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Contracting-out at Arbitration
Les sous-contrats et l'arbitrage

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Résumé de l'article

L'auteur, dans un premier article, se propose d'examiner les théories arbitrales relatives au droit de la gérance, puis d'étudier les solutions apportées par les arbitres, tant aux États-Unis que dans les provinces de langue anglaise, aux griefs relatifs à l'octroi de sous-contrats par des entrepreneurs qui ont signé une convention collective. Les décisions arbitrales rendues dans le Québec à ce sujet feront l'objet d'un second article; il faudra également tenir compte de la portée possible du nouvel article 10A de la Loi des relations ouvrières, S.R.Q., 1941, Chap. 162A.

En l'absence d'une disposition expresse régissant l'octroi de sous-contrats dans la clause des droits de la gérance, cette dernière pour dire qu'elle a le droit d'accorder des sous-contrats, s'en remet habituellement au pouvoir général qu'on y énonce, de diriger son entreprise. A défaut de telle clause, la gérance invoque son droit implicite de diriger l'entreprise, droit qui comporte, selon elle, celui d'octroyer des sous-contrats. L'agent négociateur, pour sa part, prétend généralement que les droits de la gérance doivent être exercés de façon à ne pas détruire les autres clauses de la convention collective. L'octroi de sous-contrats, selon lui, dans bien des cas, permet à la gérance de se soustraire aux conditions de travail qui ont fait l'objet des négociations et a pour effet de détruire en partie l'unité de négociation. L'agent négociateur invoque habituellement son titre de représentant exclusif des salariés et fait remarquer que certaines clauses de la convention collective, par exemple la clause relative à l'ancienneté, peut devenir sans effet à la suite de l'octroi du sous-contrat.

En somme, l'octroi de sous-contrats n'est qu'un aspect du problème plus vaste des droits de la gérance dans un régime de convention collective.

A ce sujet, deux théories s'opposent. La théorie des « droits réservés » est à l'effet que la direction a le droit de faire tout ce qui n'a pas été l'objet d'une exclusion expresse dans la convention collective et que l'agent négociateur n'a que les droits qui sont formulés dans la convention. La théorie dite « des limites implicites », pour tenter de la résumer, est à l'effet que l'agent négociateur et l'entrepreneur sont deux partenaires égaux lors des négociations et que, par conséquent, ni l'un ni l'autre ne peut prétendre à des droits qu'il aurait pu avoir avant que ne s'établisse le régime des négociations collectives. Ce régime, par ailleurs, a donné lieu à des précédents dont il faut tenir compte lorsqu'il s'agit d'interpréter la convention collective. Certains arbitres, cependant, surtout aux États-Unis, n'accordent pas une grande importance à ces théories et préfèrent rendre une décision basée sur une analyse circonstanciée des faits. On peut dire que, chez nos voisins, la théorie « des droits réservés », à l'effet que seule une défense expresse dans la convention collective peut empêcher la gérance d'accorder un sous-contrat, n'a plus cours dans les milieux arbitraux. Ces derniers acceptent à sa place une conception modérée de la théorie des « limites implicites ». Pour eux, le fait qu'un employeur ait signé une convention collective comportant une clause de reconnaissance, ou encore une clause d'ancienneté, n'entraîne pas nécessairement un empêchement absolu à l'octroi de sous-contrats sous le seul prétexte de préserver l'intégrité de l'unité de négociation. Il s'agit, au contraire, d'y voir un obstacle à l'octroi de sous-contrats qui ont pour effet d'affaiblir l'agent négociateur en permettant à l'entrepreneur d'éviter les taux de salaires et autres conditions de travail qu'il s'est engagé à respecter à la signature de la convention collective. Pour en arriver à la conclusion, dans chaque cas particuliers, que l'entrepreneur a octroyé un sous-contrat pour se soustraire aux dispositions de la convention collective, ou pour trouver, au contraire, qu'il a posé ce geste dans le but d'abaisser les coûts de production, en ayant recours à une entreprise spécialisée, les arbitres américains sont portés à considérer quelques-uns des facteurs suivants:

1. D'une façon générale: La décision de l'entrepreneur d'octroyer un sous-contrat doit avoir été prise de bonne foi. Elle ne doit pas être un moyen d'éviter les dispositions de la convention collective.
2. Pour déterminer s'il y a, ou non, telle bonne foi, on peut considérer:
3. 1. L'effet du sous-contrat sur l'agent négociateur: s'agit-il de discrimination contre tel représentant collectif? Le sous-contrat at-il pour effet de porter atteinte à l'intégrité de l'unité de négociation?
   2. L'effet sur les employés: des membres de l'unité de négociation sont-ils déplacés, mis-à-pied, en encore, perdent-ils l'occasion de faire du travail supplémentaire?
   3. Le genre de travail dont il s'agit: ainsi, l'octroi d'un sous-contrat ayant pour objet un travail de nature permanente porte plus facilement atteinte à l'agent négociateur que n'est susceptible de le faire, l'octroi d'un sous-contrat ayant pour objet un travail de nature temporaire. On peut aussi se demander si c'est la coutume, dans une industrie donnée, de faire appel à des entreprises spécialisées.
   4. L'urgence de la situation.
   5. Le manque d'employés qualifiés, d'équipement spécialisé ou de compétence technique dans l'entreprise qui accorde le sous-contrat.
   6. L'octroi de sous-contrats, dans le passé, et sans grief de la part de l'agent négociateur. Ce dernier verra également sa position affaiblie à l'arbitrage, si durant les négociations, il n'a pas réussi à faire inclure dans la convention une défense expresse d'octroyer des sous-contrats.
4. Au Canada, ailleurs qu'au Québec.

Ici, les arbitres, à l'opposé de leurs confrères américains, ont disposé des griefs relatifs à l'octroi de sous-contrats, en faisant appel, dans la quasi totalité des cas, aux deux théories relatives aux droits de la gérance déjà énoncés. Ils ont eu tendance à agir de la sorte, que le grief ait porté sur la décision de l'employeur d'avoir recours à des contremaîtres ou autres personnes exclues de l'unité de négociation pour effectuer du travail jusque là fait par des membres de cette dernière, ou qu'il se fût agi de sous-contrats au sens strict du mot, c'est-à-dire, d'ententes en vertu desquelles l'employeur a recours aux services d'une entreprise de l'extérieur, qui se spécialise dans un travail donné.

Dans ces derniers cas, on peut dire que c'est la théorie des « droits réservés » qui a été appliquée, et ce, avec rigueur. Le principe alors énoncé est à l'effet qu'une défense expresse doit exister dans la convention si on veut que l'entrepreneur ne puisse accorder de sous-contrats. On conçoit alors l'octroi de sous-contrats comme une prérogative de la gérance. A ces décisions, il faut en ajouter deux autres qui se réclament de la même doctrine, mais qui l'adoucissent en faisant appel à certains critères, tels la bonne foi de l'entrepreneur ou le fait que l'octroi du sous-contrat n'a pas pour effet d'engendrer des mises-à-pied. Toujours parmi ces décisions rapportées, il y en a trois qui font appel à la théorie dite « des droits implicites ». L'une d'entre elles, il est vrai, a été prise en faisant appel aux termes d'une disposition expresse qui régissait l'octroi de sous-contrats, tandis que dans une autre, on a procédé à l'analyse des circonstances dans lesquelles était placé l'entrepreneur. On peut dire, toutefois que cette doctrine a été exposée dans plusieurs rapports d'arbitres dissidents. Le petit nombre de décisions relatives à l'octroi de sous-contrats rapportées chaque année ne permet pas de déceler une évolution de la pensée arbitrale. En somme, on ne peut qu'affirmer qu'il y ait consensus à l'effet qu'une disposition expresse dans la convention collective soit nécessaire pour empêcher la gérance d'octroyer des sous-contrats. Ceci constitue une première différence par rapport aux décisions rendues aux États-Unis, ces dernières étant évidemment considérées dans leur ensemble. L'autre différence est le peu d'importance qu'attachent les arbitres canadiens à l'analyse des circonstances dans lesquelles est placé le sous-contractant.

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Contracting-out at Arbitration

Pierre Verge

A comparative study of arbitral decisions rendered in the United States, the Canadian Common Law Provinces and Quebec over grievances arising in the contest of collective agreements that contain no specific provision on the subject out of Management's action of arranging with an outside firm to have it perform work hitherto done by members of the bargaining unit. The possible effect of new section 10a of the Quebec Labour Relations Act on this practice of contracting out will also be considered.

Contracting out is one of the most controversial issues now confronting arbitrators. Management needs a free hand in order to compete efficiently and contracting out to a specialized firm may be a means of achieving this efficiency. On the other hand, this same act of farming out work could easily result in a shrinkage of the number of jobs available to members of the bargaining unit. The Union may also contend that Management, through its act of contracting out, is, in fact, simply trying to evade wages and other labour conditions accepted in the Agreement. More particularly, in the Province of Quebec, coping with contracting out has been made more delicate by reason of the inclusion in the Labour Relations Act of new section 10a which has been interpreted in certain quarters as extending to the subcontractor both the original certificate and the Agreement to which the contracting out firm is a party. [1]

After examining current arbitral positions on the wider « Management's rights » controversy of which contracting out is but one manifestation, it is our purpose, in a first article, to review the various approaches of arbitrators in the U.S. and the Canadian Common Law Provinces on contracting out. A second article is to be devoted to Quebec arbitral decisions and to the possible implications of new section 10a of the Quebec Labour Relations Act with respect to contracting out (*R.S.Q.*, 1941, Chapter 162A).

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(1) As an example of such interpretations, see *Industrial Relations*, Vol. 16, No. 4, October 1962, at p. 389.

I — Contracting-out defined in its setting

The « subcontracting » or « contracting out » term is intended to mean, in the pages to follow, the arrangement entered into by an employer with an outside firm, according to which either production or service work, that was or could have been done by his own employees and equipment, is to be performed by this outside firm that makes a specialty of doing the particular type of work involved.

The subcontracting issue may have been solved by the parties themselves, during the negotiations, with a resulting categorical statement of the power to contract out or the prohibition of this act. The bargain may have also resulted, among many possible variants, in a compromise to the effect that the employer is free to contract out in cases of emergency, or when regular and properly qualified employees are not available in sufficient numbers. The employer may also have bound himself to use his own employees « whenever possible... » Specific provisions of this nature are either explicit or they may merely give rise to an appreciation of facts. Their limited interest will cause them to be excluded from the scope of the present study.

NATURE OF PROBLEM

When a specific provision dealing with subcontracting is absent from the Management's rights clause of the Agreement, Management usually claims this right by invoking its usual power to manage the plant and its operations, as written out in the clause under scrutiny. Or, Management, in the absence, this time, of the whole managerial rights clause, relies upon its inherent and implicit right to direct the undertaking, of which, it explains, the right to subcontract is but one manifestation.

The Union normally claims that this general power has to be exercised in a manner compatible with the other provisions of the Agreement. It argues that contracting out results in an avoidance of the conditions of work agreed upon, as well as in a partial destruction of the bargaining unit and weakening of the co-contracting party. To bolster up its position, the Union usually invokes its recognized status of exclusive bargaining agent and points to various substantive clauses

of the Agreement, such as seniority provisions, which would, in effect, be rendered ineffective if subcontracting were to be allowed.

Basically, then, the subcontracting issue is a facet of the wider controversy over Management's rights in a collective agreement relationship, be they or they not the object of a clause of their own in the Agreement. Are these rights left unaltered and unimpaired by the presence of the Union and dealing and contracting with it? Is it even possible to speak of Management's rights alone while ignoring the Union's interests in the pre-agreement relations and practices? Or, in agreement terms: quite apart from any immediate meaning, what impact, if any, has the presence of the recognition clause and the various provisions consecrating rights in favour of the Union upon Management's freedom generally to direct the undertaking? How far, in practice, can Management go in managing the plant and directing the working force « in a manner compatible with the other terms of the agreement » — be this latter requisite expressed or implied?

MANAGEMENT'S RIGHTS THEORIES

Two schools and two versions stand at the poles: « One takes the position that management has the residual right to do everything not specifically set out in the agreement and that labour acquires only such rights as they acquire by Contract under the Agreement... The other theory is that both parties, the Union on one side and Management on the other, approach the bargaining table without fetters and as equals, and that there is no such a thing as a residual right in either party, and the parties by mutual Agreement set out the whole Contract either by specific Agreement or by implied Agreement which is implied by those parts of the Agreement set out and according to the spirit of the whole Agreement itself » [2].

A clear statement of the first position is to be found in James C. Phelps' (assistant to Vice President, Bethlehem Steel Company) now famous confrontation with Arthur J. Goldberg at the Ninth Annual

(2) Judge W.S. LANE, International Union United Automobile, and Agricultural Implement Workers of America, Local 222, in re: Duplate (Canada) Ltd. (5 Lab. Arb. Cas. 1625) (Jan. 7, 1954).

Meeting of the National Academy of Arbitrators [3]: « The more accepted view is that, except as management has agreed to restrict the exercise of its usual functions, it retains the same rights which it possessed before engaging in collective bargaining. I submit that this view is correct for it is the only one that gives full recognition to the realities of the collective bargaining relationship. In general, the process of collective bargaining involves an attempt by a labor union to persuade an employer to accept limitations upon the exercise of certain of its previously unrestricted managerial rights. To the extent that the union is unsuccessful in persuading an employer to agree to a particular demand, management's rights remain unlimited. It should equally follow that management possesses comparable freedom with respect to rights which the union has not even sought to limit. » Management enjoys absolute prerogatives except to the extent that these are not expressly curtailed by the terms of the Agreement. An arbitrator would even act improperly in trying to read into the Agreement a proviso against abuses in the exercise of these rights. « It is not for the arbitrator to correct that deficiency unless the parties jointly request him to do so » [4]. In a milder way: to a management attorney [5], the arbitrator must rule only from the result of the negotiations, that is from the Agreement. Subject to express limitations, Management enjoys freedom of decision, although this decision must not proceed from a bad faith intent to destroy the Union. (However, the effect of a good faith decision on the Union is irrelevant.) Canadian formulations of the doctrine do not depart much from this stand: « The Company has the right to manage its business to the best of its ability in every respect, except to the extent that its rights are cut down by voluntary abrogation of some of these rights through contract with the union... If the board is unable to find anything in the contract between the parties which takes away from the company's right to conduct its own business, then it cannot be concerned with the quality of the action taken by the company... » [6].

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(3) « Management Rights and the Arbitration Process » — Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators. B.N.A. (Washington, 1956), at p. 107 and sq.

(4) *Op. cit.*, p. 112.

(5) DAVID LINDAU in: Cornell-Off Campus Conference on: « The Arbitration of Two « Management Rights » Issues »; Work Assignment and Contracting Out, New York, pp. 85, sq.

(6) D.C. THOMAS, C.C.J., in re: U.A.W. and Electric Auto-Lite Ltd. (7 Lab. Arb. Cas. 333) (Oct. 31, 1957).

The historical grounding of managerial rights is also familiar: in pre-union days, a manager's power over his employees was absolute within the law: the situation is the same today with the exceptions of the growth of statutory enactments and the express concessions which have been made to the other party that has since come upon the stage [7]. The mere presence of an Agent does not, by itself, take away any of the original Common Law rights enjoyed either by the employees or by the employer.

According to the other school heralded by Arthur J. Goldberg [8], pre-union history is totally irrelevant to the determination of the respective rights of the parties under a collective agreement regime: « We cannot now assume that somehow one party to the deal brings into it a backlog of rights and powers it enjoyed in dealing with individual employees. » Practices that must be considered belong to a different order and are only those that have grown up during the period when the collective bargaining relationship was in existence. These practices are to be seen as a many circumstances surrounding the actual signing of the Collective Contract and underlying it, in the very intent of the parties. Accordingly, each of the latter has the right to assume that these practices cannot be unilaterally changed and that they subsist to the extent that they are not expressly revised in the written Agreement. In a « Goldbergian » sense, Management's rights are implicitely limited by the co-existing rights of the Union, and the contract simply represents the basis on which both parties agree to go forward... [9]. Therefore... « In examining the meaning of an agreement, it is proper to inquire about the conditions under which the bargain took place with a presumption that the normal practices which did exist are expected to continue except as the agreement would require or justify alteration and except as conditions make such past circumstances no longer feasible or appropriate. Both parties have rights to stability and protection from unbargained changes in wages, hours, and working conditions » [10].

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(7) See: United Rubber Workers, Local 446 and W.C. Hardesty Co. of Canada Ltd. (W. Little & Al) (10 Lab. Arb. Cas. 162 at p. 167) (Nov. 16, 1959); also H. Lande's decision in re: United Automobile Workers & B.O.A.C. (10 Lab. Arb. Cas. 288, at p. 291) (July 21, 1960).

(8) ARTHUR J. GOLDBERG, « Management's Reserved Rights: A Labor View », in: Proceedings of the Ninth Annual Meeting, N.A.A., *op. cit.*, pp. 118, sq.

(9) *Op. cit.*, p. 120.

(10) *Op. cit.*, p. 120.

Professor Bora Laskin also separated in an irreductible manner employer's pre-union dealings with his individual workers and the new set of relations evolved under collective bargaining with the Union [11]: « In this Board's view, it is very superficial generalization to contend that a Collective Agreement must be read as limiting an employer's pre-collective bargaining prerogatives only to the extent expressly stipulated. Such a generalization ignores completely the climate of employer-employee relations under a Collective Agreement. The change from individual to Collective Bargaining is a change of kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist. Just as the period of individual bargaining had its own « common law » worked out empirically over many years, so does a Collective Bargaining regime have a common law to be invoked to give consistency and meaning to the Collective Agreement on which it is based... » The individual contract of labour consecrated the employer's prerogatives derived from ownership, as limited by public order; the collective labour agreement sets out a number of conditions of work agreed upon by two parties, the participation of each of which is necessary to the operation of the enterprise. Hence, both are to be regarded as having vested rights in the working conditions therein.

To others, the mere confronting of the « reserved rights » doctrine with its « implied limitations » counterpart is not of great help, by itself, towards the solution of any particular problem related to managerial rights. « The (former) doctrine merely (states) that management has retained those rights which it has not given up by agreement. The doctrine does not answer the question of *what rights should management be held to have given up in the agreement.* That is the question which arbitrators are faced with » [12]. With respect to the latter: « An arbitrator must distinguish between the rights and kinds of discretion which management exercises every day in the week — and which the union wants and expects it to exercise — and those rights and kinds of dis-

(11) United Electrical, Radio and Machine Workers of America, Local 527, in re: Peterboro Lock Mfg. Co. Ltd. (4 Lab. Arb. Cas. at p. 1502) (Oct. 16, 1953).

(12) RALPH SEWARD, Cornell of Campus... *Op cit.*, p. 108.

cretion which the agreement should be held to prohibit. And in the absence of express language, he must draw such distinctions by drawing *implications* from the agreement... But neither theory has a universal validity. Whether or not an agreement should be held to preserve a certain status quo or to leave management free to change that status quo depends on the facts of each case — the language of the agreement, its history, the nature of the problem, etc. Our job as arbitrators is not to choose between theories but properly to assess such facts » [13].

II — United States

In the absence of any specific reference to the subject in the Agreement, the majority of American arbitrators would now be inclined to decide a contracting out issue by reverting to the study of the material elements of the case at hand rather than by applying a more universal, but preconceived reasoning on the retention or implied limitation of managerial prerogatives. Good faith on the part of the employer, past practice, the nature of the economies achieved through contracting out, the degree of emergency involved, would now be, among other factors, at the core of the arbitrator's decision. A contract given to an outside firm would thus be condemned, as a rule, even by an arbitrator inclined to profess that Management retains all rights not expressly surrendered in the Agreement, if the employer, in so doing, was trying to escape the pay and working conditions set out in this same Agreement. On the other hand, implied limitations to unilateral managerial action in the subcontracting field lead one to consider — in order to see precisely where these limits stand — for instance, possibly, the emergency confronting the subcontracting employer, the comparative cost as between an employer's carrying out of work through his own men or through an independent firm, in the last analysis, the employer's good faith. Those represent as many specific criteria that now occupy a prominent place in current U.S. awards.

Nevertheless, this insistence upon the factual elements of individual situations does not preclude arbitrators from taking occasion of a subcontracting case to revert to the already familiar dilemma over managerial rights. This is particularly true of earlier awards.

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(13) *Ibid.*, p. 110.

« There are two schools of thoughts on this right, or let us say subject of management's subcontracting of work.

One group follows along the theory that management may as one of its inherent rights as such, let work to outside contractors in the absence of a contract promise specifically restricting subcontracting, providing only that it is not discriminating and therefore done in good faith. I need not discuss the theory, except to state that in our instant case your arbitrator finds, as a fact, that the action of the company was in good faith and was not discriminating.

I like better the theory, and so predicate the award, that there is an implied condition in a recognition clause that an employer will not arbitrarily contract out work normally performed within the unit, and that in the absence of a specific clause governing subcontracting... the true test of management's right to subcontract is whether it acted reasonably in view of the particular existing condition and in good faith » [14].

A recent review by arbitrator Alan Dash, Jr. of U.S. subcontracting decisions [15] may illustrate, at least quantitatively, the positions of American arbitrators on the subject. Out of the sixty-four published decisions compiled by Dash [16], all dealing with subcontracting, nineteen seemed to sustain the « reserved rights » theory; in all but one of the nineteen, however, the application of the theory was limited either by the « good faith » or « reasonableness » elements the company had to meet, « none of which », he adds, « is consistent with the « reserved rights » theory. » In more than two-thirds of this first group of sixty-four decisions, justifications had been found, in addition to « good faith »: subcontracting had been either « in conformance with past prac-

(14) (22 LA 124) (as quoted in « Management's Right to Manage », by George W. Torrence, B.N.A., Washington (1959), at p. 17.

(15) « Cornell-Off Campus Conference ». Sponsored by the New York State School of Industrial and Labor Relations: the arbitration of two « Management Rights » issues; Work Assignments and Contracting Out. (February 1960, New York City), pp. 70, sq. (After a paper presented by Donald A. Crawford to the Thirteenth Annual Meeting of the N.A.A. See: « Challenges to Arbitration » — Proceedings of the Thirteenth Annual Meeting, National Academy of Arbitrators, Washington, 1960 (B.N.A. Inc. Ed.), pp. 51, sq: « The Arbitration of Disputes over Subcontracting », by Donald A. Crawford, and consequent discussion. Arbitrator Crawford, in turn, inspired himself from an earlier award by same arbitrator Dash, in re: Celanese Corp. (33 LA 925).

(16) *Op. cit.*, pp. 74, sq. and see: Table I and II.

tice not previously objected to by the union » or « dictated by the requirements of the business for efficiency, for economy, or for expedious performance » or « did not cause substantial number of employees to be deprived of their work ». The same conclusion is drawn that « even the decisions which advanced the 'reserved rights' doctrine embrace the 'implied limitation' concept to some extent, » and that, consequently, « there is no true adherence by arbitrators to the reserved rights of management concept in the field of contracting out. »

In the larger group of decision (forty-five in all), where the « reserved rights » theory is not being invoked, it was recorded that the act of subcontracting, to be upheld, had to be, either alternatively or jointly, without substantial intended or actual effect on bargaining unit work, in conformance with past practice not previously objected to by the Union, in good faith and not an attempt to evade provisions of the Agreement, or to violate its spirit or purpose, dictated by the requirements of the business for efficiency, and economy, or dictated by the emergency of the situation. More specifically, in sixteen cases, the Union's claim that the act of subcontracting had violated the recognition provisions of the Agreement was sustained.

STUDY OF DECISIONS

Illustrative decisions may now be examined individually. These may be considered under three classifications: 1) decisions where Management's right to subcontract is retained, provided, in practice, certain qualifications are met; 2) case where implied limitations derived from the nature of the Agreement, or from substantive provisions in it, are clearly set out and finally, decisions where the specific reasons to contract out in a given situation, e.g., emergency, efficiency..., are decisive in that they demonstrate, basically, that no evasion from the Agreement is being sought by the employer.

1 — *Management's right to contract out retained with qualification (s) (« Reserved rights » tendency)*

The basic reasoning whereby Management retains all rights it has not expressly surrendered was thus clearly set out [17]: « In summary,...

(17) In re: Minneapolis-Moline (33 LA 893) (as quoted in *Monthly Labor Review*, (June 1961) Vol. 84, No. 6, at p. 580).

the arbitrator must find that a clear understanding exists in the field of labour-management relations that where the parties intend to prevent subcontracting such a specific provision is incorporated in contracts to limit management's rights in this matter. »

However, even a strict adherence to the terms of the contract by the arbitrator still requires, as is the rule in contractual matters in general, that he satisfied himself that the act of subcontracting is not a maneuver to circumvent the obligations set out in the Agreement, if this latter is to exist at all. The requirement of good faith is of a contractual nature. « In other words, the duty of the arbitrator in a subcontracting case become one of interpreting the intent of the employer in his exercise of the right to contract out. If the intent of the subcontract is one of seriously reducing the scope of coverage and thereby to avoid its collective bargaining requirement, then the arbitrator is within his rights in striking down the arrangement.

This action of the arbitrator would be based, not upon the recognition clause, the seniority clause, or the list of job classifications, but upon the inherent requirement that is basic to effective collective bargaining and to any labour agreement. This requirement is that the employer's action be one of « good faith. » This, of course, means that in arbitration cases, where there is no contracting out provisions, it is the duty of the arbitrator to examine the evidence of the case and the whole relationship between the parties in order to determine the intent behind the action taken » [18].

To this first category of arbitrators, then, with the good faith proviso, subcontracting, unless it is expressly barred by a written provision, remains a management prerogative and its exercise does not constitute a violation of either recognition or seniority clauses. It is a « residual right » [19]. The usual recognition clause simply means that the Union has been selected as the representative of the unit. It must not be viewed as a guaranty that jobs within the unit are not to vary. Likewise, seniority provisions and the listing of rates of pay are not to be read as guaranties of employment [20]. « There is nothing to indicate that any particular number of jobs or that all work described in any

(18) Olin Mathieson Chemical Corp., (36 LA 1147) (Arb: T.J. McDermott).

(19) Snyder Mining Co., (36 LA 861) (Arb. M.O. Graff).

particular classification will be done exclusively by employees of the Company » [21].

The underlying principles have been clearly formulated:

« 1) Management is free to discontinue part of its operation, or to change its method of doing business, or to subcontract, unless such action contravenes some provisions of the Collective Bargaining Agreement.

2) The rights of Management are curtailed only to the extent that they are given up in the contract; ...subcontracting of work, made in good faith and in the exercise of sound business judgment is not violative of the recognition clause, in the absence of a specific ban on subcontracting.

3) An employer does not breach a labor agreement by contracting for the performance of work previously performed by the bargaining unit, and such restriction may not be implied from the fact that the contract stipulates terms and conditions of employment, designates classification and sets forth corresponding wage rates » [22].

Decisions of this type are now, however, of a less frequent occurrence. In addition, it is to be noticed that in their search for the « good faith » element, their authors are led to consider the motives that may have prompted the employer to subcontract.

In so doing, arbitrators are, in fact, qualifying Management's right to contract out. However, the consequence from the nature of the Agreement and from the recognition clause it contains, in particular, is not drawn explicitely, as in the next group of decisions to be considered.

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(20) Black-Clawson Co. (34 LA 217) (Arb. E.R. Teple).

(21) Columbus Bolt & Forging Co. (35 LA 397) (Vernon L. Stouffer).

(22) Holub Iron & Steel Co. (36 LA 106) (Harry J. Dworkin). To the same effect: West Virginia Pulp & Paper Co. (36 LA 137) (B.C. Roberts); Allegheny Lundlum Steel Corp. (36 LA 912) (M.S. Ryder).

2 — *Implied limitations to Management's right to contract out are dominant*

To Arbitrator Wallen, the seniority provision of the contract is given preference over the management rights clause... « the transfer of work customarily performed by employees in the bargaining unit must, therefore, be regarded as an attack on the job security of the employees whom the Agreement covers and, therefore, on one of the contract's basic purposes » [23].

Economy alone cannot prevail over the stability of the bargaining group « which is the foundation of the bargaining relationship between the parties » [24]. Economy, moreover, must never be understood as an evasion from payments required under the contract: « the Management Rights clause does not justify actions that would nullify other sections of the Agreement » [25]. In an instance involving janitorial work, arbitrator McIntosh clearly stated that: « When the parties... have agreed that the bargaining unit shall consist of certain jobs and that these shall be paid in a certain manner, there is a presumption that these jobs shall continue unless the processes of the Company change so radically that different types of jobs must be set up... Consequently, the unilateral action of the Company to let a job classification become unfilled, as a result of an arrangement with an outside firm specializing in janitorial work... is not only a violation of the contract, but an act which virtually strikes at the very basis of the contract and if continued could completely destroy the bargaining unit and thus render the contracting process null » [26].

More specifically, when it is not expressly provided for in the Agreement, unilateral contracting was held to violate the recognition clause it contains, which confers upon the Union the status of « exclusive representative of all incumbents of a given group of jobs... and, consequently,... plainly obliges the Company to refrain from arbitrarily or

(23) New Britain Machine Co. (8 LA 720) (Saul Wallen) (as quoted in « How Arbitration Works », by F. and E.A. Elkouri, B.N.A., Washington, at p. 349).

(24) (15 LA 111) (16 LA 644) (as quoted in G.W. Torrence, *Management's Right to Manage*, B.N.A., at pp. 23, sq.).

(25) (27 LA 671) (as quoted in Torrence, *op. cit.*, p. 27).

(26) (Socony Mobil Oil Co.) (36 LA 63) (R.F. McIntosh).

unreasonably reducing the scope of the bargaining unit »[27]. In a more concrete manner, the Arbitrator adds: « What is arbitrary or unreasonable in this regard is a practical question which cannot be determined in a vacuum. The group of jobs which constitute a bargaining unit is not static and cannot be. Certain expansions, contractions, modifications of the total number of jobs within the defined bargaining unit are normal, expectable, and essential to proper conduct of the enterprise. Recognition of the Union for purposes of bargaining does not imply of itself any deviation from this generally recognized principle. The question in this case, then, is simply whether the Company's action... can be justified on the basis of all relevant evidence as a normal and reasonable management action in arranging for the conduct of the work at the plant. »

3 — *Decisions based upon examination of objective circumstances*

Necessity is thus also felt by tenant of the « implied limitations » position to consider the peculiarities of the individual cases confronting them. An employer was found to have violated the contractual recognition and jobs classification provisions by subcontracting janitorial work: « In this case, there was no emergency nor the need for any work that had to be done which could not be performed by employees of the bargaining unit or the janitress specifically. This action of the Company, though the minimis, tends to lessen the strength of the bargaining unit and is not considered proper »[28]. The Union recognition clause bars the Company from contracting out its production work while regular employees are on lay off: « Non bargaining-unit workers should not be allowed to perform work of laid off bargaining unit employees; to allow them to do so on regular, non emergency production work would be to allow the Company to so reduce the work opportunities of bargaining unit members as to erode and render meaningless their contract rights »[29]. The same arbitrator, R.R. Williams, upheld the same

(27) National Tube Co. (17 LA 790) (Sylvester Garrett), as quoted in « Challenges *to Arbitration* », Thirteenth Annual Meeting, N.A.A., Washington, 1960, at p. 62.

(28) Container Corp. of America, (37 LA 252) (Harold T. Dworet).

(29) Vulcan Rivet & Bolt Corp. (36 LA 871) (R.R. Williams).

reasoning in its entirety with respect to the limitations brought about to an employer's right to contract out by the Agreement as an entity and the recognition clause in particular. However, he found the employer's action of farming out repair work, consistent with the terms of the Agreement since:

« 1 — No bargaining unit employees were laid off.

2 — No regular employee suffered loss of time or pay.

3 — The Union was consulted...

4 — No employees were discriminated against.

5 — The work contracted was not routine work; it was temporary, one time, « emergency » or repair work of limited duration.

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9 — The Company exercised good business judgment.

10 — The subcontracting was not an unreasonable exercise of the Company's right to manage the plant » [30].

In the present state of decisions, implied limitations resulting from the signing of the contract or, more specifically, from the recognition clause are not indeed tantamount to an absolute prohibition to contract out. In other words: « Signed agreements and recognition provisions thereof do not establish categorically that all the jobs then performed, or all future production and maintenance work will be performed by members of the bargaining unit » [31]. The implied limitations are those of good faith and of business justifications on the part of the employer contemplating contracting out. Conversely, the kind of contracting out that is being adversely ruled upon is the one which presents a threat to the integrity of the bargaining unit, whereby a permanent advantage of wages lower than those bargained for is sought by the employer. Such a position cannot but lead to a search for the objective reasons underlying individual acts of contracting out.

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(30) Riegel Paper Corp. (36 LA 714) (R.R. Williams).

(31) Dash, *op. cit.*, p. 79.

4 — *Criteria for judging contracting out cases*

Awards representative of the current American trend, while implicitely advocating that Management does not retain full right to subcontracting, are centered on the circumstances of each case. Factors that thus serve as guiding posts in determining the admissibility of subcontracting in a given set of circumstances include [32]:

1 — *In a general way:* The decision must have been made *in good faith* by the employer and not as an effort to avert the terms of the Agreement. « In the case before us it does not appear that the employer subcontracted the salvage operation as a stratagem to deprive its employees of work, but did so in the good faith exercise of its business judgment for improved efficiency and economy of operation. » [33]

2 — *More specifically:* In determining whether or not the decision was made « in good faith », consideration is given to:

a) *The effect of contracting out on the Union:* Is it being used as a method of discriminating against the Union and substantially prejudicing the status and integrity of the bargaining unit? [34]

b) *The effect on unit employees:* Are members of the Union discriminated against, displaced, laid off, or deprived of jobs previously available to them, or lose regular or overtime earnings, by reason of the subcontract? [35] However, the employment effect, quite apart from any element of discrimination, is often found to be irrelevant, with reason, by arbitrators, when other factors tend to justify the subcontract.

c) *The type of work involved:* Permanent work is more likely to involve modifications to employee and union status than does work that is of an « incidental » or « temporary » nature. Consideration may also be given as to whether work of a given type is often contracted out in the industry. « Held that employer had right to contract for one day

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(32) For listings of relevant factors, see: F. and E.A. Elkouri, « How Arbitration Works », pp. 343, sq. Also, award by J.F. Caraway, (37 LA 599) in re: Reynolds Metals Co.; « Subcontracting under the Labor Management Agreement », an article by Carl R. Schedler, in *The Arbitration Journal,* Vol. 10, N.S. (1955) No. 3, p. 131; Dash, *op. cit.*, pp. 76, sq.

(33) Los Angeles Standard Rubber Co. (37 LA 784), at p. 786 (H.F. Le Barron).

(34) Elkouri, *op. cit.*, p. 344, 4o.

(35) Elkouri, *op. cit.*, p. 344, 4o.

rental and use of portable crane and to use rental company's crane operator, as required by rental agreement, in order to dispose rapidly of excess stock pile... in the absence of any improper motivation »[36].

d) *The emergency of the situation:* In the absence of such exceptional circumstances, an employer was found to have violated a contract's recognition and job classifications provisions in re: Container Corp. of America[37].

e) *The inavailability of properly qualified employees, of suited equipment and managerial know how:* The farming out of a business experiment that required special skills and equipment was upheld in re: Reynold Metals Co.[38].

f) The *past practice* of subcontracting an operation without protest on the part of the Union: It may impede any successful grieving against a subsequent act of a similar nature[39]. The same result is to be expected from Union's *unsuccessful attempt, during contract negotiations, to have subcontracting expressly forbidden* by the terms of the Agreement.

3 — *Fundamentally:* The comparative cost advantage obtained or simply sought in farming out work hitherto done by unit employees. This efficiency of a real nature, as opposed to saving achieved by not living up to the Agreement, is often found to be the decisive element in an arbitrator's decision upholding subcontracting in a particular case[40].

(Needless to say that besides one award based upon anyone of the preceeding factors, another can be found presenting the interplay of a good number of them.)

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(36) American Radiator & Standard Sanitary Corp. (36 LA 1304) (P.H. Sanders).

(37) Container Corp. of America (37 LA 252) (Harold T. Dworet).

(38) Reynolds Metals Co. (36 LA 134) (H. Wyckoll).

(39) Snyder Mining Co. (36 LA 861) (M.O. Graff).

(40) Electric Autolite Co. (35 LA 415) (B.F. Willcox).

SUMMARY

This tendency of recent U.S. decisions concerning the subcontracting issue to place an emphasis upon the factors just considered may apparently relegate managerial rights theories somewhat in the shadow. In reality, it means that, to American arbitrators, Management's right to subcontract is implicitely limited to the extent they are ready to consider these factors before upholding a given act of contracting out. (Be it, in rare instances, the sole « good faith » requirement.) Indeed, the « reserved rights » theory, in the strict sense that only a written prohibition may preclude Management from exercising its « prerogative » of contracting out, has virtually disappeared from the American arbitral stage. It has made place for a widely accepted moderate form of the « implied limitations » theory. The signing of an agreement by an employer, or the recognition or seniority provisions it contains cannot be held to act as an absolute prohibition to subcontract, for the sake of preserving the integrity of the bargaining unit, and give the Union the certainty that all listedwork will ever be performed by unit members. They rather act as a bar to any subcontracting having the effect of undermining the Bargaining Agent through an avoidance of the pay and work standards agreed upon by the parties to the Agreement.

To express this positively, the consensus is to the effect that subcontracting must be dictated by « compelling logic or economies of operation » [41]. The distinction over the economy aspect underlying most subcontracting cases would follow the lines drawn by arbitrator Wilcox: « . . . that in my opinion, is the true meaning of decisions which say that economy does not justify a subcontract. These deal with effort to subvert a union's contractual scale of wages by hiring another Company to do the work, and to do it with non-union workers. But surely... where the work is unusual, where it can be done by experts more efficiently than by persons who do not do it every day, economy is and should be a major factor of justification » [42].

The employer is required by American arbitrators to live up to the Agreement in all good faith, but arbitrators are anxious to allow him all the flexibility he needs in his quest for efficiency.

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(41) Crawford, *op. cit.*, p. 72.

(42) B.F. Wilcox in re: Electric Autolite Co. (See p. 32).

III — Canadian Common Law Provinces awards

The majority of arbitrators in the Canadian Common Law Provinces tend to resolve disputes over subcontracting according to one of two preconceptions regarding a Collective Agreement. These preconceptions are that managerial prerogatives remain intact, except for an express provision to the contrary; and that they are implicitely limited by the recognition of the Bargaining Agent.

DECISIONS ON TRANSFER OF WORK TO SUPERVISORY PERSONNEL

This trend of arbitrators to adhere, in their solution of the contracting out issue, to either a « reserved rights » or an « implied limitations » theory [43] is also seen, by analogy, in a group of early decisions rendered on the parent issue involving the transfer of work performed by employees of the bargaining unit to supervisory personnel excluded from the unit.

By the end of 1953, Magistrate J.A. Hanrahan [44] had decided that, failing a provision to the contrary in the Agreement, a company had the right to assign work that had been performed by employees within the bargaining unit to persons excluded from it.

A few days earlier, Judge E.W. Cross had reached a similar conclusion but only with respect to overtime work that had previously been offered to all specification clerks [45].

The majority of the board, in re: John Bertram & Sons Co. Ltd. [46], ruled likewise, when finding no provision in the Agreement preventing

(43) Headings that are, here too, being adopted to facilitate exposition and without intention of reducing all decisions to either theory, regardless of the qualifications and shades found in certain of them.

(44) International Union United Automobile, Aircraft and Agricultural Implement Workers of America (U.A.W.-C.I.O.) Local 240, in re: Canadian Industries Limited. (I Lab. Arb. Cas., p. 1605) (Dec. 4, 1953).

(45) International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 240, in re: Ford Motor Company of Canada Limited (5 Lab. Arb. Cas. 1609) (Nov. 11, 1953).

(46) International Machinists Association, Loval 1740. Re: John Bertram & Sons Co. Ltd. (5 Lab. Arb. Cas. 2117) (Dec. 9, 1954).

foremen from doing work normally performed by members of the bargaining unit.

Judge W.S. Lane had, however, provided us with a more discriminating view of the problem in ruling over a grievance protesting the performance by a foreman of hourlyrated work [47]. The grievance was finally dismissed on the grounds that the contract did not « ... even by implication, restrain the company from scheduling work to its foreman... » (and that) ... on the merits, it would seem ridiculous that a foreman who has supervision over two workers should be required to do no work himself. »

Under the usual Management's rights clause, that is, without a specific prohibition concerning the assigning of work to non-unit personnel, Management was declared, more recently [48], to have the right of so doing notwithstanding seniority provisions, provided such an assignment does not result in bringing into the unit outside personnel. More specifically, it was found that when, as a result of the eliminated jobs content being distributed, employees outside the unit are performing 20% of this former job, they cannot be said to have been brought in fact within the scope of the unit.

Professor Laskin approached a similar situation differently. To him the assignment of bargaining unit work to excluded persons was a violation of the Agreement: « ... If it were not so, it is arguable at the extreme that the Company could evade all its Collective Agreement obligations simply by assigning work covered by the Agreement to its office staff or to supervisory personnel or by recruiting an entirely new working force » [49].

An unanimous board headed by Justice W.D. Roach also adopted a similar conception of the Agreement [50] by not admitting the replace-

(47) International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 222, in re: Duplate (Canada) Ltd. (5 Lab. Arb. Cas. 1625) (Jan. 7, 1954).

(48) United Steelworkers, Local 3589, and American Standard Products (Canada) Ltd. (11 Lab. Arb. Cas. 283) (Jan. 1, 1961).

(49) Local 278 C, International Union of Brewery, Flour, Cereal, Malt, Soft Drink and Distillery Workers of America in re: Brewers' Warehousing Co. Ltd. (5 Lab. Arb. Cas. 1797) (June 28, 1954).

(50) United Steelworkers of America, Local 3694, in re: Standard Sanitary and Dominion Radiator Limited, (5 Lab. Rrb. Cas. 1684) (March 11, 1954).

ment of an incentive production worker by an employee on salary, when salaried employees were excluded from the bargaining unit: « If the Company could change this particular job to a salaried job then it seems to me that it would necessarily follow that it could change all the hourly or piece-work employees to salaried employees doing the same work and thus completely destroy the effect of the Agreement. The Union would then be the Collective Bargaining Agent with no employees for whom to bargain.

In my opinion neither the good faith of the Company nor the element of necessity, if it existed, permits the Company to do something that is contrary to the Collective Agreement. »

Grievances of a similar nature were sustained in two more recent decisions [51]. One is of interest in that it relies upon the recognition clause to maintain the grievance; the other simply enunciates a specific prohibition.

DECISIONS ON CONTRACTING OUT, « STRICTO SENSU »

Subcontracting, more strictly defined, confronts the arbitrator with the same basic dilemma as does transferring works to supervisory personnel. He must consider the effect on the respective rights of the parties of the employer's recognition of the Bargaining Agent and his entering into negociations with it.

In the following analysis, in order to facilitate exposition, decisions over subcontracting are grouped according to their relation to either one of the two main conceptions of Management's rights. Of course, this classification is not to be understood to disregard the particularities of individual situations, with are carefully taken into account in more recent U.S. awards, nor to be regarded as favoring a resolving of the contracting out issue by a quasi-automatic application of a theoretical standpoint.

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(51) United Brewery Workers and Brewers' Warehousing Co. Ltd. (7 Lab. Arb. Cas. 286) Lang C.C.J., Pres. (Nov. 22, 1956); and: United Automobile Workers, Local 458 & Cockshutt Farm Equipment Ltd. (8 Lab. Arb. Cas. 249) Lane C.C.J., Pres. (March 1, 1958).

1 — *« Reserved rights » theory*

A board [52] presided over by H.D. Lang in a « reserved rightist » manner, found no violation of the Agreement in the Company's action of contracting with an outside firm, even though seventeen janitresses had been laid off as a result. Yet the board was faced both with an ordinary Management's right clause (Cl. 4), providing, inter alia, that « the Company agrees that these functions will be exercised in a manner not inconsistent with the terms of this Agreement... » and with a clause stating that « ... no job which is presently hourly rated shall be, during the terms of this Agreement removed from the bargaining unit... » A contrary position was taken by E.W. Cross, in his well-known Studebaker-Packard award [53], when he stated, obiter, that under him the Westinghouse case would have been resolved differently. « It is obvious if management were to pursue a policy of contracting all work within a plant to outside contractors, the contract would be nullified and it seems to me such a policy, being inconsistent with the terms of the agreement, is expressly forbidden by Cl. 4. Can a distinction be made between an inconsistency which nullified only part of the contract as in the case before me and one which nullified the whole? I am of the opinion that no such distinction can be supported. »

The majority of another board, in elaborating its decision over a grievance involving the reclassification of a pipe-fitter as a result of a subcontract of plumbing work, enunciated incidentally the ordinary « reserved rights » theory: « There is no provision in the Agreement restricting the company's right to manage, operate, extend, and curtail its business. If the Company wishes to contract the manufacture of part of its requirements to an outside firm and discontinue production in its own factory it has that right... » [54].

In re: John Bertram & Sons, Co. Ltd. [55], under a management's rights clause which stated that « the Company reserves the exclusive

(52) United Electrical, Radio & Machine Workers of America, Local 504, in re: Canadian Westinghouse Company Limited (4 Lab. Arb. Cas. 1536) (Dec. 13, 1953).

(53) U.A.W., Local 525 and Studebaker-Packard Ltd. (7 Lab. Arb. Cas. 310) (August 12, 1957) See pp.

(54) Textile Workers Union of America, Local 741, in re: Guelph Yarns. (5 Lab. Arb. Cas. 1657) (April 21, 1954).

(55) International Machinists Association, Local 1740, in re: John Bertram & Sons Co. Ltd. (5 Lab. Arb. Cas. 2114) (Jan. 22, 1955).

rights to manage the enterprise, the majority of the board headed by Judge H.E. Fuller, ruled likewise that the Company was « not precluded from contracting complete office maintenance services in a division of its plant. » The resulting lay off of employees, as in the Westinghouse decision, was found irrelevant.

The « Empress » case represents a more recent unequivocal acceptance of « reserved rights » principle. The board of arbitrators held [56] that subcontracting is a normal and customary function of Management and that a specific limitation must be provided for in the Agreement if the Union wishes to limit this right. The award also contains an extensive review of subcontracting decisions: The opposite Studebaker-Packard award, which had found subcontracting inconsistent with the Agreement at law, is discarded as an exception to the « reserved rights » shield as being based on a particular provision of the contract. However, no mention is made of two important decisions that had been rendered by that time: the « Falconbridge » [57], and « Canadian Car » [58] instances, both of which belong to the same family as does the Studebaker-Packard award.

The farming out of janitorial work in re: W.C. Hardesty Co. of Canada Ltd. [59] was the occasion for Chairman W. Little, D.C.J., to go to the roots of « Empress » — type views on managerial rights: « Prior to the days of collective bargaining an employer's power over his employees in the course of their employment was absolute, provided he observed the law then in existence. The situation is the same today except that there is more law regulating his actions and his powers are limited by the terms of any collective agreement to which he is a party. » A modernistic flavour is then given to this view of labour relations by referring to automation; « What then is the difference, if any, between those affected by automation, and those affected by contracting out? Both of these methods of improving efficiency are exclusive functions of management. The only possible difference is that in contracting out, people are replacing people. It could have the result in theory of

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(56) Canadian Brotherhood of Railway Employees, « Empress Division » No. 276 & C.P.R. (9 Lab. Arb. Cas. 151) (April 21, 1959).

(57) See p. and p.

(58) See pp.

(59) W.C. Hardesty Co. of Canada Limited (10 Lab. Arb. Cas. 162) (Nov. 16, 1959).

destroying the bargaining unit. But unless the contract specifically forbids such action on the employer's part, he is free to act in this manner. That is what was done here. Actually, however, in this case, no one has been affected, (...) but this fact has no bearing on our decision. »

Other decisions too adhere as firmly to the « reserved rights » principles as the W.C. Hardesty award. They have only the additional characteristic of having resource to the juridical « master and servant » relationship — which is coexistent with the power to give orders as to the manner of performing the work — in order to establish whether or not the outside firm or its employees are subject to the provisions of the Agreement as employees of the contracting out firm. Every time, in these decisions, the arbitrator has satisfied himself that the outside firm has the responsibility for its work, that it alone directs its employees as to the manner of performing the job, or is itself free from any control as to details of execution of the work on the part of the contracting out firm, in other words, when the arbitrator has found that the relationship of « master and servant » has vanished to be replaced by that of independent contractor, he then usually goes on to proclaim that such a subcontract may be entered into by Management in the absence of an express prohibition to the contrary in the Agreement. In the opposite case, i.e., when Management in fact does retain the power to give orders as to the manner to execute the job, then, workers doing this work are to be viewed as the subcontracting firm's own employees, and, as such, are simply covered by the Agreement. Such a distinction, based upon the master-servant relationship, is no longer current among recent decisions. A version of it was the difference made between a « contract for services » i.e., « ... contracting out to a bona fide outside firm which would carry out the function in question through its own employees... » [60] and under its own direction and responsibility, and a « contract of service, » whereby the contracting out firm is being supplied with outside employees whom it directs itself.

The distinction between a « contract of service » as opposed to a « contract for services » was clearly made in a case [61] involving an employer's contracting out with the Canadian Corps of Commissionaires

(60) B. LASKIN, in re: « Falconbridge », (8 Lab. Arb. Cas., at p. 280).

(61) United Steelworkers of America, C.I.O., Local 3696, in re: Norton Company of Canada, Ltd. Hamilton (4 Lab. Arb. Cas. 1451) (July 23, 1953).

and obtaining a man who did work formerly done by a member of the unit. This contract whereby the Corps was to supply a man « to do such services as the Company directed » was entirely different from say « . . . a contract for snow removal where the contractor uses his own judgment as how he shall go about the job... » and, accordingly, was found violative of the recognition clause of the Agreement. This case thus clearly sets the distinction between the two types of contract, but does not make explicit the board's attitude had it been confronted with an « independent contractor » relationship, as in cases to follow.

A close shop agreement to the effect that « only persons in good standing... shall be employed in the departments of the Company... » was invoked unsuccessfully by the Union against the engagement by the Company of a contractor to do a painting job while painters formed a classification covered by the Agreement. The Union contended that to assign anyone that was not a union member to a job covered by the Agreement resulted in a violation of the unionshop provision. The board decided, however, that since the Union had not proved that the subcontractor's men were in fact employees of the Company, (« master-servant » relationship) they were not « employed » within the meaning of the union-shop clause, and, consequently, denied the grievance [62].

As a complete rejection of the Studebaker-Packard award rendered two months earlier by E.W. Cross C.C.J. [63], and among the strongest statements of the « reserved rights » theory, stands D.C. Thomas, C.C.J., decision in the Electric Auto-Lite case [64]. A good part of the office equipment had been moved to a newly-constructed section of the plant. Janitor services in this new office space were farmed out while the older part was still being cleaned by members of the bargaining unit and while 150 employees of the bargaining unit were on lay-off. The arbitrator explained that the Ontario Labour Relations Act is limited to relations between employer and employee and that « . . . it does not regulate the manner in which an employer shall conduct his business... » In order to constitute the relationship of employer and employee, the employer has not only the right to direct what work is to be done, but

(62) Brewery Workers, Local 365, in re: Bradings Breweries (Ottawa) Limited. (5 Lab. Arb. Cas. 2039) (Nov. 25, 1954).

(63) See p.

(64) U.A.W., Local 456 & Electric Auto-Lite Ltd. (17 Lab. Arb. Cas. 331) (Oct. 31, 1957). Also quoted at p.

he must also have a measure of control over the manner of doing the work. Where these factors do not exist, the relationship of independent contractor comes into being and such a relationship is « beyond the realm of relationship between employer and employee in voluntarily contracting with each other ». Judge Thomas went on to note the presence in the Agreement of a clause limiting the authority of the arbitrator to « *interpreting the express term of the agreement* and preventing him by implication or otherwise, from adding to or substracting from the agreement... » It is then stated that: « The company has the right to manage its business to the best of its ability in every respect, except to the extent that its rights are cut down by voluntary abrogation of some of these rights to contract with the union. The Reservations (not Restrictions) to management clause which appear in most contract is nothing but a gratuitous acknowledgment by the union of this fundamental right. If the board is unable to find anything in the contract between the parties which takes away from the company's rights to conduct its own business, then it cannot be concerned with the quality of the action taken by the company, nor whether it results in loss of jobs for employees of the company, nor whether the action which produced such results was exercised within the four walls of the plant or elsewhere. »

An earlier British Columbia award [65], incidentally of particular interest in that it deals with a section of the « The Industrial Conciliation and Arbitration Act » that was of a content similar to that of a new sec. 10a of the Quebec Labour Relations Act, also based itself upon this absence of a « master and servant » relationship between the Company and the subcontractor to find that the Collective Agreement had no application since the contracting out firm was no longer having employees of its own « *carrying on the operation covered by the Agreement.* »

A reasoning of a similar nature can also be found in a decision of a board presided over by H.E. Fuller, C.C.J. [66]. The grievance was over the Company's contracting out major alterations to buildings, heating installations, etc. After deciding that an express limitation to contract-

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(65) Marine Workers and Boilermakers, Local 1, Re: Western Bridge and Steel Fabricator Limited. (5 Lab. Arb. Cas. 2035) (Aug. 24, 1954).

(66) United Electrical Workers, Local 524, and Canadian General Electric Co. Ltd. (9 Lab. Arb. Cas. p. 21) (Sept. 22, 1958).

ing out must be found in the Agreement, in order to limit this customary Management function, the board said: « In the collective agreement before this board, it is to be noted that under Art. 1, the company recognizes the union as the sole collective bargaining agent for all the hourly rated employees in the various works of the company... If the company contracts work out, those doing the work are not employees of the company and are, therefore, not covered by this agreement which, the parties agree only covers employees of the company... »

A particular expression of the reasoning involving the basic conception of the unit has been given by H.D. Lang C.C.J. in his Ford decision [67]: « One of the grievor's contention was that it is the job that is in the bargaining unit. With respect I do not think so. The bargaining unit is not the jobs but employees of the company who do the jobs enumerated. The company in this agreement has recognized the union as the exclusive bargaining agent on behalf of employees of the company in the bargaining unit, and the bargaining unit is described as all employees...

The company by laying off these 11 (restaurant) employees has not restricted nor limited their rights under this agreement... The company has not changed the bargaining unit. It has eliminated these restaurant jobs. If at any time the company decides to operate the cafeteria itself and engage its own employees those employees immediately come within the bargaining unit. » « . . . if the union wishes the fundamental right of a company to contract out to be restricted or limited or prevented then a clause to that effect has to be negotiated and inserted in the contract. »

The reasoning — in accordance with the wording of the recognition clause — involves, per se, the rejection of any implicitely acquired

(67) United Automobile Workers, Local 240, and Ford Motor Co. (8 Lab. Arb. Cas. 84) (Dec. 11, 1957).

rights to the Union with respect to its own security [68].

The last grievance to be presented, in the present study, as having been decided in a context of « reserved right » involves janitorial work at the Champion Spark Plug plant [69]. This, by itself, does not sound innovating and the award would add nothing to the picture had not the usual statements — that « . . . the right to contract out work is an inherent traditional right of management... » and that the recognition clause... « does not bind the employer to continue unchanged his mode of doing business... » — been tempered by references to objective circumstances of the case under analysis. Namely, the Company had acted « with the utmost good faith »; no employee had suffered by reason of this action. The consideration given to these factors may lead one to reason that managerial prerogatives may have tacitely undergone corresponding limitations in the process of Collective Bargaining.

2 — *« Implied Limitations » Theory*

A few early awards have already been found where it is stated that an employer, whatever may be the elements of good faith and of necessity involved, cannot indirectly destroy the effect of the Agreement by replacing unit members by persons excluded from it [70]. The strictly

(68) « To argue as the board did in the Brading's case, or as did the board in the B.C. award of re: ...Western Bridge... that a collective agreement applies only when persons are employed and not where there is a contracting out to a supplier of labour is to treat the collective agreement, as having force only when a company first establishes an employer-employee relationship to which it can apply. The truth of the matter is that a cardinal purpose of a collective agreement is to *anticipate an employer-employee relationship and to compel it within the agreement terms.* » (Prof. Laskin in: Sudbury Mins, Mill and Smelter Workers, Local 598 & Falconbridge Nickel Mines Ltd. (8 Lab. Arb. Cas. 276) (March 17, 1958, at p. 282). To « construe » « ...the recognition clause (or the bargaining unit clause) as referable to particular personnel... » during the life of the agreement, according to Prof. Laskin, « gives a static meaning to the collective agreement which, on the contrary, contemplates a shifting working force, variously and from time to time assigned to jobs or work classifications within the collective agreement and thus governed by its terms in initial employment as well in subsequent continuation or termination of employment. »

(69) United Automobile Workers, Local 195 & Champion Spark Plug Co. Ltd. (10 Lab. Arb. Cas. 67) (June 1, 1959).

(70) See, for instance, the award rendered by a board chaired by Honourable Justice H.D. Roach in re: Standard Sanitary and Dominion Radiator Limited (5 Lab. Arb. Cas. 1684) (March 11, 1954) at p.

defined issue of contracting out was itself treated in a comparatively new manner by E.W. Cross, C.C.J., in the famous « Studebaker-Packard Ltd. award [71]. Janitorial work was then involved. Upon Union's stand to the effect that the Company was required under the Agreement « to have the work done by employees of the bargaining unit in the plant and to pay them the rate bargained for such work, » it is commented:

« This is a formidable argument because it must be conceded a fundamental objective of collective bargaining is to insure that the work done by employees of the bargaining unit within a plant shall be done under the conditions set out in the bargain as to wages and hours of work. The recognition clause makes it clear that the Company recognizes the union for the purpose of collective bargaining with respect to rates of pay, hours of work, and other conditions of employment...

If the Company's contention were accepted, it could have the right to contract any job performed within the plant to a private contractor... »

The grievance was finally sustained and the contract with the industrial cleaning firm found in violation of the Agreement. The particular wording of the Management's rights clause, however, may possibly reduce the significance of the decision. The clause, indeed, stated that « except as otherwise expressly provided in this agreement, nothing... shall be deemed to limit the company in any way in the exercise of the regular and customary functions of management... » As an application of the wording of the clause, the bringing of outside contractors « into the plant to do work ordinarily done by members of the bargaining unit » was not found to be such a normal function » of Management at

(71) U.A.W., Local 525 & Studebaker-Packard Ltd. (7 Lab. Arb. Cas. 310) (August 12, 1957).

the time of the signing of the Agreement [72]. Nevertheless, the previously quoted statements of principles were breaking new grounds and it must also be remarked that Judge Cross, in this award, expressed disagreement with the decision rendered by H.D. Lang in the Westinghouse affair [73]. Managerial rights then were not being limited to « the regular and customary functions of management, » as in the Studebaker-Packard Agreement Judge Cross had to consider.

A few months later, Judge Cross, this time confronted with the broader Management's rights clause in the General Motors master agreement [74], took a different stand. The clause then enunciated that « . . . it (was) the right of the Company to operate and manage its business in all respect... » including « . . . the scheduling of its production and its methods, processes and means of manufacturing. » The arbitrator was satisfied with the proof of the Company — due to consideration being given to past practice in the interpretation of the clause — to the effect that he disposal of wase material was a « method, process or

(72) To Professor H.D. Woods of the Industrial Relations Center, McGill University, this award occupies a prominent place in the history of the « implied limitations » theory. He notes that the Management's rights clause refers to « the regular and customary functions of management » and not to « the regular and customary functions of the management of this firm ». It is to be noted, however, that at the end of his award, Judge Cross specifically states: « Apart from the Westinghouse decision, I must decide in any event what this particular management's rights clause means. In short, the question arises, is it a normal and regular function of management to bring outside contractors into the plant to do work ordinarily done by members of the bargaining unit at the time the collective bargaining agreement was signed.

It was admitted by the Company it was not a normal function of management in this plant... »

In his later General Motors award, Judge Cross thus explains the Studebaker-Packard award: « ...the arbitrator held that the onus was on management of proving that the practice of employing outside contractors to do work done by members of the bargaining unit in the plant was a regular and customary function of management and found on the facts that this onus had not been met and allowed the grievance. Furthermore, as the arbitrator pointed out in that decision, the company had admitted the contracting out in question was not a regular function of management and had failed to prove that it was a customary function in that particular plant ». (8 Lab. Arb. Cas., at p. 93).

Whatever may be the issue on this particular point, it remains that Judge Cross in his « Studebaker » decision had expressed the view, with respect to the Westinghouse award, that « ...if management were to pursue a policy of contracting all work within a plant to outside contractors, the contract would be mullified... » Judge Cross had gone as far as saying that such a result was « inconsistent with the terms of the Westinghouse agreement », and was expressly forbidden by the terms of the then broader Management's rights clause.

(73) See pp.

(74) United Automobile Workers, Local 222 & General Motors Ltd. (8 Lab. Arb. Cas., p. 90) (Jan. 6, 1956).

means of manufacturing.» He declared that « in the pursuit of efficiency, the company had the right to change this method by arranging for such waste material to be disposed of by an outside contractor.» Other factors considered were: the fact that the contractor was doing the important part of his work outside the plant; good faith of Management in effecting the change; the previous unsuccessful attempt by the Union to impose such a limitation upon Management's rights. The award, by entering into such considerations, is akin to the one rendered in re: Champion Spark Plug [75]. As recalled, the « reserved rights » principle was tempered by references to the « good faith » element that was present in the situation then under scrutiny and to the fact that no employee had been adversely affected by Management's act of contracting out. When such factors are taking into consideration at the arbitral level, they must be regarded as a many conditions to Management's initiative.

The general enunciation found in the Studebaker-Packard case was simply adopted by J.M. Cooper, C.C.J., in a Canadian Car Co. case [76]. The Company had farmed out the night cleaning of the plant and channeled its charwomen into other work that was more advantageous in terms of pay. The Management's rights clause was of the usual type, first recognizing « management's authority to manage the affairs of the company, to direct its working force, including the right... to close... » then providing that these rights would not be exercised « in a manner inconsistent with the terms of the agreement.» The umpire, having read Thomas' Auto-Lite award, nevertheless found the case « more on all fours » with the Studebaker-Packard case, and adopted « in its entirety the reasoning of Cross C.C.J. in this last case.» « The present agreement provided that its purpose is to maintain mutually satisfactory working conditions and all other conditions of employment for all employees who are subject to the provisions of the agreement. The charwomen are employees who were subject to the provisions of the agreement and the company could only eradicate this classification from the agreement by negotiation or agreement.»

Drummond Wren's many dissentions belong to the same school of thought: the Agreement to exercise Management functions « in a man-

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(75) See p.

(76) United Automobile Workers, Local 1075 and Canadian Car Co. (8 Lab. Arb. Cas. 333) (Aug. 1, 1958).

ner not inconsistent with the terms of the agreement » involves their limitation [77].

Reference is also made to the Studebaker-Packard award in the extensive review of arbitral positions on subcontracting to be found in Prof. Laskin's « Falconbridge » decision [78]. However, this discussion of rendered awards seems to have been made for its own value, since the decision to dismiss the grievance confronting the arbitrator was made more immediately from a clause of the Agreement which allowed subcontracting, with the proviso that « no regular employee of the company shall have his employment with the company terminated as a direct result of any work being contracted out. » This condition had been met. In addition to the simple syllogism from which the award is derived, statements of interest are to be found: « Since a collective agreement is not in itself a contract of employment, it cannot, for this among other reasons, be interpreted as a barrier to a complete elimination of work. But what a company engages by reason of the agreement is that if it has work of the kind specified therein, it will be subjected to the terms thereof, whether in relation to existing employees or those which the company may have to engage to have the work performed. In this respect, this board finds no distinction of substance between contracts for services and contracts of service » [79]. It had been said: « at the outset the board would remark that whatever the proper conclusion under the collective agreement, it cannot be based on any claim of urgency or necessity. The collective agreement does not efface or qualify itself in the light of these factors... »

The same Prof. Laskin, had, a few months earlier [80], dismissed a grievance over the subcontracting of work covered by the Agreement. Repairs to a ship that had been damaged at the Company's dock were the object of the subcontract. The decision was grounded on the merits of the case: no men were on lay-off at the time of the contract; ironworkers were even working overtime in ordinary plant operations; the Company had acted in good faith; « no existing employee's seniority

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(77) See, for example: Canadian General Electric (9 Lab. Arb. Cas. at p. 29).

(78) Sudbury Mine, Mill and Smelter Workers, Local 598 and Falconbridge Nickel Mines Ltd. (8 Lab. Arb. Cas. 276) (March 17, 1958).

(79) See p. 284.

(80) United Steelworkers, Local 2251 and Algoma Steel Corp. (8 Lab. Arb. Cas. 273) (Dec. 1957).

was affected »; an emergency situation was involved and this « pressing matter » was an isolated one. In other words: « management's recourse to a contracting out was not « a means of circumventing the terms of the collective agreement. » Professor Laskin's acceptance of the « implied limitations » theory may be said to have been underlying the award and it would have operated to disapprove Management's action, had « work falling within the bargaining unit... (been)... regularly contracted out to the disadvantage of existing employees or by reason of an inadequate work force which the company unreasonably was unwilling to enlarge. »

SUMMARY

During the past decade, subcontracting issues in Common Law Provinces have been decided along the lines of the basic, but rather theoretical controversy over the retention of — or the implied limitations to-managerial prerogatives in a Collective Agreement context.

The « reserved rights » theory found application in the strictest manner in at least eight of the cases that were reviewed with respect to contracting out proper. Among these, the absence of the « master-servant » relationship was appealed to in three cases. To these strict « reserved rights » cases, must be added two other ones where the same doctrine was prevalent, but tempered by subsidiary criteria (good faith, no adverse effect on employment...). The « Canadian Car » case can be labeled « implied limitations theory ». This latter theory also constituted the prevailing climate in another case that was dealt with more immediately by a specific provision. It also underlay the « Algoma » case, that was resolved more immediately from an analysis of the factual elements of the individual case. Finally, « implied limitations » principles were professed in many dissentions. The relatively small number of decisions on subcontracting reported each year renders difficult to perceive any change in trend over the period of time this study purported to consider. The strong majority of awards upholding the « reserved rights » position appears constantly. The exceptional references to the « implied limitations theory » or considerations of factual elements are not clustered in any particular part of the period studied.

In the near future, contracting out of a production nature may well come and make a lasting appearance besides the now dominant « main-

tenance » type. This could help center the issue upon the nature of the savings sought in contracting out: wages and conditions of work inferior to those bargained for, or logical economies resulting from a more specialized use of machinery and skills.

For the time being, however, it may only be affirmed that there is a very strong majority of decisions in Common Law Provinces to the effect that an express provision in the Agreement is needed if Management is to be denied the right to contract out. This is the first difference with U.S. awards, taken as a whole,the other being the comparatively little consideration given to the factual elements of individual situations.

LES SOUS-CONTRATS ET L'ARBITRAGE

L'auteur, dans un premier article, se propose d'examiner les théories arbitrales relatives au droit de la gérance, puis d'étudier les solutions apportées par les arbitres, tant aux Etats-Unis que dans les provinces de langue anglaise, aux griefs relatifs à l'octroi de sous-contrats par des entrepreneurs qui ont signé une convention collective. Les décisions arbitrales rendues dans le Québec à ce sujet feront l'objet d'un second article ; il faudra également tenir compte de la portée possible du nouvel article 10A de la Loi des relations ouvrières, S.R.Q., 1941, Chap. 162A.

En l'absence d'une disposition expresse régissant l'octroi de sous-contrats dans la clause des droits de la gérance, cette dernière pour dire qu'elle a le droit d'accorder des sous-contrats, s'en remet habituellement au pouvoir général qu'on y énonce, de diriger son entreprise. A défaut de telle clause, la gérance invoque son droit implicite de diriger l'entreprise, droit qui comporte, selon elle, celui d'octroyer des sous-contrats. L'agent négociateur, pour sa part, prétend généralement que les droits de la gérance doivent être exercés de façon à ne pas détruire les autres clauses de la convention collective. L'octroi de sous-contrats, selon lui, dans bien des cas, permet à la gérance de se soustraire aux conditions de travail qui ont fait l'objet des négociations et a pour effet de détruire en partie l'unité de négociation. L'agent négociateur invoque habituellement son titre de représentant exclusif des salariés et fait remarquer que certaines clauses de la convention collective, par exemple la clause relative à l'ancienneté, peut devenir sans effet à la suite de l'octroi du sous-contrat.

En somme, l'octroi de sous-contrats n'est qu'un aspect du problème plus vaste des droits de la gérance dans un régime de convention collective.

A ce sujet, deux théories s'opposent. La théorie des « droits réservés » est à l'effet que la direction a le droit de faire tout ce qui n'a pas été l'objet d'une exclusion expresse dans la convention collective et que l'agent négociateur n'a que

les droits qui sont formulés dans la convention. La théorie dite « des limites implicites », pour tenter de la résumer, est à l'effet que l'agent négociateur et l'entrepreneur sont deux partenaires égaux lors des négociations et que, par conséquent, ni l'un ni l'autre ne peut prétendre à des droits qu'il aurait pu avoir avant que ne s'établisse le régime des négociations collectives. Ce régime, par ailleurs, a donné lieu à des précédents dont il faut tenir compte lorsqu'il s'agit d'interpréter la convention collective. Certains arbitres, cependant, surtout aux Etats-Unis, n'accordent pas une grande importance à ces théories et préfèrent rendre une décision basée sur une analyse circonstanciée des faits. On peut dire que, chez nos voisins, la théorie « des droits réservés », à l'effet que seule une défense expresse dans la convention collective peut empêcher la gérance d'accorder un sous-contrat, n'a plus cours dans les milieux arbitraux. Ces derniers acceptent à sa place une conception modérée de la théorie des « limites implicites ». Pour eux, le fait qu'un employeur ait signé une convention collective comportant une clause de reconnaissance, ou encore une clause d'ancienneté, n'entraîne pas nécessairement un empêchement absolu à l'octroi de sous-contrats sous le seul prétexte de préserver l'intégrité de l'unité de négociation. Il s'agit, au contraire, d'y voir un obstacle à l'octroi de sous-contrats qui ont pour effet d'affaiblir l'agent négociateur en permettant à l'entrepreneur d'éviter les taux de salaires et autres conditions de travail qu'il s'est engagé à respecter à la signature de la convention collective. Pour en arriver à la conclusion, dans chaque cas particuliers, que l'entrepreneur a octroyé un sous-contrat pour se soustraire aux dispositions de la convention collective, ou pour trouver, au contraire, qu'il a posé ce geste dans le but d'abaisser les coûts de production en ayant recours à une entreprise spécialisée, les arbitres américains sont portés à considérer quelques-uns des facteurs suivants :

1) *D'une façon générale :* La décision de l'entrepreneur d'octroyer un sous-contrat doit avoir été prise de bonne foi. Elle ne doit pas être un moyen déviter les dispositions de la convention collective.

2) *Pour déterminer s'il y a, ou non, telle bonne foi, on peut considérer :*

   a) L'effet du sous-contrat sur l'agent négociateur : s'agit-il de discrimination contre tel représentant collectif ? Le sous-contrat a-t-il pour effet de porter atteinte à l'intégrité de l'unité de négociation ?

   b) L'effet sur les employés : des membres de l'unité de négociation sont-ils déplacés, mis-à-pied, en encore, perdent-ils l'occasion de faire du travail supplémentaire ?

   c) Le genre de travail dont il s'agit : ainsi, l'octroi d'un sous-contrat ayant pour objet un travail de nature permanente porte plus facilement atteinte à l'agent négociateur que n'est susceptible de le faire, l'octroi d'un sous-contrat ayant pour objet un travail de nature temporaire. On peut aussi se demander si c'est la coutume, dans une industrie donnée, de faire appel à des entreprises spécialisées.

   d) L'urgence de la situation.

   e) Le manque d'employés qualifiés, d'équipement spécialisé ou de compétence technique dans l'entreprise qui accorde le sous-contrat.

f) L'octroi de sous-contrats, dans le passé, et sans grief de la part de l'agent négociateur. Ce dernier verra également sa position affaiblie à l'arbitrage, si durant les négociations, il n'a pas réussi à faire inclure dans la convention une défense expresse d'octroyer des sous-contrats.

3) *Au Canada, ailleurs qu'au Québec.*

Ici, les arbitres, à l'opposé de leurs confrères américains, ont disposé des griefs relatifs à l'octroi de sous-contrats, en faisant appel, dans la quasi totalité des cas, aux deux théories relatives aux droits de la gérance déjà énoncés. Ils ont eu tendance à agir de la sorte, que le grief ait porté sur la décision de l'employeur d'avoir recours à des contremaîtres ou autres personnes exclues de l'unité de négociation pour effectuer du travail jusque là fait par des membres de cette dernière, ou qu'il se fût agi de sous-contrats au sens strict du mot, c'est-à-dire, d'ententes en vertu desquelles l'employeur a recours aux services d'une entreprise de l'extérieur, qui se spécialise dans un travail donné.

Dans ces derniers cas, on peut dire que c'est la théorie des « droits réservés » qui a été appliquée, et ce, avec rigueur. Le principe alors énoncé est à l'effet qu'une défense expresse doit exister dans la convention si on veut que l'entrepreneur ne puisse accorder de sous-contrats. On conçoit alors l'octroi de sous-contrats comme une prérogative de la gérance. A ces décisions, il faut en ajouter deux autres qui se réclament de la même doctrine, mais qui l'adoucissent en faisant appel à certains critères, tels la bonne foi de l'entrepreneur ou le fait que l'octroi du sous-contrat n'a pas pour effet d'engendrer des mises-à-pied. Toujours parmi ces décisions rapportées, il y en a trois qui font appel à la théorie dite « des droits implicites ». L'une d'entre elles, il est vrai, a été prise en faisant appel aux termes d'une disposition expresse qui régissait l'octroi de sous-contrats, tandis que dans une autre, on a procédé à l'analyse des circonstances dans lesquelles était placé l'entrepreneur. On peut dire, toutefois que cette doctrine a été exposée dans plusieurs rapports d'arbitres dissidents. Le petit nombre de décisions relatives à l'octroi de sous-contrats rapportées chaque année ne permet pas de déceler une évolution de la pensée arbitrale. En somme, on ne peut qu'affirmer qu'il y ait consensus à l'effet qu'une disposition expresse dans la convention collective soit nécessaire pour empêcher la gérance d'octroyer des sous-contrats. Ceci constitue une première différence par rapport aux décisions rendues aux Etats-Unis, ces dernières étant évidemment considérées dans leur ensemble. L'autre différence est le peu d'importance qu'attachent les arbitres canadiens à l'analyse des circonstances dans lesquelles est placé le sous-contractant.