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Book Review: Labour Arbitration in Canada, by A. W. R. Carrothers

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BOOK REVIEWS
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Labour Arbitration in Canada. By A. W. R. CARROTHERS, Professor of Law and Director of the Institute of Industrial Relations, University of British Columbia. Toronto: Butterworth & Co. (Canada) Ltd. 1961. Pp. 179. ($7.25)

Professor Carrothers has, for the second time within five years, made a "significant contribution to Canadian jurisprudence in the field of labour law".[1] His analysis of the role of arbitration as a method of settling grievance disputes in labour-management relations is perceptive and provocative. Indeed, the text suggests that as an author, Professor Carrothers possesses many of the virtues that he identifies as the essential attributes of the ideal labour arbitrator: "The skills of a lawyer, the understanding of a physician, the sympathy of a priest, the artfulness of an actor, the dispassion of a stoic, the discipline of a yogi, the wisdom of Solomon, and the patience of Job."[2] To assert these virtues is not to deny that a reviewer might have several reservations about this book. Whether these reservations are the product of the reviewer's objective analysis or of his subconscious prejudgments is a decision which requires powers of self-analysis that a Freud might have possessed, but this reviewer does not.

The book opens with a sketch of the legislative background of labour arbitration. One may query the observation that the pattern of "present-day collective bargaining statutes in Canada can be traced in concept directly to United Kingdom legislation of the late 1890's, and in administrative technique to the United States Wagner Act of 1935".[3] Of the fourteen "essential components" of the legislation summarized by the author,[4] ten are obviously drawn from the Wagner Act[5] and the remaining four are all related to the distinctive Canadian technique of compulsory conciliation and arbitration. Professor Carrothers does not at this juncture, nor indeed elsewhere, address himself to the problems created by the simultaneous application of English common law and Canadian

[1] McAllister, Review of Carrothers, The Labour Injunction in British Columbia (1958), 36 Can. Bar Rev. 592.
[2] P. 106. [3] P. 5. [4] P. 10.
[5] National Labor Relations Act, 1935, 49 Stat. 449, 29 U.S.C., s. 141 *et seq.*

and American statutory techniques, each of which is based upon a different value judgment about the proper limits of concerted labour activity.[6]

Against this legislative background, the essential distinction is drawn between disputes arising from the conflict of economic interests during negotiation of the collective agreement and grievance disputes arising from its administration, once concluded. Professor Carrothers thus comes directly to a theme that recurs throughout the book: "Whereas compromise is often the essence of settlement in negotiation disputes, legal principles lie at the root of grievance disputes."[7] Just what is meant by "legal principles" becomes apparent when he goes on to analogize the development of labour arbitration to that of the law merchant,[8] and to demonstrate the modest contribution of the common law to the resolution of "fundamental conflicts of interest". "Many of these issues call for a new jurisprudence" says the author. "A new jurisprudence may be aborning; but it is scarcely crackling in its shell."[9] Having thus exposed the substantive inadequancy of the common law as a guide to the interpretation of collective agreements, the solution must be the statutory provision for compulsory private settlement of disputes during the term of an agreement, the only alternative being a resort to economic force which public policy forbids. The implications of compulsory arbitration (as opposed to settlement by other means) are several: minimum standards for the arbitration machinery, the availability of judicial review, and the public nature of the award. An analysis of the scope of disputes statutorily committed to arbitration follows, with particular reference to disputes on the issue of "Arbitrability". Finally, the author canvasses the various statutory provisions governing the enforceability of arbitration awards.

In chapter 2, Professor Carrothers passes to a consideration of the nature of the collective agreement. He refers to various analogies — business compact, code of relations, treaty of peace — and concludes that, despite their sociological validity, these analogies "beg the question of what, philosophically, is or ought to be the nature of the collective agreement, and whether legal principles are applicable to its administration".[10] In dealing with these questions, the author states that "the collective agreement is superimposed on the prevailing and traditional employer-employee relationship"[11] by virtue of the union's "statutory agency" to bargain on behalf of the employees. This rather restricted view

[6] See for instance, Commons and Andrews, Principles of Labor Legislation (4th ed., 1936), pp. 374-6.

[7] P. 13.

[8] *Cf.* Cox, Reflections Upon Labor Arbitration (1959), 72 Harv. L. Rev. 1482, at p. 1483.

[9] Pp. 17-18. [10] P. 39. [11] P. 39.

later[12] leads Professor Carrothers to speculate upon the ability of the individual employee to prosecute his own grievances and to look for an answer in the terms of the agreement itself. Such authorities as do exist appear to turn upon the statutory scheme and to conclude that "there is no room left for private negotiation between employer and employee".[13] From this view of the collective agreement, Professor Carrothers continues to retrace his steps from life to law, past the fork in the road where he states that "the agreement represents a *modus vivendi*, a manner of living together of the employer and his employees",[14] to his point of departure: "In moments of conflict [the agreement] is a memorandum of rights."[15] It is a mark of the author's skill that while reducing the social complexity of the collective agreement to a legal form of words—"memorandum of rights"—he nonetheless defines those rights in the context of "a system of free collective bargaining, the tangible product of which is the collective agreement".[16]

To illustrate the unique nature of these "rights", we are offered a brief review of the subject-matter of a typical agreement, the circumstances under which the agreement was executed, and the vocabulary used to express the consensus (which may range from inexactitudes to terms of industrial art). Professor Carrothers then reenacts the "conceptual nightmare" of the common law which began[17] with the negation of the very existence of the union as an entity and of the collective agreement itself, and has finally merged with reality by recognizing the existence of both,[18] albeit an existence inferentially derived from the statutory scheme. With this recognition has come the likelihood that some features of the general law of contracts will find their way into the developing law of the collective agreement. "If the agreement looks like a duck, swims like a duck and quacks like a duck, the courts may reasonably be expected to treat it as a duck."[19] Alas, a drake, too, fulfills for the casual observer all the requirements of "duck-ness", but what a catastrophe for the future of the species should the essential differences be forgotten.

It is at this stage in the development of Professor Carrother's thesis that one might well have expected an analysis of some of the important substantive issues in labour arbitration: the implica-

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[12] P. 73.

[13] *Le Syndicat Catholique* v. *Paquet*, [1959] S.C.R. 206, at p. 212; see also *Vera Elkington & Wallace Barnes Co. Ltd.*, [1960] C.C.H. LL.R. Para. 16, 198 (O.L.R.B.).

[14] P. 40. [15] P. 41. [16] P. 42.

[17] *United Mineworkers* v. *Strathcona Coal Co.* (1908), 8 W.L.R. 649 (Alta. S.C.).

[18] *Re Polymer Corp. and Oil, Chemical & Atomic Workers' International Union, Local 16-14* (1961), 26 D.L.R. (2d) 609 (Ont. H.C.), affd. (1961), 28 D.L.R. (2d) 81 (Ont. C.A.).

[19] P. 68.

tions of the "management's rights" clause, the requirement of "just cause for discharge", the effect of the "recognition" clause on the redistribution of work between men and machines or between employees and non-employees, the duty to bargain during the term of the agreement. All of these issues would serve to distinguish "ducks" from "drakes"—commercial contracts from collective agreements. Instead, the author has chosen to confine his study to purely procedural matters. Moreover, he deals with these matters not by an analysis of reported arbitration cases (of which only two are cited in the entire book) but by drawing upon two sources: judicial decisions and the author's personal experience. While the latter is a valuable guide to the proper conduct of labour arbitration, it is naturally not susceptible of legal analysis. The former source represents only the failures of labour arbitration and not its many successes. The net effect is that while we learn a great deal about what one good arbitrator and some bad arbitrators have done, we are left with only a little knowledge about the prevailing problems, practices and ethics of the institution as a whole.

The author next embarks upon a discussion of the status of the parties to an agreement. The reciprocal rights and obligations of the employer and the union are fairly obvious. The union's duty to prosecute the grievances of employees (or their *locus standi* to prosecute grievances without the intervention of the union) is somewhat more obscure, and reference to the *Wallace Barnes* case[20] or to *Steele* v. *Louisville*[21] would have been useful. One may query whether (as the author suggests) the answer depends upon the express terms of particular agreements, or is rather a product of the exclusive nature of the union's statutory bargaining authority.

One of the most controversial sections of the book is that entitled "The Function of Compromise", a question which is characterized as "sticky". As a matter of sound industrial relations, compromise may be preferable to adjudication; as a danger to the "judicial" processes of arbitration, compromise should be avoided upon pain of loss of jurisdiction. The necessity of choosing one of these two alternatives is avoided in a discussion of "the woolly area of the law relating to the punitive powers of employers and the remedial powers of arbitrators"[22] where Professor Carrothers demonstrates, by example, that foresight and good draftmanship can provide a solution. He also suggests, no doubt as a counsel of caution, that if wrongful dismissals are to be remedied by reinstatement, the agreement should so provide. The argument against the "inherent" power of the arbitrator to reinstate obviously does not turn on the notion that the silence of the agreement

[20] [1961] C.C.H. L.L.R. Para. 16, 198 (O.L.R.B.).
[21] (1944), 323 U.S. 192. [22] P. 95.

precludes the remedy; *Polymer*[23] indicates otherwise. Rather, the arbitration award is liable to be unenforceable because of equity's reluctance to specifically enforce contracts of personal service.[24]

In the following chapters, entitled "Procedure of Arbitration" and "The Award", we are given an integrated discussion of the practical and legal requirements for the conduct of the proceedings, from the formation of the board to the enforcement or vacating of the award. Ontario, Manitoba and Saskatchewan readers are initially cautioned that arbitration under the Labour Relations Acts are not subject to the Arbitration Acts of those provinces. However, the footnotes throughout these chapters make reference to the provisions of the Arbitrations Acts of all provinces, presumably (in the interest of completness) to cover those situations in Ontario, Manitoba and Saskatchewan where the Labour Relations Acts do not apply. Professor Carrothers poses for legislative solution a host of practical and legal problems relating to the mechanics of arbitration, many of which remain of first impression, at least in those jurisdictions where the Arbitration Acts do not apply to labour arbitration. One of the most pressing practical problems is the selection of chairmen for arbitration boards—a current controversy which involves in Ontario the future of County Court judges as arbitrators.[25]

In the section dealing with "Enforcing, Setting Aside and Quashing the Arbitration Award", the author provokes but does not convince. After setting forth the traditional "hands off" attitude of the courts to arbitration, Professor Carrothers skilfully demonstrates those distinctive features of labour arbitration which seem to invite judicial supervision:

> In sum, in many instances labour arbitration today, in contrast with arbitrations from which many of the older precedents are drawn, is a method of settlement which is either imposed on the parties or may be only nominally volitional; it can involve important issues of law, and issues of fact of general interest, and it can influence legal relationships, and in consequence the lives, of such large numbers of persons that there may be perceived generally an essential public interest in the process.[26]

Certainly, one senses from the increasing numbers of reported cases that judicial supervision is being more frequently sought by unsuccessful parties to arbitration proceedings. But Professor Carrothers, the lawyer, must inevitably come to grips with Pro-

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[23] *Supra*, footnote 18.

[24] This objection would seem to be untenable in Ontario, by virtue of s. 34(9) of the Ontario Labour Relations Act, R.S.O., 1960, c. 202.

[25] E. H. Silk, Report to the Attorney-General for Ontario of Certain Studies of the Jurisdiction of County and District Courts (1961), p. 61 *et seq.*

[26] P. 151.

fessor Carrothers, the perceptive analyst of industrial relations. The lawyer sees a collective agreement as a "memorandum of rights" and thus identifies as dominant themes of arbitration "Is it faithful to basic legal principles?"[27] and "The Board must stay within its jurisdiction".[28] The labour relations expert says "[arbitration] is an adjunct of the continuing process of collective bargaining".[29] In the author's assessment of judicial review of labour arbitration, it is the lawyer who speaks while the labour relations expert remains silent. There are many disturbing questions which are neither posed nor answered: What can the common law bring to labour arbitration beyond a set of minimal procedural safeguards? What sort of "basic legal principles" ought to be applied to the interpretation of collective agreements? Are those legal principles of interpretation that are based upon an assumption of *consensus ad idem* applicable to what the author earlier described as "the product of compromise . . . hammered out from a hot forge"?[30] Can *expressio unius* or *ejusdem generis* be applied in situations in which, as Professor Carrothers notes, "negotiators are not always perceptive to possible gaps or to potential implications in the words used"?[31] Of what utility is judicial resort to a lexicon of "Words and Phrases" when we are told that "the draftsmen are not always trained in the precise use of language" and "may use words which are peculiar to the vocabulary of industrial relations"?[32] And, even assuming judicial familiarity with the peculiarities of collective agreements, if judicial review results in costs and delays with consequent deterioration of "the general attitude of considered acceptance"[33] of labour arbitration, what price legal principles!

Nonetheless, as Professor Cox noted in the *Harvard Law Review:* "The judges hold the trumps."[34] We have judicial review and our task as lawyers is to make it work. Professor Carrothers has organized in systematic fashion the techniques and grounds of review. An award may be reviewed on civil or criminal proceedings to enforce the award; on an application to vacate, under the

[27] P. 13. [28] P. 172. [29] P. 178. [30] P. 47.

[31] P. 47. An example of the application of these rules to the interpretation of collective agreements in review proceedings is *Re Sandwich, Windsor & Amherstburg Rwy.*, [1961] O.R. 185 (C.A.). *Per* Aylesworth J.A. (McGillivray J.A. dissenting), at p. 187:

> ". . . the collective agreement does not in precise terms prohibit that which the company has sought to do by its resolution. It therefore becomes . . . a question as to whether or not the company is prohibited from puting in force the resolution it has adopted by necessary implication from the terms of s. 46 . . . . We are of the opinion that to interpret or seek to interpret the collective bargaining agreement as was done by the majority of the arbitrators and by Spence, J., is to add words and a meaning to s. 46 which is not apparent from a full and fair reading of that section and which cannot be added thereto under the principle of 'necessary implication'."

[32] P. 47. [33] P. 47. [34] *Op. cit.*, footnote 7.

Arbitration Acts; or in a proceeding by way of *certiorari* to quash. Whether, and upon what grounds, the substantive issues before the arbitrator may be relitigated in enforcement proceedings is a moot question. In proceedings under the Arbitration Acts or by way of *certiorari*, the nominal bases of review appear to be "denial of natural justice", "defect of jurisdiction", and "error on the face of the record". The state of the law apparently did not permit the author to make any comparison of the scope of review available in these two types of proceedings. However, in a recent *certiorari* case,[35] McRuer C.J.H.C. refused to draw any distinction. In so doing, he declined to follow the law as expounded by Professor Carrothers[36] and refused to correct an error of law on the face of the record:

> It is not part of my task to consider whether the Board came to the right conclusion or the wrong one. The specific point of law was referred to it for decision and that decision is final unless it appears on the face of the award that the Board misconducted itself by the improper reception of evidence or otherwise.[37]

In another recent decision, the Ontario Court of Appeal succinctly stated:

> It is immaterial whether or not the Court from whom an order of *certiorari* is sought agrees with the interpretation given to the agreement by the arbitrator; it is sufficient to defeat the application if it can be said that the interpretation given to the agreement by the arbitrator is one which the language of the agreement reasonably will bear. The Court has no appellate function to discharge with respect to the interpretation of the agreement except to decide whether or not the interpretation applied by the arbitrator is one, which as I have said, the language of the agreement will reasonably bear.[38]

Both of these cases are surely indicative of a return to the traditional "hands off" attitude of the courts to arbitration.

In the last chapter, "The Operation of Labour Arbitration", the author draws together many of the matters dealt with earlier. He concludes with a section entitled "The Function of Arbitration in Labour Relations"—the finest in the book—in which he abandons much of the preoccupation with legal rights and rules of which this review has been critical. One cannot but concur in Professor Carrother's peroration:

> Arbitration is a solemn process. It is not a game to be won or lost by manipulation of the rules. Nor is it a legalistic technique operating

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[35] *Re Canadian Westinghouse and United Electrical, Radio & Machine Workers of America, Loc. 504* (1961), 30 D.L.R. (2d) 676 (S.C.O.).

[36] P. 167.

[37] *Re Canadian Westinghouse and United Electrical, Radio & Machine Workers of America, Loc. 504, supra*, footnote 35, at p. 685.

[38] *Re Canadian Westinghouse & Local 164, Draftsmen's Association of Ontario* (1961), 30 D.L.R. (2d) 673, at p. 676 (Ont. C.A.).

on a plane divorced from human values and aspirations. It is a dynamic process in a dynamic context. It cannot eliminate conflict. But it can help to contain conflict; and it can play an influential role in the development of an emerging and as yet inchoate twentieth century industrial jurisprudence.[39]

In sum, this book is provocative and therefore valuable. Readers might disagree with Professor Carrothers; might wish occasionally for closer analysis, occasionally for more fundamental criticism. But no one can come away from the book ungrateful for the intellectual adventure.

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[39] P. 179.

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