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FINDING THE FAITH : SURFACE BARGAINING AND COMMUNICATION IN THE EMPLOYMENT RELATIONS ACT

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CONTENTS

I INTRODUCTION

The Employment Relations Act 2000 (the ER Act) induced a wave of publicity surrounding the introduction of "good faith bargaining" into New Zealand's employment law. Following numerous public submissions both for and against the obligation, the provisions survived, albeit in an amended form. However, as the ER Act approaches its first anniversary, there is little progress forward on what this good faith creature entails. Questions remain unanswered as to what bad faith claims may consist of and also what form they will take.

Many areas have been identified where good faith is likely to penetrate. This paper addresses two aspects of collective bargaining which have proven contentious abroad. The first, surface bargaining, is not generally argued as a breach of a particular provision, yet rather good faith as a whole. This will be examined in contrast with the second, impermissible communication, which may be observable within surface bargaining, but also stands as an independent breach. To determine where the line of good faith will be drawn in New Zealand, this paper will identify the specific paths followed by the United States and Canada, and the relevant factual backgrounds. The connections between the North American good faith obligations, New Zealand's labour law history and the ER Act provisions will be analysed, with the intent of finding indicative good faith guidelines.

II NEW ZEALAND LEGISLATIVE ENVIRONMENT

A The Context Surrounding Enactment of the ER Act

The publicity attracted by the ER Act is largely attributable to the starkly different nature from its predecessor, the Employment Contracts Act 1991 (the EC Act.) The object of the EC Act was to "promote an efficient labour market,"[1] achieved through an Act based on a contractual approach to employment. Consequent interpretations formed what has been described as a "minimalist bargaining regime," with employers reaping the benefits.[2] A marked increase in individual employment contracts, at the expense of

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[1] Employment Contracts Act 1991, long title.
[2] John Hughes "The Collective Bargaining Code of Good Faith" (2001) 26(1) NZJIR 59, 62.

collective employment contracts and unionisation, was observed as a major feature.[3] In contrast, the ER Act's object is to build productive employment relationships, to be achieved through measures such as promoting collective bargaining, mediation, the observance of core International Labour Organisation Conventions[4] and the use of good faith.[5] These contrasting objectives highlight the different directions of the two Acts, particularly the move from an individualist to collective scheme. A major component of this move is the significant role the characterisation of employment as a relationship enjoys in the ER Act.[6]

Where the EC Act did not mention the words 'trade union', the ER Act offers increased recognition, support and rights for unions,[7] and actively encourages collective bargaining. However, the ER Act does not represent a complete overhaul of the EC Act, as it maintains the same "direct, contractual, not overly formal"[8] bargaining approach, with many sections, such as freedom of association and personal grievance provisions, carried forward from the EC Act.[9] The ER Act then builds on these elements with new concepts, particularly good faith, in an attempt to build relationships and address the inherent bargaining inequality. The recognition of mediation as "the primary problem-solving mechanism,"[10] reinforces this, encouraging parties to come to their own answers

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[3] See Margaret Wilson "The Employment Relations Act : A Statutory Framework for Balance in the Workplace" (2001) 26(1) NZJIR 5, 6.

[4] Section 3(b) promotes observance of the International Labour Organisation (ILO) Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively. New Zealand has not ratified these Conventions, but have an obligation rising from ILO membership to respect, promote and realise these principles. During the EC Act the Freedom of Association Committee of the ILO investigated New Zealand's compliance, and found that the EC Act did not adequately address these conventions, (despite a Final decision which was far less critical than the Interim.) See Gordon Anderson "Collective Bargaining and the Law: New Zealand's Employment Contracts Act Five Years On" (1996) 9 AJLL 103.

[5] Employment Relations Act 2000, s 3.

[6] See generally Robyn Mackay (ed) *Employment Law Guide* (5 ed, Butterworths, Wellington) 11-13, 26-27.

[7] A union is the only legitimate body of employees who can negotiate a collective agreement with employers, see s5 interpretation of 'collective agreement.' This recognition is supported with wider access rights, particularly for the purposes of recruitment, compare Employment Relations Act 2000, s 20, with Employment Contracts Act, s 13.

[8] Peter Boxall "Evaluating Continuity and Change in the Employment Relations Act 2000" (2001) 26(1) NZJIR 27, 28.

[9] Compare Employment Relations Act 2000, ss 8, 9, 11 with and Employment Contracts Act 1991, ss 6, 7, 8, and also Employment Relations Act 2000, s 103 with Employment Contracts Act 1991, s 27 respectively. However the new personal grievance section is supplemented with the addition of reinstatement as the primary remedy, Employment Relations Act 2000, 125.

[10] Employment Relations Act 2000, s 3(a)(v).

at an early stage. A specialist investigatory body, the Employment Relations Authority (the Authority),[11] follows mediation, and is the first step in a judicial process which the ER Act aspires will play only a minimal role in employment relationships.[12]

B The ER Act's Good Faith Provisions

1 Section 4 and Section 32

The ER Act emphasises the important foundation which mutual trust and confidence[13] and good faith will provide in these relationships. As these values have not previously been in New Zealand's statutory employment law,[14] their interpretation and implementation will be instrumental to any ER Act reforms. In order to achieve the object of good faith, both general and specific measures have been engaged. Section 4 imposes a general obligation on the parties, in either individual or collective employment agreements, to deal with each other in good faith, without undertaking misleading or deceitful actions.[15]

Section 32 then provides more specific good faith obligations for collective bargaining. This section takes the form of a non-exhaustive list of minimum requirements, including an obligation to meet for bargaining, consider proposals from each other, provide reasonably necessary information and recognise the role and authority of representatives.[16] Bargaining in good faith does not impose an obligation to form an agreement. Section 33 specifies the parties do not have to compromise or agree on either specific issues or an agreement as a whole. Good faith therefore exists in the ER Act as a process based obligation, hence recognising the contradictory interests of the parties, and not forcing these interests to an agreement.[17]

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[11] See Alistair Dumbleton "The Employment Relations Authority Gets Under Way" (2001) 26(1) NZJIR 119.

[12] Employment Relations Act 2000, s 3(a)(vi).

[13] A concept which had been previously recognised by the Courts as existing within the employment relationship, see *Pemberton v WAS Ltd* [1999] 2 ERNZ 436, 450 (Emp Ct) Goddard CJ.

[14] With the exception of s 149C amendment to Labour Relations Act 1987 which was repealed soon after its inclusion.

[15] Section 4(1), which includes actions which are likely to mislead or deceive each other.

[16] Employment Relations Act 2000, s 32(1).

[17] Geoff Davenport "Good Faith Bargaining – What does it Really Mean" (2000) 6 ELB 113, 120.

C *The Code of Good Faith*

1 *Legal Status of the Code*

To supplement section 32, a Code of Good Faith for Bargaining for Collective Agreement (the Code), has been approved by the Minister of Labour.[18] The Department of Labour recommended the Code should maintain a benchmark rather than regulatory form, effectively making it a guideline.[19] Section 39 provides that the Authority or Employment Court (the Court) may have regard to such an approved Code,[20] reinforcing the recommendatory not compulsory nature. The enforceability of the Code in practice is therefore essentially in the hands of the authorities. The Chief Justice of the Employment Court has asserted his interpretation that the ER Act "requires the Court…to have regard to any Code of good faith."[21] Section 32(3) includes approved Codes and individual good faith agreements as matters "which are relevant" to the determination of good faith, wording which may strengthen the provisions of the Code. Therefore despite the benchmark label, it appears the Code is likely to be held in high esteem while determining the existence of good faith. Perhaps the most practical summation of the legal position of the Code is that asserted by its founding committee:[22]

> Parties who voluntarily follow the guidance of the code in working out their own collective bargaining approach can reduce the potential of litigation and legal intervention. Following the guidance in the code will ensure that in most cases a question of whether or not an action is taken in good faith will not arise.

2 *Content of the Code*

In accordance with its supplementary nature, the Code incorporates the format and substantive provisions of section 32, and then provides further specific

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[18] Pursuant to Employment Relations Act 2000 s 35, as notified by Hon Margaret Wilson (2 October 2000) IV *New Zealand Gazette* 3523-3525.

[19] See John Hughes "The Collective Bargaining Code of Good Faith" (2001) 26(1) NZJIR 59,60 for discussion on the policy development of the type of Code to be established.

[20] This mirrors the words of the equivalent section 20(9) of the Health and Safety in Employment Act 1992. In this Act, the wording has remained relatively unchallenged, although it should also be noted that in some cases compliance with the Code has not been sufficient to satisfy the requirements of the Act. See Hughes, above, 65.

[21] TG Goddard "The Only Constant is Change…The Changed Role of the Employment Court under the Employment Relations Act 2000" (2000) 6 ELB 113,119.

[22] Interim Good Faith Bargaining Committee "Consultation on Draft Code of Good Faith for Bargaining for Collective Agreement" (11 September 2000) < http://www.nzir.dol.govt.nz/oldsite/update/new/Code%20

details. Section 32(1)(a), requiring the parties to use their best endeavours to form a bargaining process agreement, is extensively expanded upon in this way. Whereas the section remains quite broad, clause 2.2 of the Code lists twenty matters which should be considered where relevant. Included are matters such as the size and composition of the bargaining team, timing, venue and frequency of bargaining meetings, costs and completion.[23] Further substantive clarifications include requiring considerations for proposals over a reasonable time, reasons for refusal, and procedures for disagreement.[24]

D Remedies

The practical impact of legislation is often highly dependent on the effectiveness of the enforcement and remedies available. This is particularly true of the good faith obligation, which was introduced amidst controversy as to how the obligation would work in practice. Section 161(f) provides jurisdiction for the Authority to determine whether the good faith has been complied with. However, as soon as a matter is brought before the Authority, section 159 prescribes the first action as determining whether the matter would be appropriate for mediation, and if so, to direct such mediation.

Section 137(1)(a)(ii) allows compliance orders to be issued if it is found collective bargaining was not undertaken in good faith. These orders must include a time limit,[25] and any other limits which the Authority sees fit.[26] Although penalties are not directly available for a breach of good faith, section 140(6) outlines the measures which the Court may undertake to enforce an order to bargain in good faith, which includes penalties of up to $40 000.

The aforementioned actions operate on the premise an agreement has not

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of%20GFB%20for%20Coll%20Agmt.html> (last accessed 18 August 2001)

[23] For the full list see Code of Good Faith for Bargaining for Collective Agreement (2 October 2000) IV *New Zealand Gazette* 3523-3525, cl 2.2(a) - (t) (the Code).

[24] The Code, above, cl 4.3-4.7.

[25] Employment Relations Act 2000, s 137(3).

[26] Employment Relations Act 2000, s 138(4), this order then is enforceable in the same manner as a District Court Order, s 141.

yet been achieved. If bargaining is completed, and a collective agreement formed, the Authority does not have jurisdiction to cancel or vary a term or agreement,[27] as they may with an individual agreement procured by unfair bargaining.[28] This attempt to preserve the finality of a collective agreement[29] may only be disturbed by the limited ability of the Court to suspend and reopen bargaining on certain terms, perhaps with mediation.[30] In any situation, the opportunity to seek common law damages for the breach of good faith remains open.

III GOOD FAITH BARGAINING IN THE UNITED STATES AND CANADA

A United State's Statutory Provisions

Good faith bargaining in United States labour law is found in the collective bargaining definition of the National Labour Relations Act 1935 (NLRA).[31] Section 8(d) outlines the;[32]

> mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment.

This obligation has been refined and developed by the National Labour Relations Boards (NLRB or Board) and the United States Court of Appeals. This development began with the principle, "the Act does not compel any agreement whatsoever between employees and employers,"[33] a position equivalent to section 33 of the ER Act. From this beginning the Boards and Courts have devised numerous specific principles and tests for certain aspects of labour law.[34]

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[27] Section 163 restricts the Authority, and is extended to the Court under s 190(1), see also s 192.
[28] Employment Relations Act 2000, s 69.
[29] Robyn Mackay (ed) *Employment Law Guide* (5 ed, Butterworths, Wellington)176, ERpt 5.5.
[30] Employment Relations Act 2000, s 192
[31] National Labour Relations Act 29 USC § 151-67 (1964).
[32] National Labour Relations Act 29 USC § 158 (1964).
[33] *NLRB v American National Insurance* (1952) 343 US 395, 402.
[34] See Part III E Contentious Areas of Good Faith in the United States and Canada.

1 Good faith process

Allegations of breaches of good faith are made to the NLRB as unfair labour practices, which the appropriate field office will investigate and pursue if it finds substance in the claim.[35] Section 10(c) confers wide discretion for the Board to "take such affirmative action....as will effectuate the policies."[36] In essence the deciding authority can formulate an appropriate remedy for the unfair labour practice, yet these usually tend to be bargaining orders,[37] or access and notice remedies.[38]

B Canadian Good Faith Provisions

One fundamental distinguishing feature between Canadian and United States labour law is the jurisdictional level of operation. Canadian labour law issues primarily fall within the jurisdiction of the provinces,[39] with limited issues within federal jurisdiction. The Canada Labour Code[40] directs these latter issues, which along with previous federal legislation, tends to borrow principles from the United States.[41] Section 50 imposes a requirement to "meet and commence, to bargain collectively in good faith" and "make every reasonable effort to enter into a collective agreement."[42] Requirements which are clearly similar to the NLRA provisions. In terms of the daily impact of labour law, each Canadian province also imports a similar general good faith bargaining obligation.[43] Overall, Canadian labour laws bear a strong resemblance to the United States system, highlighting how one jurisdiction can combine another's experience with their own legal identity to develop similar, yet unique labour principles.

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[35] National Labour Relations Board <http://www.nlrb.gov/facts.html> (last accessed 10 August 2001).
[36] National Labour Relations Act 29 USC § 158 (1964).
[37] Also known as Gissel Bargaining Orders, *NLRB v Gissel Packing Co* (1969) 395 US 575, 610.
[38] Leonard Page, General Counsel, National Labour Relations Board "NLRB Remedies : Where are they Going?" (10 April 2000) Press Release R-2388, 1.
[39] *Toronto Electric Power Commissioners v Snider et al* [1925] AC 396 (PC).
[40] Canada Labour Code RSC 1985 cL-2, which retains jurisdiction over certain labour activities which are of an inter-provincial nature as defined in s 2.
[41] Gina Fiorelli "Good Faith Bargaining in Canadian Labour Law: An Overview of the Law" (Paper prepared for the Council of Trade Unions, May 2000) 4.
[42] Canada Labour Code RSC 1985 cL-2, s 50(a).
[43] Fiorelli, above, 3. For the purposes of this paper the Canada Labour Code will primarily be referred to as representative of the provinces' labour law requirements.

C *Relevant Distinctions between North American and New Zealand Laws*

In looking to any foreign legal developments, differences between the legal systems and potential impacts must be borne in mind. Several such features arise between the North American and New Zealand systems. Union certification is the most regulated process within the United States' and Canadian systems.[44] As there is no equivalent process in New Zealand, the statutory focus is instead on collective bargaining.[45] This distinction is likely to see major differences in the form of good faith claims in New Zealand. North American bad faith claims primarily arise as the union is campaigning for certification during specified time limits. Employer tactics to delay or undermine the union therefore have a detrimental effect, which is unparalleled in New Zealand.

1 *Mandatory Bargaining Subjects*

Deriving from section 8(d) of the NLRA, the United States alone recognises mandatory bargaining subjects, which a party can insist on to an impasse, and permissive subjects, on which parties can negotiate, but not insist on.[46] This distinction is relevant in direct dealing good faith claims,[47] where the communication must be on a mandatory subject. New Zealand may here follow Canada's lead, and acknowledge this distinction, while simultaneously establishing a comparable base with reference to "matters relating to terms and conditions of employment."[48]

2 *Political influences and union strength*

The underlying context in the United States, specifically the politicisation of the NLRB, and relatively weak status of unions, must also be acknowledged. NLRB

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[44] Ellen Dannin "Good Faith Bargaining, Direct Dealing and Information Requests: The United States Experience"(2001) 26(1) NZJIR 45, 48.

[45] In New Zealand unions must be registered in accordance with Part 4 to collectively bargain, yet do not have the politically charged election campaigning process for certification as found in North America.

[46] *NLRB v Wooster Division of Borg-Warner Corp* (1958) 356 US 342. See further "Major Operational Decisions and Free Collective Bargaining : Eliminating the Mandatory / Permissive Distinction" (1989) 102 Harv L Rev 1971,1971.

[47] As the investigation in the United States may be initially more focused on determining whether the subject matter is of communication was a mandatory subject. Gina Fiorelli "Good Faith Bargaining in Canadian Labour Law: An Overview of the Law" (Paper prepared for the Council of Trade Unions, May 2000) 4-5.

[48] Employment Relations Act 2000, s 32(1)(d).

members are appointed by the President,[49] and therefore perceived as holding political bias. The correlation between the political party in power at the time of Member appointment and the outcome of unfair labour practices has been found to be "particularly robust."[50] Consequently there is a constant turnover in members, with each Board applying minimal deference to previous decisions.[51] This effect can be compounded by the coercive and illegal tactics employers have utilised against unions, with little or inadequate remedies available.[52] Inadequacies of NLRA's remedies are said to include focusing on reparation of minor individual harm, rather than preventing collective interference,[53] and the considerable delay in achieving remedies. Where employers partake in stalling tactics, with no effective counter from the NLRB, the union's presence, perceived ability and certification status are severely disadvantaged.[54]

3 Restrictions on employer involvement with unions

A further notable disparity between New Zealand and North American laws is the control of union involvement by employers. Section 8(a)(2) of the NLRA,[55] and section 94(1)(a) of the Canadian Labour Code,[56] prohibit employers from participating or interfering with the formation or administration of unions, with the United States also restricting domination or financial contribution by employers.[57] When employee participation plans are in question, preliminary questions of whether such plans constitute 'labour organisations,' must be addressed in accordance with these sections.[58]

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[49] National Labour Relations Board <www.nlrb.gov/facts.html> (last accessed 10 Aug 2001)
[50] James Brudney, Sara Schiavani and Deborah Merritt "Judicial Hostility Toward Labour Unions? Applying the Social Background Model to a Celebrated Concern" (1999) 60 Ohio State Law J 1675, 1737.
[51] Robert Brownstone "The National Labour Relations Board at 50, Politicisation Creates Crisis" (1986) 52 Brook L Rev 229, 243.
[52] Paul Weiler "Promises to Keep Securing Worker's Rights to Self Organisation under the National Labour Relations Act" (1983) 96 Harv L Rev 1769, 1769-74.
[53] Weiler, above, 1788.
[54] Weiler, above, 1795.
[55] National Labour Relations Act 29 USC § 158 (1964).
[56] Canada Labour Code RSC 1985 cL-2,s Chap L-2, s 94(1)(a).
[57] Both sections have further qualifications and descriptions which these prohibitions are subject to.
[58] Devki Virk, "Participation with Representation : Ensuring Worker's Rights in Co-operative Management" (1994) U Ill L Rev 729, 741.

D Value of North American Developments to New Zealand

In looking to North American developments it is important to account for these disparities. In this manner it has been repeatedly emphasised neither the ER Act, nor the good faith obligation, is an attempt to transplant North American laws into New Zealand, and the ER Act must develop its own identity.[59] On the other hand, it has been suggested "it is not necessary to 'reinvent the wheel.'"[60] As the ER Act nears its second year of enactment, it remains to be thoroughly tested,[61] hence leaving North American principles as possible guidance. This notion was acknowledged whilst developing the Code, with a tri-partite tour of the United States and Canada to increase understanding as to how "the principles were actually applied in practice."[62]

E Contentious Areas of Good Faith in the United States and Canada

As both North American jurisdictions have relatively broad statutory good faith obligations, the specific principles developed during practical implementation may be the most useful to New Zealand. One good faith issue which has proved particularly contentious is surface bargaining. This allegation runs a fine line between permissible 'hard' bargaining and the impermissible feigning of intent to form a collective agreement.[63] At the other end of the good faith scale is the collection of actions which have come to be treated as per se breaches of good faith. Refusing to bargain, failing to meet, changing previously agreed terms, undermining a representatives authority, refusing access, failing to provide necessary information, communicating directly with employees, and insistence on extreme proposals have emerged as bad faith actions.[64]

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[59] Ellen Dannin "Good Faith Bargaining, Direct Dealing and Information Requests: The United States Experience"(2001) 26(1) NZJIR 45, 46.

[60] Judy Brown "Good Faith Bargaining and the Disclosure of Information under the ER Act," (2001) 1 ELB 1, 2.

[61] No difficult or contentious issues have been dealt with by the Authority , Court or Court of Appeal. See Part VIII A Employment Court and Authority Determinations.

[62] Anne Knowles and James Ritchie "Good Faith Bargaining in North America" (Report of Study Tour to USA and Canada, 1 March 2001)

[63] Ellen Dannin "Good Faith Bargaining, Direct Dealing and Information Requests: The United States Experience"(2001) 26(1) NZJIR 45, 52 and Gina Fiorelli "Good Faith Bargaining in Canadian Labour Law: An Overview of the Law" (Paper prepared for the Council of Trade Unions, May 2000) 9.

[64] See Dannin, above, 49, for United States' examples and Fiorelli, above, 10-18 for Canadian examples.

A parallel may be drawn in between many of these 'bad faith' actions and the effect on the union's status, either in terms of the bargaining at hand, or in the eyes of its membership. Enacting good faith obligations recognises there is an inequality in bargaining power, and attempts to redress this through aiding and supporting employees to pursue collective opportunities, should they so choose.[65] Most of these 'bad faith' actions attack this support, or otherwise drastically increase the employer's strength in some form. The ER Act in identifying within its objects the need to address the "inherent inequality of bargaining power,"[66] in conjunction with promoting collective bargaining and individual choice,[67] expresses recognition of the need for these protections. Subsequently many of these principles have been incorporated into the ER Act, perhaps as an attempt to pre-empt issues which have arisen in North America.[68]

1 Direction of this paper

This paper will draw on the North American experience in terms of two good faith issues; surface bargaining and communication with employees. Surface bargaining has arisen as a general yet complex claim, which has not been directly addressed within the ER Act. It is a claim which often depends on the existence of other specific good faith breaches, such as communication with employees. This issue has a controversial history in New Zealand, and was vigorously debated through the passage of the ER Act, resulting in a highly anticipated future.

IV SURFACE BARGAINING IN THE UNITED STATES AND CANADA

A Definition

Surface bargaining is an illusive concept in North America, a general allegation which is difficult both to pinpoint and substantiate. *Royal Bank of Canada, Kenogami,*

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[65] Dannin, above, 47.
[66] Employment Relations Act 2000, s 3(a)(ii).
[67] Employment Relations Act 2000, s3(a)(iii) and (iv) respectively.
[68] For example, with respect to communication with employees (or direct dealing) provisions, it has been noted that "the ERA essentially codifies matters which have been left as common law in the United States." Ellen Dannin "Good Faith Bargaining, Direct Dealing and Information Requests: The United States Experience"(2001) 26(1) NZJIR 45, 54.

Quebec et al[69] formulated what has essentially become the Canadian definition of surface bargaining:[70]

> 'Surface bargaining' is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement.....The parties to collective bargaining are expected to act in their individual self interest and in doing so are entitled to take firm positions which may be unacceptable to the other side.....the distinction between hard bargaining and bargaining in bad faith lies essentially on an appreciation of the facts in each case and must take into account their entire relationship.

This elaboration also reflects the United States' position on surface bargaining, which particularly emphasises the totality of conduct over individual actions.[71] It can therefore be hypothesised that surface bargaining will not arise as a specific breach of the ER Act, and instead will rely on the absence of required intent, ascertained from the entirety of the employer's conduct.[72] Surface bargaining appears to go to the heart of what good faith is trying to minimise, parties' eluding their responsibility to build productive employment relationships.

B The Process of Pursuing a Surface Bargaining Claim

North American surface bargaining claims have predominantly been pursued as breaches of their respective general good faith sections.[73] Canada's section 50(a)(ii)

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[69] *Royal Bank of Canada, Kenogami, Quebec et al* (1980) 41 di 199 (CLRB) (*Royal Bank*)

[70] *Royal Bank,* above, 212, approving *The Daily Times* [1978] OLRB Rep July 604. See also *Retail Clerks International Union, Local 206 v MacLean-Hunter Cable TV Ltd* (1980) 42 di 274, 286 (CLRB) and *Canadian Union of Public Employees v Iberia Airlines of Spain* [1990] 80 di 165, 190 (CLRB).

[71] Established in the United States in *NLRB v Truitt Manufacturing Co* (1956) 351 US 149,155, where the Court asserted its right to use "the previous relations between the parties, antecedent events explaining the behaviour at the bargaining table, and the course of negotiations," in determining the state of mind of the defendant.

[72] Although either party could undertake surface bargaining, in most situations it is the employer, hence this paper will refer to claims as being against employers. This stance is supported by the fact that collective bargaining is essentially the reason a union exists, so it is in the union's best interests to collectively bargain with intent to form an agreement. Alternatively employers exist for reasons more than just collective bargaining, and indeed may not wish to collectively bargain at all. Shieber "Surface Bargaining : the Problem and a Proposed Solution" (1974) 5 U Tol L Rev 656, 659.

[73] National Labour Relations Act 1935 29 USC § 158 (1964) s 8(d) and Canada Labour Code RSC IV 1985, s 50.

requirement to make every reasonable effort to enter an agreement,[74] also encompasses an intent to only surface bargain. The concept of surface bargaining has been described as the most contentious that Labour Boards are required to approach.[75] This could be attributable to the general nature of the issue, and the reliance on determining intent, as opposed to an observable behaviour. Initially these difficulties resulted in the practical implication that surface bargaining claims were predominately only successful if they were pursued conjointly with another unfair labour practice.[76]

There is a fine line between the permissible adoption of a firm stance, or hard bargaining, and a finding of surface bargaining. The prediction of guidelines is also limited by the assertion that "no two surface bargaining cases are alike and good faith can have meaning only as applied to the particular facts in a particular case."[77] This feature adds to the caution which New Zealand must undertake when seeking guidance from North American cases generally. Yet with no legislative direction, North American guidance may shed the only light on the darkness surrounding surface bargaining in New Zealand.[78]

C Determining Employer's Intent

In the United States and Canada a surface bargaining claim turns on the intent of the defendant. Although this might distinguish it from other unfair labour practices, it is not an unachievable task. Courts regularly undertake these decisions within many facets of law, primarily inferring such mens rea from objective evidence.[79] United States Labour Relation Boards have asserted that in order to do so they will consider the

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[74] Canada Labour Code RSC 1985, s 50(a)(ii)

[75] Michael Bendel "A Rational Process of Persuasion : Good Faith Bargaining in Ontario" (1980) U Toronto LJ 1, 27-28 & Bruce Meizlish "Surface Bargaining : A Problem in Need of a Remedy" (1985) Det Coll L Rev 721, 721.

[76] Bendel, above, 21.

[77] *National Labour Relations Board v American National Insurance Co* (1952) 343 US 395, 410, see also *Electri-Flex Company v International Association of Machinists and Aerospace Workers, AFL-CIO* (1978) 238 NLRB 713, 731.

[78] A position alluded to in an early Authority determination, see Part VIII A 2 The Independent Newspapers case.

[79] Ellen Dannin "Good Faith Bargaining, Direct Dealing and Information Requests: The United States Experience"(2001) 26(1) NZJIR 45, 51.

substantive content of proposals from the bargaining.[80] For instance where the employer's proposals "are so unusually harsh and unreasonable that they are predictably unworkable...[and]...would have left the Union and the employees with substantially fewer rights and less protection,"[81] a surface bargaining claim would be likely to succeed. Similarly Canadian Labour Relation Boards trace bargaining progress on key issues such as wages, union status and management rights.[82] The employer's attitude towards their own proposals may also be appropriate to consider.[83] One accepted example of such a bad faith attitude is a "take it or leave it" offer,[84] which now stands as a per se violation of good faith.[85]

1 Tracing Progress

Other indications of surface bargaining include continually inflexible stances, submitting proposals which the party knows will be completely unacceptable, or 'talking to death' issues.[86] *NLRB v A-1 King Size Sandwiches*[87] illustrates how Courts look through such proposals. The Board initially examined what proposals had been tabled, including those pertaining to wages, management rights and no-strike clauses. The dissimilarities to the previous contract and employer's reaction to Union's counter-proposals were then noted. Ultimately it was found the company "insisted on unilateral control over virtually all significant terms and conditions of employment," throughout these proposals. For instance, where the Union objected to the wide nature of a clause, the employer would reply with a broader clause.[88] The central factor in NLRB investigations such as these, is the search for the 'patently unreasonable proposal.'[89]

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[80] *APT Medical Transportation v National Association of Government Employees* (2001) 333 NLRB No 98, 6 citing *McClatchy Newspapers v NLRB* (1997) 131 F.3d 1026, 1034 (DC Cir)

[81] *National Labour Relations Board v A-1 King Size Sandwiches Inc* (1984) 732 F.2d 872, 877 (11th Cir) referring to *NLRB v Wrights Motors* (1979) 603 F.2d 604, 610 (7th Cir) and *NLRB v Johnson Manufacturing Company of Lubbock* (1972) 458 F.2d 453 (5th Cir).

[82] Bruce Meizlish "Surface Bargaining : A Problem in Need of a Remedy" [1985] Det Coll L Rev 721, 723.

[83] Meizlish, above, 727.

[84] *NLRB v Insurance Agents' International Union AFL-CIO* (1960) 361 US 477, 485.

[85] Compare with the position in *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894 (CA) Keith J, where the Court of Appeal allowed the presentation of 'take it or leave it' contracts under the EC Act.

[86] Michael Bendel "A Rational Process of Persuasion : Good Faith Bargaining in Ontario" (1980) U Toronto LJ 1, 28.

[87] *NLRB v A-1 King Size Sandwiches* (1984) 732 F.2d 872, (11th Cir) 874-877.

[88] *NLRB v A-1 King Size Sandwiches,* above, 877.

[89] Michael Bendel "A Rational Process of Persuasion : Good Faith Bargaining in Ontario" (1980) U Toronto LJ 1, 31, see *Electri-Flex Company v International Association of Machinists and Aerospace*

2 Relationship to Other Unfair Labour Practices

Unfair labour practices are often supplemented with a surface bargaining allegation. The only substantive evidence of surface bargaining may in fact be a single unfair labour practice. North American surface bargaining claims have been observed primarily based on unfair labour practices such as refusals to supply relevant information,[90] discharges and threats,[91] delays in offering proposals, or refusing to supply reasoning for negotiation decisions.[92]

D Standard and Extent of Approach

1 Objective test focusing on totality of conduct

The Supreme Court of Canada in *Royal Oak Mines Inc v Canada Labour Relations Board* asserted "the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry."[93] The incorporation of this objective element may increase the deterrent effect of a surface bargaining finding. The ability of Courts to directly compare conduct may put employers on caution as to their intended actions. The determination is also made in light of the totality of conduct, which extends to conduct away from the bargaining table and prior relationships between the union and employer.[94]

2 Restriction on Examining into Agreement

Nonetheless, the use of these subjective examinations is intended to be limited to inferring intent. It has been stressed the Board does not "directly or indirectly, compel concessions or otherwise sit in judgement upon the substantive terms of collective

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Workers, AFL-CIO (1978) 238 NLRB 713, 716.

[90] *K-Mart Corporation v NLRB* (1980) 626 F.2d 704, 707 (9th Cir).

[91] *Electri-Flex Company v International Association of Machinists and Aerospace Workers, AFL-CIO*, above, 731.

[92] *APT Medical Transportation v National Association of Government Employees* (2001) 333 NLRB No 98, 12.

[93] *Royal Oak Mines Inc v Canada Labour Relations Board* [1996]1 SCR 369, 396-7 para 42

[94] *NLRB v Truitt Manufacturing Co* (1956) 351 US 149, 155, see also Bruce Meizlish "Surface Bargaining: A Problem in Need of a Remedy" [1985] Det Coll L Rev 721, 724.

bargaining agreements."[95] This has arisen as a fine line, with the suggestion that the North American courts have in fact blurred the line between procedural and substantive fairness.[96]

E Remedies in United States and Canada

The effectiveness of North American labour remedies is particularly contentious for surface bargaining claims. Claims against employers are often perceived of little value to unions. If the true complaint is that no intent to form a collective agreement exists, the pursuit of this claim is likely to lead into a lengthy Board and Court process. By implication, an employer with strong anti-union animus may engage in surface bargaining, and be prepared to bear the brunt of litigation in order to stay the union for as long as possible. If the claim succeeds, the likely remedy is merely an order to bargain, which still does not guarantee an agreement for the union. Meanwhile, the employer is likely to have benefited from the exclusion of improved conditions, and may continue to do so following the finding.[97] Canadian Boards often direct the parties to a mediator, in an attempt to settle some of their differences.[98]

F North American Surface Bargaining Conclusions

Where one party is bargaining with no true intent to form an agreement, a breach of a general good faith provision may be sought in the form of surface bargaining. Although these claims were only originally successful if brought in conjunction with other unfair labour practices, surface bargaining is developing strength as a stand alone claim. North American claims are decided on a case-by-case basis, yet guidance may be drawn from the factors which both the United States and Canadian authorities often consider. Emphasis is placed on the totality of the conduct, in the often harsh climate of collective bargaining. The Boards then examine the substantive content of the proposals, without judging or changing them. Factors searched for include ideas blatantly and knowingly unacceptable, whether the union member's position will decrease, and the

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[95] *NLRB v American National Insurance Agents* (1952) 343 US 395, 404.
[96] Steven Fraser "Good Faith Bargaining" (2000) 1 ELB 13, 14.
[97] Bruce Meizlish "Surface Bargaining : A Problem in Need of a Remedy" [1985] Det Coll L Rev 721, 729.
[98] Michael Bendel "A Rational Process of Persuasion : Good Faith Bargaining in Ontario" (1980) U Toronto LJ 1, 21.

degree of flexibility each party has expressed in relation to these proposals. The possibility of intra-industry comparison is highlighted as a viable measure of determining the reasonableness of such bargaining positions. The recurrences of these factors assist in establishing stability in an otherwise elusive concept.

V SURFACE BARGAINING IN NEW ZEALAND

A Status of Surface Bargaining in New Zealand Law

The ER Act enters a framework which previously did not require the parties to negotiate, let alone negotiate in good faith,[99] leaving surface bargaining as unexplored territory. Despite no section directly addressing surface bargaining, there are indications that many North American principles have been acknowledged. Moreover, an early Authority determination has laid a foundation, in commenting that "surface bargaining would be in breach of New Zealand law."[100]

1 The exclusion of an express provision

By including issues that have arisen in North America, section 32 clarifies these actions as clear breaches of the ER Act.[101] Although the inclusion of such elements can be linked to the development of foreign surface bargaining law, the exclusion of a specific surface bargaining provision must be read as intentional. In developing the Code, union representatives proposed a surface bargaining clause containing "parties should not simply 'go through the motions' of bargaining with no real intent to reach an agreement on a matter."[102] This clause is a direct reference to surface bargaining, yet was not included in the final Code due to strong employer opposition in the tri-partite process. The opposition centred on the 'prescriptive subjective' element this clause would involve. This was submitted to contravene the objective nature the ER Act and Code had

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[99] Gordon Anderson "Collective Bargaining and the Law: New Zealand's Employment Contracts Act Five Years on" (1996) 9 AJLL 103, 114.

[100] *New Zealand Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington, WA51/01, GJ Wood.

[101] For example, the responsibilities to meet for bargaining and consider and respond to proposals, which hence prohibit refusing to meet and 'take it or leave it' offers, as developed in North America.

[102] Interim Good Faith Bargaining Committee "Consultation on Draft Code of Good Faith for Bargaining for Collective Agreement" (11 September 2000), < http://www.nzir.dol.govt.nz/oldsite/update/new/Code%20of%20GFB%20for%20Coll%20Agmt.html> (last accessed 20 August 2001) cl 4.8.

conformed to.[103] In the absence of such a provision, surface bargaining in the ER Act will need to be established elsewhere. If the claim at hand does not consist of any behaviour prohibited by section 32, it will need to be pursued as a general breach of good faith under section 4.

B Related Sections in the ER Act

1 General Good Faith Requirements

Section 4 of the ER Act is comparable to the broad good faith sections in the labour laws of United States and Canada. Accordingly section 4 may be perceived as a strong section to pursue surface bargaining under. The feigning of intent seen in surface bargaining may also be deemed a form of deceit, bringing it within the realm of section 4(b).

2 Specific Good Faith Requirements

(a) Bargaining Agreement Obligations

The section 32 bargaining agreement obligations are the first which appear as somewhat directed at minimising surface bargaining. The relevant considerations included in clause 2.2 of the Code, would make it increasingly difficult to avoid serious bargaining. These factors are not strictly mandatory, however the use of "best endeavours" appears to impose quite a heavy responsibility on the parties, which may be likened to the Canadian requirement of using "best efforts" to form an agreement.[104] An employer could possibly use this wording in defending an allegation of surface bargaining. One may plead they used their best endeavours, yet these were not sufficient to form a bargaining agreement, let alone actually bargain. The formation of a bargaining agreement, with no actual bargaining is not itself sufficient to fulfil the good faith obligation. Clause 4.2 of the Code requires the parties to "adhere to any agreed process for the conduct of the bargaining," hence eliminating the possibility a party forming a bargaining agreement with no intent to follow through with its provisions.

(b) Meeting obligations

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[103]Interim Good Faith Committee, above, cl 6.

The section 32(1)(b) requirement for parties to meet "from time to time" for bargaining, effectively codifies the judicially developed North American principle that a refusal to bargain is a breach of good faith.[105] It stands as a useful section in bringing parties to the bargaining table and eliminating 'take it or leave it' offers. However this section does not single-handedly overcome the problem of surface bargaining. Claims may often involve parties meeting for bargaining, thus satisfying section 32(1)(b), yet not bargaining with the intent to form an agreement.

(c) Consideration of Proposals

The section 32(1)(c) responsibility to "consider and respond to the proposals made by each other" is limited to only the first time proposals are put forth.[106] The Code then suggests good faith requires an explanation for rejection of a proposal.[107] An employer entering bargaining to fulfil section 32(1)(b), who then repeatedly turns down proposals with little consideration or reasoning, would be thought to be surface bargaining, and be explicitly caught by section 32(1)(c). In these circumstances, North American authorities look for plausible, legitimate reasons to support the bargaining stance, the absence of which infers intent to surface bargain. The ER Act appears to have drawn on these judicial methods, and then drafted them as an express bargaining requirement. Although this still allows New Zealand Courts to retrospectively infer intent, it also encourages the party to utilise these good faith tools during bargaining, in an attempt to reduce dependence on judicial intervention.

C Aspects of Surface Bargaining not Addressed

In excluding direct surface bargaining provisions, and maintaining an objective Act, the opportunity has been given to the Authority and Court to develop surface bargaining claims, processes and remedies. It is foreseeable that surface bargaining claims under the ER Act will adopt an approach similar to the 'patently unreasonable

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[104] Canada Labour Code RSC 1985 cL-2, s 50(a)(ii).
[105] Ellen Dannin "Good Faith Bargaining, Direct Dealing and Information Requests : The United States Experience"(2001) 26(1) NZJIR 45, 49.
[106] Employment Relations Act 2000, s 32(2).
[107] Code of Good Faith for Bargaining for Collective Agreement (22 September 2000) cl 4.5. The information provisions of the ER Act are also applicable in proposal reasoning, see Employment Relations Act 2000, s 32(1)(e) and s 34.

proposal' approach followed in North America.[108] In ascertaining reasonableness, the authorities may examine the proposal content, trace bargaining progress, or make intra-industry comparisons. The importance placed on totality of conduct opens the door for conduct away from the table to also be examined. However this door is limited by the timeframe of the ER Act, as conduct and relationships prior to enactment were not subject to good faith, and can therefore not be included.[109]

United States and Canadian case law adopts a clause by clause analysis to determine the true intent of a party. Even if this analysis results in a surface bargaining breach of good faith, the authority cannot vary, cancel or impose terms on an agreement. However these proposals are likely to be compared to previous employment agreement conditions, relevant rates of inflation, and reasonable industry standards.[110] These practices demonstrate a fairly structured approach, which may answer some of the demands of how good faith will be fairly and consistently determined. It should also be borne in mind that determining such mental elements is undertaken by Courts everyday. Although often difficult, it ultimately is a matter of weighing up circumstances and questions whether they justify an inference of intent,[111] or otherwise provide a legitimate reason for the disputed actions.[112]

D Remedies

Should the New Zealand Courts develop a concept of surface bargaining, a suitable and effective remedy must also be established. The United States and Canada have highlighted how ineffective remedies can dull the threat of a surface bargaining claim. The ER Act prioritises the use of mediation, which is commonly used in these circumstances in Canada. This method is likely to be fast and effective if the parties are able to reach an outcome, without resistance from either party. If mediation fails, the

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[108] Michael Bendel "A Rational Process of Persuasion: Good Faith Bargaining in Ontario" (1980) U Toronto LJ 1, 31.
[109] *New Zealand Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington, WA51/01, GJ Wood, 2.
[110] *Royal Oak Mines Inc v Canada Labour Relations Board* [1996]1 SCR 369, 396-397 para 42.
[111] Ellen Dannin "Good Faith Bargaining, Direct Dealing and Information Requests : The United States Experience"(2001) 26(1) NZJIR 45, 51.
[112] *NLRB v Wrights Motors* (1979) 603 F.2d 604, 609 (7th Cir).

subsequent Authority and Court options may succumb to the increasing delays which plague North American claims. The Court's ability to suspend a term and order bargaining reopened,[113] may be of limited value where surface bargaining barred the completion of an agreement. A good faith order therefore seems the likely remedy, which begs the question of whether New Zealand orders will end up being perceived as meaningless, as they are in North America. The answer will depend on the extent to which the Court enforces them. As fines and other powers are available,[114] it remains to be seen to what extent these will be used, and if so, whether these sanctions will be sufficient to outweigh the employer's perceived benefit of not settling a new collective agreement.

VI EMPLOYER COMMUNICATION WITH REPRESENTED EMPLOYEES

A Importance of Communication as a Specific Requirement

An indication of the behaviour expected in a collective employment relationship can be projected from the minimum requirements in section 32.) Some of the actions prohibited have been brought under the auspices of the ER Act as a reactionary measure to permissible behaviour under the EC Act, others as lessons learnt from the United States and Canada. As illustrated, these actions often affect surface bargaining claims through their contribution to the totality of conduct. The drafting of the ER Act has elevated the significance of these actions, establishing them as stand alone claims. Although the requirements are of equal standing, the future interpretation of the employee communication provisions are of particular interest to many, and hence will be addressed by this paper. This interest initially derives from the importance of preserving the authority of representatives. In New Zealand the Court of Appeal seriously eroding union representatives' positions under the EC Act heightened this interest.

B Relevant United States' and Canadian Principles

1 Statutory Provisions

Section 8(a) of the NLRA provides an employer will commit an unfair labour

[113] Employment Relations Act 2000, s 192.

practice if they "dominate or interfere with the formation or administration of any labour organisation"[115] or refuse to "bargain collectively with the representatives of his employees."[116] Section 94 of the Canada Labour Code similarly prohibits an employer from participating or interfering with the formation and administration of a union or representation of employees.[117] Alternatively, the ER Act expressly provides that each party must recognise the role and authority of the representative, not bargain, directly or indirectly with the represented party, or do anything that will or be likely to undermine the authority of the other party.[118] In order to be registered, a union must be independent and operate at arm's length from any employer.[119] New Zealand's provisions have emerged as more explicit and specific with regard to communication, with lesser clarification on employer interference in unions.

2 *North American case law*

The Supreme Court promptly established it was "clear that an employer violates its duty when it treats directly with individual employees."[120] The Canadian formulation similarly entails "that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations."[121] The concept of respecting the other party's representative has remained accepted, with the more contentious questions arising as to which particular communications are undermining representation.[122]

C *The Distinction between Permissible and Impermissible*

1 *The* Southern California Gas *test*

In *Southern California Gas Co*[123] the Court traversed previous communication cases, and formulated a test based on the developed principles. An impermissible

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[114] Employment Relations Act 2000, s 40(6).
[115] National Labour Relations Act 29 USC §158, s 8(a)(2).
[116] National Labour Relations Act 29 USC §158, s 8(a)(5).
[117] Canada Labour Code RSC 1985 cL-2, s 94(1)(a).
[118] Employment Relations Act 2000, s 32(1)(d).
[119] Employment Relations Act 2000, s 14(1)(d).
[120] See *JI Case v NLRB* (1944) 321 NLRB 332 and *NLRB v Insurance Agents (Prudential Insurance Company)* (1960) 361 US 477.
[121] *A.N Shaw Restoration Ltd v OPCM Local 172* [1978] 2 CLRBR 214, 219.
[122] Also referred to as direct dealing.

communication was found to exist if three requirements were fulfilled. Initially the employer must have communicated directly with union represented employees. Secondly the discussion must be shown to be for the purpose of establishing or changing wages, hours, terms and conditions of employment or undercutting the union's role.[124] And finally the communication must be to the exclusion of the union.[125]

Labour Boards were then required to establish whether the facts would lend themselves to these actions and purposes. The first and third requirements require some observable and therefore objective conduct. Therefore it is the second limb, charged with subjectively finding a necessary purpose, which has proved the most contentious.[126] Although the ER Act is not bound to follow the direction of the United States, this test is speculative as to the approach which may be developed, and can be further understood through looking to determinations in practice.

D Categories of Communication

1 Employee Involvement Programmes

Recent human resource management trends have seen the widespread implementation of programmes increasing employee involvement in their organisations.[127] These programmes are seen as a vehicle to greater efficiency, where greater ownership of work leads to increased motivation. However many of the United States' unions perceive these programmes as employers merely dressing up their direct dealing attempts.

Permanente Medical Group Inc[128] provides a recent application of the *Southern California Gas* test. The employer deployed selected employees into "design teams," who were empowered to come up with job redesign recommendations for the organisation. These teams were found to not be in breach of section 8(a)(5). A deciding factor was the

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[123] *Southern California Gas Co* (1995) 316 NLRB 979.
[124] See Part III C 1 Mandatory Subjects.
[125] *Southern California Gas Co*, above, 982, see further *Obie Pacific* (1972) 196 NLRB 458, 459.
[126] See Part IV C Determining Employer's Intent..
[127] *(Re) Canadian Broadcasting Corp* (1994) 96 di 122, 132 (CLRB).
[128] *Permanente Medical Group Inc* (2000) 332 NLRB No 106 (*Permanente*).

employer's continually expressed intent to present the team's recommendations to the union for collective bargaining. The employees were also encouraged to create innovative suggestions and espouse their own views, as opposed to being a forced voice of the employer.[129]

(Re) Canadian Broadcasting[130] provides a similar Canadian example. Here the employer implemented a programme which selected employees as leaders, who were then trained to canvass other employees for input and feedback on bargaining related topics. The Board recognised and expressly discussed the importance such programmes play in the modern workforce, increasing efficiency and employee satisfaction. It was therefore noted a more collaborative approach was indeed necessary.[131] The union had always played a significant role in this particular workplace. Thus the Board found an employer cannot implement a programme which invited direct input from unionised employees on matters from within the collective agreement, with no involvement whatsoever from the union.[132]

2 *Questionnaires and Surveys*

In *Southern California Gas*, the employer was undertaking a cost cutting "re-invention" programme. The project started with data collection, followed by 'idea generation and evaluation' and concluded with recommendations to senior management. The union failed to substantiate the claim that any of these steps were attempts to undercut their representative status, especially because the data collection was related to job processes and design, which were permissible subjects.[133] In addition, management were found to have a right to information relating to the "tasks its employees perform on a daily basis.....whether or not it intends to use that information to later formulate operational changes or propose changes in the collective-bargaining contract."[134]

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[129] *Permanente*, above, 4.
[130] *(Re) Canadian Broadcasting Corp* (1994) 96 di 122, 132 (CLRB).
[131] *(Re) Canadian Broadcasting Corp,* above, 131-132.
[132] The union had asked to be involved, and the employer had indicated it would meet with the union after the information had been gathered, but such a meeting never took place. *(Re) Canadian Broadcasting Corp*, above, 126, 145.
[133] *Southern California Gas Co* (1995) 316 NLRB 979, 983.
[134] *Southern California Gas Co,* above, 983.

Southern California Gas re-emphasises that communication to employees is not prima facie bad faith. It remains important to establish that the communication is sufficiently related to the bargaining topics.

Further illustration of this principle is found in *Logemann Brothers Co,*[135] where a one-page questionnaire distributed to employees to generate efficiency improving ideas. Justifying this communication as permissible, the Court looked to the open-ended nature of the questions, the past practice of communication with employees, the distribution to all employees and the existence of legitimate business concerns.[136] Where the Board in *East Tennessee Baptist Hospital*[137] determined a similar survey permissible,[138] weight was given to the contractual ability to change shift patterns and the mid-contract timing, with no pending negotiations.[139]

3 Meetings with Employees

On a more controversial note, are situations where employers meet directly with employees. The employer in *Obie Pacific Inc*[140] was restructuring, when it held a meeting with employees regarding cost cutting and lay-offs within their positions. The Board found this meeting could not be described as information dissemination nor idea generation, yet instead had the purpose of gaining employee's opinions, to be later used in a presentation to the union.[141] Consequently these actions were found to be "designed to undermine the exclusive agency relationship between the agent and its collective principals," to the extent they may be "surreptitious espionage" or "open interrogation."[142]

Canadian authorities have asserted employers cannot use 'bargaining progress'

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[135] *Logemann Brothers Company* (1990) 298 NLRB 1018.
[136] *Logemann Brothers Company,* above, 1019-1020.
[137] *East Tennessee Baptist Hospital* (1991) 304 NLRB 872.
[138] The survey among employee's related to ways to overcome staffing problems with respect to the shift schedule.
[139] *East Tennessee Baptist Hospital*, above, 873.
[140] *Obie Pacific Inc* (1972) 196 NLRB 458, 459.
[141] *Obie Pacific Inc,* above, 458.
[142] *Obie Pacific Inc,* above, 459.

reports to mask direct negotiation attempts.[143] However they are:

> free to explain to it's employees its position with respect to the collective bargaining....The nature, timing and circumstances of such communications must be assessed to determine whether what appears to be permissible is actually improper.

For instance, where there was a mature relationship with the union, and the communications were responsive, in number and content, to union instigated communications, these meetings were found to not constitute direct dealing.[144] A recurring theme is also the context in which these communications are undertaken. This has been classified as a highly charged, often-heated emotional time, in which it is not "inappropriate to pass opinion,"[145] and where criticisms will not be treated as degradations of authority per se, nor individually evaluated as such.[146]

4 Final Offer

This type of communication involves the employer directly informing the employees of the final bargaining proposal being presented to the union. The employer in *CUOE v Brookfield Management Services Ltd*[147] issued its offer to the represented employees and their union simultaneously, immediately before a prearranged bargaining meeting. This offer was found to be not a violation "provided that the explanation is not misleading, coercive or calculated to intimidate, and provided that it has first made the employee's bargaining representative aware of its position."[148] In notifying the union, and in the specific factual situation of an imminent strike, this offer was found to be made in good faith.

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[143] *Southern Ontario Newspaper Guild Local 87 v Toronto Star Newspapers Ltd* [1988] 19 CLRBR (NS) 374, para 34.
[144] *Ottawa Newspaper Guild v Ottawa Citizen* [1991] 10 CLRBR (2d) 203, 311 para 36.
[145] *Ottawa Newspaper Guild v Ottawa Citizen,* above, 311 para 37.
[146] *Ottawa Newspaper Guild v Ottawa Citizen,* above, 312 para 37, see also *Noranda and CAIMAW* [1975] 1 CLRBR 145,161.
[147] *CUOE v Brookfield Management Services Ltd* [2000] 63 CLRBR (2d) 238.
[148] *CUOE v Brookfield Management Services Ltd* , above, para 110 following *Perimeter Transportation Ltd v ICTU, Local 1* (1990) 9 CLRBR (2d) 264, 266.

VII EMPLOYEE COMMUNICATION IN NEW ZEALAND

A Communication under the Employment Contracts Act 1991

In determining the intended direction of the ER Act, the appropriate statutory and case law developed under the EC Act is highly significant. The EC Act's protection of bargaining representative's authority was found in section 12(2). A seemingly simple statement that the other party shall recognise the authority of the representative chosen by the other party represented the totality of the obligation placed on the parties under the EC Act. Two Court of Appeal cases, *Capital Coast Health v New Zealand Medical Lab Workers Inc*[149] and *New Zealand Fire Service v Ivamy,*[150] were instrumental in the interpretation and consequential practical implications of section 12(2).

1 Capital Coast Health *and* Ivamy

Capital Coast Health adopted the obiter statement of Gault J in *Eketone v Alliance Textiles (NZ) Ltd*[151] confirming the approach for determining the status of bargaining communication:[152]

> it is a matter in each case of striking a balance between the competing rights of the parties – those of the employer under section 14 of the Bill of Rights Act and those of the employee under section 12(2) of the Employment Contracts Act. It is not a case of one prevailing over the other, but of both being given sensible and practical effect

The Court narrowed the scope further, through the interpretation of 'negotiations', the period where communication would be most restricted. This was limited to the process of mutual discussion, where proposals were being put forth and responded to.[153] Additionally, communication of factual information, including information related to the bargaining process, was found not to be an interference during the proscribed period. *Ivamy* approved and applied the *Capital Coast Health* approach,

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[149] *Capital Coast Health v New Zealand Medical Lab Workers Inc* [1996] 1 NZLR 7 (CA) Hardie Boys J, *(Capital Coast Health)*

[150] *New Zealand Fire Service v Ivamy* [1996] 2 NZLR 587 (CA) Gault J *(Ivamy)*

[151] *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783, 796 (CA) Gault J.

[152] *Capital Coast Health*, above, 18 Hardie-Boys J.

[153] Contrast with *Ivamy v New Zealand Fire Sevice Commission* [1995] 1 ERNZ 724, 761 (Emp Ct) Goddard CJ; "It is wide enough to include all communications, oral or written, formal or informal, from

with emphasis on placing the communications in the context of the parties and bargaining at hand. The Court in *Ivamy* then took this a step further, holding an employer was entitled to attempt to persuade the employees to withdraw their representatives authority, including unjustifiably denigrating the representative, as this was part of the "traditional robustness" of collective bargaining.[154]

There were a number of communications investigated in *Capital Coast Health*, including general letters, meetings, a proposal which purported to be the one which the union had negotiated, and highly critical letters regarding union officials, circulated to represented staff. The Court of Appeal held two of the critical letters, and a contract proposal which had invited feedback, as breaches of section 12(2). Although both of these types of communications may have been permissible, it was perceived the only intent in circulating both to staff could have been undermining the authority and intending to negotiate respectively, illustrating the pivotal role of a legitimate reason. The permissible communication in *Ivamy* was an information pack outlining the employer's latest offer, including a $4000 incentive to sign. This appeared to many as an attempt to negotiate directly with staff, which consequently drew strong opposition to the Court's ruling.

The combined effect of *Capital Coast Health* and *Ivamy* left the status of a union as a representative in a very frail state. Employers could undertake a wide range of communication, often critical of and detrimental to the union's role. Widespread opposition was voiced, with the demand for action answered by the legislative reform of the ER Act.

B Communication Provisions in the ER Act

1 Section 32(1)(d)

The ER Act has taken the basic ideal of recognising authority from the EC Act, and expanded upon it in section 32(1)(d), reflecting many North American principles. To

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one side to the other, during employment contract negotiations, intended to induce the other side to see or accept the first side's point of view."

[154] *New Zealand Fire Service v Ivamy* [1996] 2 NZLR 587, 599-600 (CA) Gault J *(Ivamy)*

ascertain the full impact, this section must be read in conjunction with the section 5 interpretation of bargaining. This has been defined widely, initially through "all interactions between the parties....that relate to the bargaining,"[155] and extended to include all negotiations, and all "communications and correspondence (between or on behalf of the parties, before, during, or after negotiations) that relate to the bargaining."[156] Incorporating the section 32(1)(d)(ii) inclusion of direct and indirect communication, the restricted period has a wide scope. This is increasingly important when contrasted with the relatively small period of restricted communication operating following *Capital Coast Health* and *Ivamy*.

The subsections appear to have their origins based in overturning the effect of *Capital Coast Health* and *Ivamy*. Subsections (ii) and (iii) are intended to prevent employers acting in bad faith through bypassing the representative. This may be achieved through attempting to procure a contract directly with a represented employee, or attacking the credibility of the representative, presumably with the desire the employee will discharge the representative. The sections eventually enacted are considerably weaker than those originally proposed. The Employment Relations Bill essentially imposed a blanket ban on communications between employers and employees "about matters relating to the terms and conditions of employment."[157] Employers ardently opposed this ban, on the basis it would disallow all communication, which was perceived as an impractical encroachment on freedom of expression.[158] The ER Act partially addressed these concerns by narrowing the provisions, while also clarifying the intent to exclude communications which undermine a representative's authority.[159]

2 *Freedom of Expression*

The ER Act has not completely displaced the role of freedom of expression and the Bill of Rights Act. Section 4(3) allows the parties to communicate statements of fact or opinion, reasonably held about the other party. *Capital Coast Health* effectively gave

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[155] Employment Relations Act 2000, s 5 'bargaining' (a).
[156] Employment Relations Act 2000, s 5 'bargaining' (b)(i)-(ii).
[157] Employment Relations Bill 2000, no 8-1, cl 33.
[158] New Zealand Bill Of Rights Act 1990, s 14.
[159] Through the addition of subsection (iii).

freedom of expression overriding importance. In dissenting in *Ivamy*, Thomas passionately attacked this aspect, asserting this 'balance' was provided at the expense of collective bargaining. By contrast, the ER Act's provisions focused on the ideal that "bargaining representatives should not be able to be bypassed by direct communications,"[160] with freedom of expression acknowledged, but no longer in a leading role. In this manner, it can be seen how the alterations made by section 32(1)(d) have been characterised as an adoption of Thomas J's "strong dissent" in *Ivamy*.[161] In essence there has been a shift from a neutral position, which realistically favoured the employer's freedom of expression, to one which is built on addressing the inherently unbalanced bargaining powers.

C Application of North American Principles

1 Guidelines which could be transferred to the ER Act

In North America it is clearly not fatal for the employer to communicate with the employee, the espoused concern of employers towards the communication provisions.[162] When communicating, they must be wary as to the timing, process and context of the communication and bargaining at hand. North American cases stress situations where bargaining is imminent or underway, as times when employers must proceed with caution. This may be exemplified with the involvement of the union, be it notification of the intended communication, direct prior consultation or concurrent involvement. The stronger the union presence, the more significant this involvement becomes. The ER Act demands this caution even more so, with more express and detailed statutory provisions focusing on preventing the bypassing of representatives.

(a) Employee Involvement

With regard to employee consultation, the United States and Canada are more likely to experience difficulty in implementing such programmes due to their respective legislative provisions. Implementing a programme intricately related to bargaining

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[160] Letter from RA Stockdill, Department of Labour to Walter Grills, Interim Good Faith Committee (20 September 2000).
[161] John Hughes "'Good Faith' and Collective Bargaining under the Employment Relations Bill" (2000) 3 ELB 45, 56.
[162] Robin Mackay (ed) *Employment Law Guide* (5ed, Butterworths, Wellington) 193, ER32.11.

subjects without union involvement, in a unionised workplace is likely to be deemed bad faith, and also devalue the success of the programme.[163] Methods of successfully initiating these programmes include bringing the scheme to the bargaining table,[164] demonstrating an intent to present all generated ideas to the union,[165] or at the minimum, notifying the union. Work consultation groups may not meet with such difficulty in New Zealand, yet this tentative guidance may be increasingly relevant if these schemes begin to be used with the ulterior motive of undermining or eliminating union presence. If this should this be the case, these guidelines may only be preaching to the converted, as employers with these motives will be unlikely to regard or adhere to any North American good faith principles.

Under the EC Act, *Duval v Sky City Auckland Ltd*[166] distinguished meetings,[167] from which the union was excluded, as consulting with staff over an operational policy, rather than negotiating contract variations.[168] Although this determination would now be subject to the ER Act's extended bargaining definition, such distinctions as to what constitutes bargaining are likely to play an increasing role in employee consultation scenarios.

(b) Bargaining progress and final offer communications

North American case law has tended towards conclusions that bargaining reports to employees are permissible in certain circumstances, such as when the union is informed. The ER Act's express provisions may cause a deviation from the path of North American principles. Section 32(1)(d) is clearly at least partially drafted with intent to alter New Zealand's stance on communications from the wide permissible base in *Capital Coast Health* and *Ivamy*. In this sense, it appears unlikely employers would be able to simultaneously present final offers to employees, if this would restrict the union's ability to explain and represent the employees. Bargaining progress meetings such as those

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[163] Joseph Ryan "The Encouragement of Labour-Management Co-operation : Improving American Productivity through Revision of the National Labour Relations Act" (1992) 40 UCLA L Rev 571, 629.
[164] Ryan, above, 630.
[165] *Permanente Medical Group Inc* (2000) 332 NLRB No 106, 4.
[166] *Duval v Sky City Auckland Ltd* [1999] 1 ERNZ 15 (Emp Ct) Travis J.
[167] The meetings involved the staff request and petition for free meals during shifts.
[168] *Duval v Sky City Auckland Ltd,* above, 26 Travis J.

sometimes allowed in North America may be slightly more permissible, yet only in a restricted sense. Employers would need a legitimate reason, such as a demonstrable claim that the union is severely misrepresenting the progress, bad faith which the employer might be trying to counter. As a whole, the ER Act's statutory expressions regarding the undermining of authority offer a more limited view than has evolved in North America, hence North American case law should accordingly be viewed in a restricted sense.

The ER Act will clearly restrict communications between employers and employees considerably more than the EC Act did. The inclusion of indirect communication within a wide interpretation of bargaining considerably narrows what is permissible. New Zealand's sections are drafted more stringently than the North American counterparts. This calls for employers to be circumspect as to the subject, manner and timing of any communications undertaken within the wide bargaining period. Ultimately the ER Act demands an increased respect for representatives.

VIII EARLY INDICIA OF NEW ZEALAND GOOD FAITH DEVELOPMENT

The good faith obligation is clearly dependent on each factual scenario, and will develop in a case-by-case manner. In the first year of operation the ER Act has faced no strong challenge to the bargaining aspect of the good faith obligation. Early determinations may shed light on New Zealand's approach to the wider good faith obligation.

A Employment Court and Authority Determinations

1 Baguley v Coutts Cars[169]

Baguley was the first case of its kind to be heard by the Employment Court. Primarily an unjustified dismissal personal grievance, Baguley's claim was supplemented with an alleged breach of good faith.[170] The Court, in recognition of the precedent setting ability of the case, carefully traversed the good faith sections, articulated the legislature's

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[169] *Baguley v Coutts Cars* (3 April 2000) Employment Court Auckland AC 25/01, Judgment of the Court (*Baguley*).

[170] *Baguley*, above, 7 para 7.

emphasis on the relationship approach to employment, [171] and then noted this would require EC Act cases to be reconsidered.[172] The Court found the employer had failed to fulfil their good faith obligation, yet awarded no damages for this breach. Nonetheless the Court was careful not to rule out the future possibility of awarding damages for a section 4 breach. [173]

2 *The* Independent Newspapers Ltd *case*[174]

This determination of the Authority involved a union claim that each of the respondent employers had not bargained in good faith following the union initiation of multi-employer collective bargaining.[175] The employers, each independent subsidiary branches of Independent Newspapers, had only bargained on the issue of whether there would be a multi-employer agreement. The Authority was asked whether failing to consider the union's substantive proposals for a multi-employer contract was a breach of good faith. The decision was observed to follow many of the procedural steps utilised in North America, such as using a subjective test and a totality approach to determine whether the intent to bargain in good faith existed.[176] Only one newspaper was found to have come to bargaining with a closed mind,[177] yet all regional newspapers were found to have not bargained in good faith by not meeting, considering or responding to the union's proposals. Section 32(1)(b) and (c) compliance orders were then ordered by the Authority.

Although this Authority determination does not directly address the issues of this paper, it does illustrate how section 32 requirements may be used to narrow a union's

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[171] *Baguley*, above, 18 para 56.
[172] *Baguley,* above 13, para 43.
[173] *Baguley,* above, 20-21 paras 63-64, $15 750 in damages were awarded as compensation for the personal grievance claim.
[174] *New Zealand Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd* (3 August 2001) Employment Relations Authority Wellington, WA51/01, GJ Wood *(Independent Newspapers)*
[175] The first respondent, Independent Newspapers Ltd, owns all of the other ten respondents, each independent regional newspapers.
[176] *Independent Newspapers,* above, 16-24 GJ Wood.
[177] This was the Manawatu Standard, whose General Manager clearly stated in a letter to the union that he was not interested in a multi-employer contract, then did not sent a direct representative to the bargaining session, despite its proximity to their offices, and was uninterested in the outcome of the session.

broad good faith claim.[178] *Independent Newspapers* is also indicative of the ER Act's aim to intervene at a relatively early stage, in the hope that the parties can solve the bargaining issues themselves, and build a more productive relationship. In supporting the features of this paper, the Authority expressed obiter recognising "that 'surface bargaining' would be in breach of New Zealand law," and North American case law may also be appropriate to refer to in other cases.[179]

IX THE PATH AHEAD FOR GOOD FAITH BARGAINING

Combining North American trends with the early ER Act interpretations, it may be predicted New Zealand authorities will tend to rely on specific breaches of the ER Act, with general good faith claims dealt with as secondary, supportive claims. Where there is a breach of section 4, yet an absence of excessively bad faith behaviour, the Authority or Court may often find this breach in name only, with no direct remedy, as per *Baguley.*[180] This approach does not entirely marginalise good faith, as it remains the concept that underpins the whole Act, with the specific requirements often enacted as a measure of achieving good faith.[181] This tendency does not exclude the undertaking of more drastic action where excessively bad faith behaviour is encountered.

The two focal points of this paper, surface bargaining and communications between employers and employees are likely to grow through different paths under the ER Act. Surface bargaining has developed in North America as a general good faith claim, focusing on the totality of conduct and subjective intent, and is not expressly addressed in the ER Act. Comparatively, communication offences have clearly been included, and are proven through the observance of objective behaviour. In this manner, a good faith claim which can rely on a specific section 32 breach will be the more certain approach, with a general claim, such as surface bargaining operating as a more background element.

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[178] For although the unions claims were against most of the employer's bargaining actions, breaches were only found in the above narrow areas.
[179] The decision here was arrived at without extensive reliance on North American case law.
[180] Especially where there is specified remedies for the other breach, such as those specified in Part 9, for personal grievances.
[181] Particularly s 32, entitled 'Good faith for Collective Bargaining.'

As surface bargaining is not expressly addressed in the ER Act, it may be hypothesised that New Zealand authorities will increasingly look to North American case law. The many years of United States and Canadian experience may therefore be highly influential in the development of an obligation in New Zealand.[182] Alternatively, claims embraced within one of the requirements of section 32, and to a lesser degree the Code, may be more likely to develop independently of North American case law. Such provisions have the ability to refer to the section's wording, the drafter's intent, the purpose of the Act and especially in the case of communication, the New Zealand history pertaining to the action. Therefore, although connections to United States and Canadian developments can be observed in the legislation, they are less likely to receive in depth judicial contemplation. In terms of the substantive direction of the communication provisions, the ER Act's provisions have emerged as more detailed than the principles developed in North America, which may be attributable to the previously wide employer rights. Early interpretations may therefore lean towards a comparatively stringent approach to communication during an extended bargaining period.

The effectiveness of available remedies will be highly influential in the practical implementation of good faith. This has emerged as a major barrier to effectively preventing employers from surface bargaining in North America. The eventual bargaining order poses no substitute for the damage to union status incurred from delay. The remedy imposed must also be sufficient to overcome the cost an employer may be willing to pay to keep a union out of their agreement, be this through surface bargaining or direct communication with the intent to undermine the union. The willingness of the Court to follow through with the provided penalties for breaches of compliance orders will be instrumental to this development.

X CONCLUSION

The true nature of New Zealand's good faith bargaining obligation remains to be exposed. Unions and employers alike remain uncertain as most sections wait to come

under the scrutiny of the specialist institutions. The approaches of the Court of Appeal may be even more anticipated, due to its notoriety under the EC Act for diminishing employee's rights. The collective relationship duties have been defined somewhat more specifically than both those required in individual agreements and foreign collective relationships. In this sense, the minimum requirements outlined may be read as a relatively stern warning as to what action must be avoided, particularly with reference to communication during bargaining. General claims, in many circumstances may stand meekly behind these provisions, yet be of an unknown quantity should they stand alone. In this context, the influence of the United States and Canada is clear in the drafting of a relatively specific good faith obligation. Although clearly a source of legislative guidance, in many cases it appears likely that such guidance will play only a limited rule in subsequent judicial interpretation.

[182] This may also be applicable to the information provisions, which while being a new statutory obligation in New Zealand, are well established principles in North America.

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