same sections of the Code. The basis for the complaint is again a refusal by the Locals to engage in collective bargaining for a renewal agreement on other than an industry-wide basis.

The PPWC requested and was granted interested party status to participate in these proceedings. Various locals of the PPWC represent employees at pulp and paper mills in the Province and have previously been involved in joint industry bargaining with locals of the Communications, Energy and Paperworkers' Union (the "CEP"). Standing was similarly granted to Avenor, which operates a pulp mill in the Province and is certified to Local 11 of the PPWC. A request by the BC Fed for intervenor status was also granted, given the significance of the issue to the labour relations community generally. However, the Panel declined to grant a request by the Hospital Employees' Union at the outset of the hearing for either interested party or intervenor status.

II. BACKGROUND

There is very little difference over the immediate facts giving rise to the present complaints, as well as over the manner in which collective bargaining has historically occurred in the Province's pulp and paper industry. Additionally, the outcome of these complaints turns almost entirely on the appropriate law and policy which should govern collective bargaining under the Code -- and, more particularly, whether disputes over the format of collective bargaining can be taken to impasse. We will therefore only summarize the basic elements of the evidence in order to provide a factual context for the legal arguments of the parties and our analysis. While we have considered all of the evidence, those parts omitted from this decision do not impact on our ultimate conclusion.

(i) The Primary Parties

Northwood is an integrated forest products company which operates a pulp mill at Prince George. Local 603 is certified to represent employees working at the mill. The two parties are signatory to a document known as the "B.C. Standard Labour Agreement" which had a term ending April 30, 1994. They also negotiate a series of local agreements referred to as "Bull Sessions." These two documents together comprise the collective agreement between the parties.

MacMillan Bloedel operates a pulp mill at Port Alberni. The employees at that location are certified to two different locals of the CEP. The papermaker employees are certified to Local 686 and the remaining employees at the pulp mill, except office staff, are certified to Local 592. MacMillan Bloedel and the two Locals are also signatory to the B.C. Standard Labour Agreement and have their own "Bull Sessions" agreements.

(ii) The History of Collective Bargaining

For many years, bargaining in the Province's pulp and paper industry was conducted between the Pulp and Paper Industrial Relations Bureau (the "Bureau") on behalf of its employer members, and the CEP and the PPWC (or their predecessors) on behalf of employees. The Bureau became an accredited employers' organization in June of 1970.

Prior to 1977, the CEP (then known as the Canadian Paperworkers Union (the "CPU")) and the PPWC bargained separately with the Bureau on behalf of the various bargaining units which they represented. The nine PPWC locals negotiated what became known as the "Joint Labour Agreement" (the "JLA"); the sixteen locals of the CEP collectively negotiated the B.C. Standard Labour Agreement (the "SLA"). Additionally, as indicated, locals of the two Unions negotiated with individual employers over local issues (the "Bull Sessions" items) on a mill-by-mill basis.

The CPU and the PPWC decided in 1977 to pursue joint bargaining for the first time and negotiated together with the Bureau. However, the two Unions continue to have two separate agreements (the JLA for the PPWC, and the SLA for the CEP). The terms and conditions found in the two agreements are very similar.

The Bureau sought and obtained de-accreditation from the Labour Relations Board in 1985: see Pulp and Paper Industrial Relations Bureau, BCLRB No. 77/85. The application was opposed by the PPWC (and, to some extent, by the CPU). In

response to arguments raised by the Unions the Board stated as follows:

> The trade unions have described a number of serious potential results touching industrial stability and the process of collective bargaining in the industry which may flow from the de-accreditation of the Bureau. The bargaining structure in this industry represented by the existence of the Bureau as an accredited employers' organization is a long standing one. De-accreditation of the Bureau may have a significant impact on collective bargaining and industrial stability in this sector.
>
> These difficulties can be avoided, however, if a rational substitute structure of collective bargaining is substituted for that represented by the Bureau. The fact that negotiations of an acceptable substitute structure may fail is not a sufficient ground to deny the Bureau's application for cancellation of the accreditation. ... (p. 4)

The de-accreditation application was granted as it was supported by all member employers of the Bureau. The Board's policy was to grant such applications where there was unanimous support, in the absence of special circumstances (none of which were present).

Following de-accreditation, the two Unions and the Bureau met in the Spring of 1985 to discuss bargaining format for the 1986 negotiations. The Bureau outlined its members' various concerns about bargaining as a group. It took the position that unless a different system could be agreed to, the individual employers would bargain on their own. In a joint letter from their respective business representatives, both Unions expressed "the wish that the format be continued even though in modified form." The Bureau was encouraged by the Unions' response. However, it reiterated that its members wanted a change in the bargaining procedure. The Bureau pointed out, as a consequence of de-accreditation, that each employer had the right to withdraw from joint bargaining and negotiate on its own at any time. The Bureau and the Unions eventually arrived at a protocol agreement which satisfied the concerns raised by the Bureau. The structure agreed to was to apply only to the 1986 negotiations.

The next round of bargaining was in 1988. It was also preceded by discussions regarding format. The Bureau and the Unions met in 1987 to discuss whether there was sufficient common ground to continue industry-wide bargaining. The Unions advanced positions on bargaining format which, in the Bureau's view, represented a return to the pre-1986 format. The Bureau's position was that this was not acceptable. Further discussions ensued. Eventually, a bargaining format was agreed which included provisions that allowed: an employer or a Union local to opt out before main wage bargaining began; some or all employers and locals to agree to be bound under certain specific conditions; and the employers and locals retaining flexibility to leave bargaining at any time.

In 1991 the collective agreements were eventually extended for a ten month period. However, before that occurred the Bureau and the Unions had discussions about bargaining format. The Bureau took the position that if industry-wide bargaining was to take place, the Unions would have to agree to a process that would protect the employers from being struck separately on local issues. Additionally, the Bureau wanted an opportunity for its members and the locals to view the entire industry agenda (including unresolved local issues) before committing to joint bargaining. It further wanted the option for its members and the locals to reconsider their commitments to the process if certain specified events occurred.

The Bureau and the Unions next entered into negotiations in 1992. They again discussed bargaining format. The process which the Bureau was prepared to follow provided for:

1. An opportunity by every local or operation to carefully review the entire agenda prior to committing to the process.
2. A commitment to be bound to the process as long as meaningful constructive negotiations are proceeding. This would mean that:
    - i) if we break off for any reason other than for a mutually agreed period or,
    - ii) if there is job action or,
    - iii) if settlement is voted on and rejected,

    each local or operation has a right to reconsider its commitment and to act accordingly.

These points became the protocol for the 1992 negotiations. Moreover, at the first meeting, the Bureau's spokesperson advised the Unions that "the management group is more fragile than it has ever been before". If negotiations got to a point where one or more of the employers could not continue, the industry might have to call "a time out". At that point, there could be two ways to go: the negotiations could be considered at an impasse and fall apart, or the industry could reassess its position and see where it went. In response to a direct question, the Bureau stated that there might be a point in the future when some employers might not want to be a party to the 1992 negotiations.

(iii) Separate Negotiations

Even prior to de-accreditation of the Bureau there were a number of instances where a party withdrew from industry negotiations. One example given occurred in 1983 when the Powell River Local of the CPU unilaterally withdrew from bargaining at the outset as it wished to negotiate independently. It subsequently rejoined the 1983 bargaining. However, there was no argument, either from the employers' side or from the Unions' side, about the Local's right to withdraw.

There were also instances after de-accreditation where parties withdrew from the main bargaining table. In 1986 two Westar mills withdrew from the Bureau and from industry-wide bargaining prior to commencement. During the course of those negotiations, Western Pulp (Port Alice) withdrew and concluded its own collective agreement.

Additionally, during 1991 bargaining only three locals of the PPWC agreed to the protocol. The Bureau's representative was acting under instructions that unless a local accepted the protocol, he could not represent the employer to which that local union was certified. However, by the time bargaining concluded in 1991 all locals of both the CPU and the PPWC were participating.

(iv) The Current Dispute

(a) Northwood

In mid-February 1994 Northwood notified Local 603 in writing that it wished to commence collective bargaining. Shortly thereafter, representatives of the two parties met. During the course of that meeting the president of Local 603 stated that his local, along with other individual locals, were collectively locked into industry-wide bargaining.

A further meeting was held in mid-March. Representatives of Local 603 told representatives of Northwood that they could not give the employer an agenda until issues regarding the industry pension plan were settled. Northwood told Local 603 it was not prepared to wait forever to start the bargaining process. Northwood said it expected an answer to its mid-February letter requesting the commencement of collective bargaining.

Towards the end of April Northwood (along with all employers party to either the SLA or the JLA) received a letter from the CEP and the PPWC. The letter advised that the two Unions desired "to meet jointly with all Employers to negotiate the terms for renewal of the Labour Agreement". Northwood responded, saying it had already provided Local 603 with its notice to commence collective bargaining and confirming that it was prepared to enter into negotiations at any time. Local 603 replied and said it was bound by the Unions' Joint Caucus and intended to stay with that position.

On May 30 the Joint Caucus co-chairs, Brian Payne for the CEP and Stan Shewaga for the PPWC, held a press conference. In a joint media release handed out at the press conference, the two Unions stated that their locals had voted to maintain industry-wide bargaining. The Unions had also resolved that no local would meet separately on industry-wide issues or local issues until a bargaining protocol for industry-wide bargaining was reached. In a letter dated May 30, 1994 to all employers party to the Labour Agreements the Unions advised as follows:

> We are left with no alternative at this point but to inform you that in the event that the industry fails to respond positively to this request for a meeting to discuss a bargaining protocol, that the unions will proceed with necessary actions to bring about the renewal of our industry wide labour agreements.

A day or two later, the president of Local 603 advised Northwood that the press release accurately reflected his local's position on bargaining. He reiterated the Unions' position that pension and other issues could not be negotiated separately.

In addition to the press release, Northwood submitted a copy of transcripts from a series of CKNW radio news broadcasts. In the course of those broadcasts Stan Shewaga stated that if there were no province-wide talks in place by June 13 strike votes would be taken. These facts were not disputed by counsel for the two Unions.

(b) MacMillan Bloedel

A similar sequence of events occurred with respect to MacMillan Bloedel and the Locals certified at the Alberni mill. In late February 1994, MacMillan Bloedel sent letters to both Local 592 and Local 686 advising that it wished to bargain collectively. MacMillan Bloedel received separate responses from the Locals to the effect that they had not yet finalized their bargaining proposals.

In late April MacMillan Bloedel received the letter from the CEP and the PPWC advising that the two Unions desired to meet jointly with all the employers to negotiate a renewal of the collective agreements. In its statement of material facts (which was entered as evidence by agreement) MacMillan Bloedel refers to the same media release and the same CKNW radio news broadcasts described to earlier.

A representative of MacMillan Bloedel spoke to the president of Local 686 on June 7, 1994; the latter confirmed that the local's position was the same as the position set out in the press release signed by Payne and Shewaga. MacMillan Bloedel representatives then met with the president of Local 592, who confirmed that his local was similarly taking the position that there would be no meetings outside of industry-wide negotiations; he also confirmed that the press release reflected the position of Local 592.

(c) Differences Over Bargaining Format

The desire of Northwood and MacMillan Bloedel to negotiate separately with the Locals which represent their respective employees reflects the position now being taken generally by employers in the Province's pulp and paper industry. The employers see a need to engage in "enterprise" bargaining, and no longer believe that industry-wide negotiations are compatible with their interests. Consistent with this, the objects and purposes of the Bureau -- as well as its name -- were changed in 1993. The Bureau is now known as the Pulp and Paper Employee Relations Forum. The primary purpose of the former Bureau has been deleted from the amended Constitution; namely, on behalf of its members "to bargain collectively and enter into collective agreements...with trade unions or other bargaining agents or representatives of employees of its members".

For their part, the CEP and the PPWC view the continuation of industry-wide bargaining to be in their best interests. Brian Payne testified that industry bargaining "is the number one issue...[it is] an absolute priority with all our locals to maintain the industry structure". He stated the CEP is prepared to take a strike over the issue. The Unions have negotiated what he believes to be the best wages and benefits in North America for their industry. Individual bargaining, as sought by the employers, is seen as a threat to the JLA, the pension plan "and everything we have fought for".

The lines are thus drawn, in terms of the positions of the employers and the Unions over the format for the current round of collective bargaining.

(v) Other Evidence

As indicated near the outset, other aspects of the evidence do not impact on our ultimate conclusion respecting the central issue raised by the present complaints. For example, there was a fair degree of testimony surrounding the industry pension plan. The result appears to be that amendments made to the plan in 1985 would permit individual and differing contributions by employers. This would certainly make matters more "complicated" (as stated by Payne) because pensions are currently based on equal contributions by employers and cross-industry service. Nonetheless, industry-wide negotiations are not necessary for continuation of the pension plan.

Likewise, nothing turns on the fact that the employers did not assert their current position of individual bargaining until after conclusion of the last round of negotiations. The Unions suggest that this would have been a strike issue in 1992 had the employers given notice of their current position. There might have been some significance to the timing of the employers' "notice" had they led the Unions to believe that industry-wide negotiations would continue indefinitely. However, the

employers have repeatedly asserted the right to negotiate individually since de-accreditation in 1985. On the other hand, the mere assertion of this right by the Bureau on behalf of its members is not conclusive. In each round of negotiations since de-accreditation, the parties have successfully reached a protocol agreement on format. The simple truth is that this is the first occasion on which the parties have ultimately come to an impasse over format, and they now require a determination of their legal rights under the Code.

III. POSITIONS OF THE PARTIES

Northwood and MacMillan Bloedel (supported by Avenor) rely primarily on the Industrial Relations Council's decision in The Board of School Trustees of School District No. 44 (North Vancouver), IRC No. C200/92 (Reconsideration of IRC No. C103/92), (1993) 17 CLRBR (2d) 254. That decision held, among other things, that employers cannot lockout, nor unions strike, over the sole issue of protocol agreements. The decision also held that any party is free to bargain beyond the current limits of its statutory format; however, parties may not strike or lockout in order to compel recognition of a bargaining agent, or to expand the scope of a bargaining unit. This decision has been accurately described as representing a change from prior Council and Board decisions over the permissible scope of collective bargaining: V.I. Care Management Ltd., BCLRB No. B223/93, (1993) 19 CLRBR (2d) 153.

The Unions (supported by the BC Fed) urge a return to the previous jurisprudence. The CEP in particular argues that any subject which may legitimately be in a collective agreement or the subject of collective bargaining may be taken to impasse. A "legitimate" subject means an issue which affects the welfare of workers as workers and is not prohibited by, or inconsistent with, the scheme of the Code. The CEP argues that where the format of bargaining is blended with substance, this becomes a matter which can be taken to impasse. In the present case, format will have a very real affect on the terms and conditions of the resulting collective agreement. Further, there are no provisions in the Code which govern how parties can bargain -- only who can bargain and what they can bargain over.

IV. ANALYSIS

The initial approach in British Columbia to the statutory "duty to bargain in good faith" was established in Noranda Metal Industries Limited, BCLRB No. 151/74, [1975] 1 Can LRBR 145. The Board in that case signalled that it would regulate the process of collective bargaining, but not the substantive proposals made by parties in the course of those negotiations:

> ...It would be inconsistent with the fundamental policy of the Code -- the fostering of free collective bargaining -- for the Board to evaluate the substantive positions of each party, to decide which is the more reasonable, and then to find the other party to be committing an unfair labour practice for not moving in that direction. That interpretation of s. 6 would amount to compulsory arbitration in disguise, and without the restrictions carefully placed around s. 70. The theory of the Code is that each side in collective bargaining is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike to force the other side to make the concessions. ... (p. 159; emphasis in original)

This approach was echoed in Pulp and Paper Industrial Relations Bureau, BCLRB No. 62/77, [1978] 1 Can LRBR 60, where the Board considered the ability of the CPU to pursue enhanced pension benefits for retired workers. The panel considered it inconsistent with the objectives of the Code to start the Board down a path of overseeing, even to a limited extent, substantive discussions of parties at the bargaining table. Instead, the evolution of the subjects of collective bargaining should be the result of pragmatic accommodations worked out by unions and employers in their individual relationships, responding to the nuances of their own situations (p. 79). The panel's reasoning was supported in part by what it saw as a practical (and sufficient) limitation on the types of bargaining demands which might be proposed -- namely, the willingness of employees to take job action:

> ...We need not repeat our lengthy discussion of the reasons why active employees would seek that concession [improved pension benefits] from their employer. But it is worth while noting that it is precisely at this stage that one can find a true index of the sincerity of the active employees' interest in that issue. If a majority of these employees vote to strike for that reason, and are willing to sacrifice their earnings to secure that kind of concession, than it hardly lies with either the employer or the Board to say that this item is not something which the active employees consider to be an essential "condition of their employment". As we read the Labour Code, if a contract demand is a legitimate part of the bargaining regime under the statute, something which the parties can properly agree to make part of their collective agreement, then a dispute about that topic can be the "cause or occasion" of a legal strike under Section 80 of the Code. (pp. 76-77; emphasis added)

In a footnote to this passage, the panel quickly acknowledged that there will be some topics which cannot be properly included in a collective agreement because they would be illegal (e.g., wage rates below the level of employment standards legislation).

The early approach articulated in the Noranda and Pulp Bureau cases (among others) became the subject of refinement. Without reviewing all of the intervening developments, we note the following summary in Vancouver Symphony Society et al., IRC No. C3/93, (1993), 17 CLRBR (2d) 161 -- a decision of the Council which followed shortly after North Vancouver School Board, supra:

> Exceptions to the "hands off" approach established by Noranda, supra, have since been recognized: certain demands will in and of themselves be contrary to s. 6 of the Act. Those proposals which violate the duty to bargain in good faith fall into two categories. Some will be "illegal" from the outset, as they are expressly prohibited by the Act or some other applicable enactment (e.g., human rights legislation). Even where agreed to by the parties and incorporated in their collective agreement, such proposals are not enforceable: see MacDonalds Consolidated Ltd. and R.W.D.S.U., Local 580, [1976] 2 Can LRBR 292 (BCLRB No. 51/76). The second category is comprised of proposals which may be tabled, made the subject of negotiations and agreed to by the parties; however, they cannot be pressed to impasse: see, for example, Northern-West Elevator Ltd. and Int'l Union of Elevator Constructors, Local 82, B.C.I.R.C. (No. C127/91) [reported 12 CLRBR (2d) 308], and Altech Architectural Products Ltd., B.C.I.R.C. (No. C20/89). These proposals become "improper" when taken to impasse, and a violation of s. 6, as their attainment through the use of economic sanctions would be inconsistent with the law and policy of the statute. (p. 172)

The Unions, and particularly the CEP, dispute the propriety of a second category of bargaining proposals which can be discussed but not taken to impasse. They argue that it makes no practical sense to allow collective bargaining proposals which cannot be pursued by resort to economic sanctions -- demands are either legitimate (and can be included in a collective agreement) or are illegitimate (and cannot be the subject of collective bargaining nor included in a collective agreement).

We do not agree with the Unions' submission on this point, and need only give the example of a voluntary recognition or accretion clause. Such clauses are commonly found in collective agreements. However, they cannot be pursued to impasse (nor can an employer lockout to reduce the scope of the bargaining unit) because this would be inconsistent with the certification provisions of the statute: Vancouver Symphony Society, supra, and cases referred to therein. Acceptance of the Unions' argument here would have the logical consequence of invalidating existing recognition and accretion clauses which have been voluntarily negotiated by parties to those collective agreements.

It is perhaps important to note an argument which is not advanced by the Unions. Specifically, they do not assert that past industry bargaining has effectively resulted in the voluntary or other recognition of a multi-employer bargaining structure (by analogy, see Metal Industries Association, BCLRB No. 57/78, [1979] 1 Can LRBR 191). Nor would such an argument be supported by the evidence. Since de-accreditation, the employers have made it clear that negotiation of a protocol is a necessary pre-condition for industry bargaining. While such agreements are legally binding, the protocols negotiated have clearly applied to the then current round of bargaining, and have not been intended to have future application. Further, the protocols themselves have permitted both employers and locals of the Unions to leave industry negotiations if certain events occurred. Finally, the collective agreements resulting from each round of negotiations have been signed individually by the employers and the CEP (by convention, the PPWC does not sign the collective agreements once ratified). Consistent with this, the signature page to the B.C. Standard Labour Agreement at Northwood expressly recognizes that it is "...made between

the Union [Local 603] and the company [Northwood]".

In some respects there is no difference between the position advanced by the Unions and the approach articulated in North Vancouver School Board. The test may be simply stated: a party may not resort to economic sanctions in order to achieve a collective bargaining proposal which is contrary to, or inconsistent with, the statute. There should be little difficulty in identifying demands which are prohibited by the Code (or, for that matter, other applicable laws). The more challenging exercise in some circumstances will be to determine those matters which are inconsistent with the statute. We thus come to the central issue raised by the present complaints: Is it inconsistent with the law and policy of the Labour Relations Code to strike or lockout over proposals concerning the format of collective bargaining? The Unions assert that there is no inconsistency because the statute is "neutral" on this subject.

(i) Case Law - Other Canadian Jurisdictions

A dispute over the format of bargaining arose in Burns Meats Ltd. (1984), 7 CLRBR (NS) 356 (OLRB). The employer alleged that the union had failed to bargain in good faith and make every reasonable effort to conclude a collective agreement. The complaint arose out of the union's refusal to negotiate for a new collective agreement covering the employer's Kitchener plant unless negotiations were conducted on a national basis with a master agreement for all of the employer's Canadian plants. A national bargaining format had been in place for approximately 30 years. This had been done voluntarily between the parties, as there was no statutory basis for inter-provincial bargaining.

The positions which the parties took in Burns Meats were virtually identical to the stand-off between the Unions and the employers in the current pulp and paper industry negotiations. The Kitchener plant was bound to the same, single collective agreement as the employer's other plants, in a long-established and mature relationship. The employer wanted to bargain in respect of the Kitchener plant only; the union made it equally clear that it was opposed to bargaining on any other basis than the national format.

The Ontario Board referred to prior authorities which held that the critical starting point for collective bargaining is the bargaining unit. It is in respect of that unit of employees to which a trade union's exclusive bargaining rights apply. The union in Burns Meats was certified for the Kitchener plant only, and it accordingly followed:

> ...For the purpose of this complaint and the Board's jurisdiction under the Act, therefore, the Board finds that the employees of the employer at its Kitchener plant constitute the bargaining unit. It is that unit which defines the legal limits of the bargaining agent's exclusive bargaining rights. It is with respect to the employees in that unit that the employer and the bargaining agent are required to "bargain in good faith and make every reasonable effort to make a collective agreement", if they are to comply with the legal duty imposed by s. 15 of the Act. (p. 366)

The Burns Meat decision can partially be distinguished on the basis that the union sought a national bargaining format; that is, a format which went beyond the jurisdictional scope of the Ontario labour legislation. However, the Board also grounded its decision on the fact that the union was seeking to bargain beyond the limits of its exclusive bargaining rights (i.e., the bargaining unit for which it was certified), regardless of the jurisdictional question:

> ...What the respondents are seeking to do with their demand that there be a single set of nation-wide negotiations and a single national collective agreement executed respecting all plants which traditionally have been covered by the Agreement, is bargain beyond the legal limits of the exclusive rights attaching to the Kitchener plant. For the respondents to pursue that objective to impasse is inconsistent with the scheme of the Act that bargaining shall be in respect of a bargaining unit of employees for which a trade union has exclusive bargaining rights. In the Board's decision in United Brotherhood of Carpenters and Joiners of America, [1978] OLRB Rep. 776, particularly para. 18 on p. 784, it was because the Board found it inconsistent with the scheme of the Act for the United Brotherhood to pursue to impasse the objective of expanding its exclusive bargaining rights by voluntary recognition on a province-wide basis that the Board found the United Brotherhood in breach of s. 15 of the Act. While the specific objectives of the respondents and the United Brotherhood differ, the result is the same; an attempt to bargain beyond the legal scope of their exclusive bargaining rights contrary to the scheme of the Act. In this respect, see also the Board's decision in Northwest Merchants Ltd. Canada, [1983] OLRB Rep. July 1138 at para. 29. For these reasons, it is inconsistent with the scheme of the Act and unlawful for the respondents to take to impasse their bargaining objective of a single nation-wide set of negotiations and single national collective agreement. (pp. 367-68; emphasis added)

A similar conclusion was reached by the Canada Labour Relations Board in Western Cablevision Ltd. et al. (1986), 65 di 150. The IBEW held separate certifications for groups of employees working for each of seven cablesystem companies. Joint bargaining had been conducted on a voluntary basis for all cablesystem companies in the British Columbia Lower Mainland for over ten years. A dispute arose when the companies insisted that bargaining continue to take place jointly, and advanced that position as a pre-condition to negotiations. The union was prepared to bargain with each of the companies separately, but refused to participate in joint bargaining.

The Canada Board considered relevant provisions of the Canada Labour Code, including Section 131(1) which provided for the designation of an employers' organization where a trade union applied to be certified as the bargaining agent for a unit comprised of more than one employer (we will return to comment upon the history of such a statutory provision in British Columbia). The Canada Board held that where no such designation exists "...employers who wish to join together and bargain jointly may do so only where there is voluntary agreement amongst themselves and with the trade union or trade unions who hold certifications for employees of those employers" (p. 155; emphasis added). This means that "...whereas multi-party bargaining may be desirable, it is...voluntary and thus, for the most part, not enforceable" (p. 158). Finally, the Canada Board adopted the union's argument respecting the effect of its certifications:

> ...In the instant case, the union holds separate certification orders for units with each employer. In our view, section 136(1) of the Code normally provides a union with the right to insist on bargaining separately for employees in each bargaining unit:
>
> > "136.(1) Where a trade union is certified as the bargaining agent for a bargaining unit,
> >
> > (a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;"
>
> As the Board has not found the insistence of the union to no longer bargain jointly with the employers to be unlawful or in bad faith, the union has the right to rely on their exclusive authority to bargain for separately certified bargaining units. (pp. 160-61)

Accordingly, the complaint by the cablesystem companies did not succeed. They were ordered to commence collective bargaining pursuant to the notices which had been given individually by the union.

Another decision which considered the same issue is Stelco Inc., [1990] Alta. L.R.B.R. 535. The employer complained that the local of the Steelworkers which represented its employees had failed to meet its good faith bargaining obligation under the Alberta statute. The dispute arose due to the employer's wish to negotiate each of its Canadian plants individually, and the union's wish to maintain a unified national bargaining process. A passage quoted from an earlier Alberta Board decision is worthy of note. In United Food and Commercial Workers' Local 280-P v. Gainers Inc., [1986] Alta. L.R.B.R. 529, the chair of the Board stated:

> ...it is our view that the duty to bargain in good faith and make every reasonable effort to enter into a collective agreement contains within its purpose not only the individual interests of the parties in arriving at a collectively bargained settlement, but also an element of public interest. The parties have imposed on them by legislation a positive duty to bargain in a manner that will not only serve to protect the rights of the other side to the bargaining but also that will ensure that industrial conflict and the related disruption to third parties only occurs when it is necessary because the dispute cannot be resolved by a process of free, open, informed and mature collective bargaining. The Board is charged with the task of determining the rules of the collective bargaining process (as distinct from the results of that process - the specific contents of the collective agreement) and we will do so in light of what we have just described as the section's purpose. (p. 548; emphasis added)

The Alberta Board in the Stelco decision eventually stated that "[a]bsent consent, these negotiations are, and must be, conducted in accordance with the rights and responsibilities under the Alberta Labour Relations Code" (p. 551). The union's insistence on national bargaining was found to be unreasonable, and the Board directed that local bargaining resume.

(ii) Case Law - British Columbia

The question of whether demands over bargaining format can be taken to impasse did not squarely arise in this jurisdiction until the Council's decision in Famous Players Inc., IRC No. C213/89 (affirmed in IRC No. C77/90), (1990), 5 CLRBR (2d) 107. Two movie theatre companies, Cineplex and Famous Players, insisted on joint negotiations with the union representing their employees. One of the matters before the Council was an application by the union for a declaration that the insistence of the companies on joint bargaining amounted to a failure to bargain in good faith. In this respect, the panel made the following statements:

> There is no question that Cineplex and Famous Players are each entitled to bargain with the Union, and it is not contrary to the principles of the Act for them to decide to bargain together. This entitlement to bargain together is exercised by the Employers in the form of the Committee given "exclusive bargaining authority" to negotiate with the Union. But the Employers must win the right through bargaining to have the Union meet with their Committee to negotiate the terms of both their collective agreements at once. It may be that the Union will continue to refuse to discuss the possibility of negotiating with the Employers in this format. If this occurs, the Employers or the Union, having all made a reasonable effort to reach an agreement on this issue, are entitled to resort to a lockout or a strike.
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> Section 59 [the employer accreditation provision] therefore continues to have significant meaning with the context of the Act. Although a group of employers may form an agreement among its members which effectively binds them in a manner similar to accreditation, only s. 59 confers upon an employers' group the right [sic] as exclusive bargaining agent of its members under the Act, to have a union meet with that group to negotiate collective agreements with that union for all the group members. An employers' group which is not accredited may arrive at the same format with the agreement of the union. This agreement may be obtained by means of the economic pressure of a lockout of union members imposed by employers in the group. Likewise, an uncertified bargaining council of trade unions may demand that an employer negotiate with them as a group. If the employer does not agree to this format, the unions in the group may resort to a strike in order to attain their goal. (p. 116; emphasis added)

The reasoning in Famous Players was criticized and characterized as "internally inconsistent" by the original panel in the North Vancouver School Board decision (see IRC No. C103/92, at pp. 7 et seq). The original panel proceeded to embark upon a detailed analysis of the jurisprudence concerning the legitimacy of bargaining proposals. It ultimately concluded that reliance on Famous Players "...for the blunt statement that [a union] may take the issue of collective bargaining format to a strike to force the other party to sign a protocol agreement, is wrong" (p. 17). While reaffirming the Pulp Bureau decision, and not generally adopting the American mandatory/permissive approach to collective bargaining demands, the original panel stated that the Council would not hesitate to consider whether continued insistence on certain demands is inconsistent with the statutory scheme of the Act where collective bargaining is actually obstructed.

The reconsideration panel in North Vancouver School Board upheld the original conclusion that proposals which are inconsistent with the Act cannot be taken to impasse, although it may be legitimate to raise these matters in bargaining. Specifically with respect to "protocol agreements", the reconsideration panel concluded that employers cannot lockout, nor unions strike, over the sole issue of such agreements (p. 260). As to the statutory format of bargaining, the reconsideration

panel concurred with the original decision to the extent that it concluded the format of bargaining cannot form the basis of a refusal to bargain, or form the basis of either a strike or lockout (p. 260).

(iii) Conclusions

We disagree with the Unions' fundamental position that taking proposals over bargaining format to impasse is not inconsistent with the law and policy of the Labour Relations Code. As indicated especially by the Ontario Board in Burns Meats Ltd., supra, a trade union's exclusive bargaining rights under the statute relate to the unit for which it is certified. In the absence of voluntary arrangements, any resort to economic sanctions for the purpose of negotiating beyond the parameters of these exclusive bargaining rights is contrary to the scheme of the Code. Adopting this approach brings British Columbia in line with the scope of bargaining permitted in other Canadian jurisdictions. We reject the submission by the Unions that differences in our statutory language warrant a contrary conclusion.

A necessary corollary is that two or more employers cannot unilaterally force the trade unions which represent their employees to engage in joint negotiations; there must similarly be mutual agreement. Even accreditation under what is now Section 43 of the Code does not compel this result. Accreditation requires the trade unions to bargain collectively with the employers' organization, rather than directly with each employer, because the organization is the exclusive bargaining agent. Accreditation does not, however, bring about a mandatory change in the format of those negotiations.

There are at least two additional reasons why strikes or lockouts over bargaining format or other "protocol" issues are inconsistent with the Code. First, to the extent that such demands are raised and pressed at the outset of negotiations (as will typically be the case) the parties will not have "bargained collectively" in accordance with the Code. This pre-condition to a strike or lockout vote requires at a minimum that a party seeking changes to a collective agreement make the other party aware of all the items in its bargaining agenda: Citic B.C. Inc., IRC No. C134/91, affirmed in IRC No. C170/91, (1991), 13 CLRBR (2d) 161.

Another reason for concluding that the Unions' insistence on industry-wide negotiations is inconsistent with the Code results from past statutory provisions addressing this subject. In some circumstances, the Code's "silence" may indeed mean that there is no inconsistency, and bargaining demands on a particular issue may be pursued to impasse. However, the Unions' assertion here that the Code is "neutral" on the format of collective bargaining ignores legislative history regarding multi-employer certifications.

The Labour Code as enacted in 1973 included Section 40 which allowed a trade union with sufficient membership support in an appropriate bargaining unit "in which the employees are employed by 2 or more employers" to apply for certification. The Board was required to certify the trade union where, among other things, a majority of the employers had consented to representation by one trade union. Section 40 was amended in 1984 to require that all the employers of the employees in the unit consent to multiple employer certification. The current Labour Relations Code does not contain any express provision for multi-employer certification. The Unions are essentially seeking a bargaining format which the Legislature has not seen fit to continue -- and was in the past only permitted where a majority or all of the employers affected gave their consent.

The conclusion that insistence on industry-wide bargaining is inconsistent with the Code does not automatically limit the nature of the proposals which locals of the Unions may table in negotiations with their employers. The Board will only intervene where specific demands are illegal, are inconsistent with the scheme of the statute (as here), or where they constitute evidence of bad faith bargaining. As the Ontario Board went on to state in Burns Meats Ltd., supra:

> It may well be that the respondents have pursued their impugned course of conduct for the objective of preserving for the Kitchener Plant employees the uniform wages and working conditions which they have in common with employees in other plants covered by the Agreement. While that objective is not itself illegal, for the reasons set forth above, the means by which the respondents are attempting to achieve it are contrary to the Act. It is not unlawful for a union to bargain for wages and working conditions paralleling those at other plants operated by the employer. The Board's approach to enforcing the s. 15 duty has allowed parties to collective bargaining broad freedom to determine the subjects about which they will bargain and the contents of their collective agreements. ... (p. 368)

Accordingly, it is open to the Unions to pursue common demands with each of the employers in the pulp and paper industry. At least to this extent, what has been described in previous cases as "coordinated bargaining" continues to be

permissible. In Stelco, supra, the Alberta Board similarly recognized a distinction "...between bargaining hung up on bargaining structure and those hung up on collective agreement terms" (p. 549). While the union there was directed to negotiate with the employer locally (instead of pursuing national bargaining), the Alberta Board did not direct what the union proposals must contain.

V. THE BOARD'S ROLE IN REGULATING COLLECTIVE BARGAINING

As we have already noted, the early approach of this Board was to regulate the process of collective bargaining but not the substantive proposals made by parties engaged in that process. This followed largely from the view that a more developed notion of "good faith" would be inconsistent with the concept of free collective bargaining. Introducing rigid legal criteria could result in parties litigating when they should be negotiating -- a concern based upon the American policy experience.

In the United States, the criticized over-regulation of bargaining results from the "mandatory/permissive" distinction enunciated in Wooster Division of Borg-Warner Corporation, 113 NLRB 1288 (1958), aff'd 356 U.S. 342 (1958). A "mandatory" bargaining proposal is one that is related directly to "wages, hours and other terms and conditions of employment". It can be the subject of a strike or lockout, and refusal to bargain such a mandatory item is an unfair labour practice. Other bargaining proposals are characterized as "permissive" (or voluntary). They can be raised and discussed in negotiations, but cannot be taken to impasse. This is true notwithstanding that the permissive proposal is not illegal per se, and has been brought forward by one of the parties in good faith.

The American scheme has been criticized because parties engaged in collective bargaining are unable to predict with any certainty which of their proposals will be classified as mandatory and which will be classified as permissive. This has the result of placing undue constraints on the process of collective bargaining.

We will briefly review the Borg-Warner decision, and then deal with the statutory tension between the duty to bargain in good faith and free collective bargaining.

In Borg-Warner, the employer had put forward two proposals as a condition to entering into a collective agreement: first, a "ballot" clause calling for a pre-strike secret vote of employees regarding the employer's last offer; and second, a "recognition" clause that excluded the international union which had been certified by the NLRB from the agreement and substituted, instead, the uncertified local affiliate of the international union. The U.S. Supreme Court split on the employer's proposed last offer clause, with the majority stating that it was bargaining in bad faith to insist upon such a term. However, the Court was unanimous in declaring that the employer committed an unfair labour practice by attempting to exclude the certified bargaining agent from the agreement.

We now have a statutory provision in British Columbia which permits a last offer vote. It is fair to say, however, that the U.S. Supreme Court's ruling respecting the "recognition" clause in Borg-Warner would be decided in precisely the same manner in many Canadian jurisdictions including this Province. An employer is not entitled to insist that a union other than the certified bargaining agent be made a party to the collective agreement. Similarly, a trade union cannot use its economic leverage to extend its bargaining rights. That would amount to a recognition strike -- a strike aimed at achieving bargaining rights. The certification provisions of the Code define not only the procedures for obtaining bargaining rights but the scope of those bargaining rights, except as varied by mutual agreement.

A further criticism of the American model is that it affects not only the process of collective bargaining, but additionally the substantive terms and conditions of the resulting collective agreement. In our view, the Labour Relations Code impacts upon both the process and the substance of collective bargaining. In determining issues related to the duty to bargain in good faith, process and substance cannot be separated into "watertight compartments".

The role which this Board will now take in regulating the duty to bargain in good faith -- and, more particularly, the move from a "hands off" approach limited to scrutinizing only process -- is not unique as demonstrated by our review of authorities in other Canadian jurisdictions. Indeed, this shift in policy was similarly described by then Chief Justice Dickson in Re Canadian Union of Public Employees and Labour Relations Board (Nova Scotia) et al. (1983), 1 D.L.R. (4th) 1 (SCC):

> The early cases on the duty of bargain in good faith abstained from dealing with the content of bargaining proposals. They focused instead on the mechanics of bargaining, in recognition of freedom of contract. Although labour statutes impose a collective bargaining regime, and typically a few minimum terms, the general thrust of the legislation is to leave it to the parties to find their own bargain, if they can. The relationship between the general right of freedom of contract and the duty to bargain in good faith has always been uneasy. Recently, labour boards have been more willing to acknowledge that the duty to bargain in good faith does in some significant ways detract from the notion of freedom of contract. Labour boards have embraced what D.D. Carter, former Chairman of the Ontario Labour Relations Board, calls the doctrine of illegality: "Duty to Bargain in Good Faith: Does it Affect the Content of Bargaining?" in Swan & Swinton (editors), Studies in Labour Law (1983), pp. 35-53.
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> By "doctrine of illegality" Carter means that a specific bargaining proposal may be held to constitute a breach of the duty to bargain in good faith. Some of the cases involve instances in which the bargaining proposal, on its face, is inconsistent with the statutory scheme of labour relations or otherwise illegal: ... (p. 21)

At the same time, this Board affirms one of the basic values underlying free collective bargaining: that it is an exercise in self government. Parties to a collective bargaining relationship are in the best position to construct the agreement which should govern their relationship; that is the value of a private contractual arrangement, as opposed to either compulsory arbitration schemes or legislated terms and conditions of employment.

There is no question that the policy enunciated in this decision results in greater scrutiny of collective bargaining. However, there is an important distinction between the American "mandatory/permissive" doctrine and the "illegality" doctrine in Canadian jurisdictions. (They are admittedly similar to the extent that some bargaining proposals may be discussed but not take an impasse.) In Canada, bargaining proposals are not defined in relation to an abstract classification scheme, but rather are defined in terms of the provisions of the statute as a whole (i.e., the law and policy of the Code). In the article cited by the Supreme Court of Canada in CUPE, supra, Professor D.D. Carter comments upon the distinction between the American and Canadian models:

> ...Not only are the limits of [the American doctrine] unclear, but it also allows for the possibility that an otherwise legal demand could not be carried to impasse. The problem here is that the full range of legitimate bargainable issues may not be recognised in the application of this verbal formula. The doctrine of illegality that is evolving in some Canadian jurisdictions, while perhaps still unclear in its scope, does at least define the range of legitimate issues for negotiation by reference to the public policy expressed in the collective bargaining legislation itself. (p. 52)

The basic and unsurprising principle inherent in the "illegality" doctrine is that the process of collective bargaining must be consistent with the Code -- as indeed it must be consistent with other public statutes such as the Human Rights Code. The importance of a proposal, in terms of "self-interest" and the willingness to resort to economic sanctions, cannot alone be the test of good faith. Public policy has restricted private industrial disputes, and the statute balances free collective bargaining with industrial stability (see also the purposes contained in Section 2(1) of the Code).

VI. SUMMARY AND DISPOSITION OF COMPLAINTS

In regulating the statutory duty to bargain in good faith now contained in Section 11 of the Code, the Board is primarily concerned with the process of collective bargaining. There may nonetheless be occasions where the substance of collective bargaining (i.e., a proposal being advanced by one of the parties) overlaps with process or otherwise calls for scrutiny. The circumstances in which the Board will intervene are where specific demands are illegal, are inconsistent with the law and policy of the statute, or constitute evidence of bad faith bargaining.

On the central issue in this case, we have concluded that unions cannot strike and employers cannot lockout over the format of collective bargaining. In the absence of mutual agreement, negotiations must take place in accordance with the exclusive bargaining rights held by the trade union; i.e., the scope of the certified bargaining unit. Any attempt to pursue a different format for collective bargaining beyond the stage of impasse results in a failure to bargain in good faith. This conclusion is consistent with the approach taken in other Canadian jurisdictions, and with the evolution in this Province of the statutory duty to bargain in good faith. Among other things, there is a general public interest (as embodied in the Code) in minimizing industrial conflict. Parties to a labour dispute are not permitted to resort to economic sanctions in furtherance of

proposals which are inconsistent with the statutory scheme.

It readily follows that both of the present complaints must succeed. In the case of Northwood, Local 603 has failed to commence collective bargaining contrary to Section 47 of the Code, by insisting on an industry-wide format as a pre-condition to negotiations. This position has also resulted in Local 603 failing or refusing to bargaining collectively in good faith and make every reasonable effort to conclude a collective agreement, contrary to Section 11 of the Code. In the case of MacMillan Bloedel, Locals 592 and 686 have similarly breached those provisions of the statute. Any strike vote under Section 59(1) of the Code would be unlawful until such time as the Locals have "bargained collectively" with their respective employers.

We therefore order the Locals to cease and desist from refusing to bargain except on an industry-wide basis. Local 603 is directed to commence collective bargaining in good faith with Northwood within ten days of this decision. Locals 592 and 686 are likewise directed to commence collective bargaining with MacMillan Bloedel. We trust that nothing further will be required, but are prepared to issue a formal order on written application.

S. LANYON, CHAIR
J.B. HALL, ASSOCIATE CHAIR (ADJUDICATION)
M. GIARDINI, VICE-CHAIR