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Howard Snow

"SOME COMMENTS ON LABOUR BOARDS AND JUDICIAL REVIEW"

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In early July, 1975, the Ontario Legislature considered amendments to *The Labour Relations Act*.[1] One of the proposed amendments, and the only one which was not enacted, was a provision to further exclude the role of the courts in labour arbitration.[2] I recall a friend asking me at the time why labour lawyers were so often complaining of the influence of the judiciary and advocating the removal of labour law from the courts. In other areas of the law a "wrong" decision in the courts evokes comment on that decision but rarely does anyone suggest that the correct solution is to remove the courts altogether from the issues involved. The usual arguments as to the need for speed and final resolution of issues, together with reliance on the expertise present in the labour field did not convince my friend. The courts are no slower in labour law than they are in criminal law, for instance, and the local magistrate soon develops a great deal of expertise in dealing with criminals and the police.

As often happens, shortly after losing an argument one knows should have been won, one finds something that says everything that could be asked for and says it so much better than anyone else could ever hope to say it. In this case, the something is Professor Paul Weiler's chapter on "The Supreme Court and Canadian Labour Law", which is the fifth chapter in his book *In the Last Resort*. Professor Weiler makes a complete and convincing argument about what has been wrong with the intervention of the Supreme Court of Canada in the last 25 years. He advocates that the Court ought to take a position of judicial restraint, one of extreme caution, in interfering in the area of labour relations. Although not an exhaustive study, he does detail sufficient cases to demonstrate convincingly that the Supreme Court has been somewhat of a hindrance in the development of our labour law system.

I do not intend to summarize the chapter since it is reasonably short and ought to be read in full by anyone with an interest in the Supreme Court or in public law generally. Professor Weiler makes the point that Bora Laskin, now the Chief Justice of Canada, was Canada's leading labour law scholar in the 1950's, and that Harry Arthurs, Dean of Osgoode Hall Law School, was in the 1960's. Since Professor Weiler may well turn out to be the 1970's version, I recommend his chapter on labour law to be read by anyone interested in the field.

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[1] R.S.O. 1970, c. 232. Most of the proposed amendments were enacted as S.O. 1975, c. 76.

[2] Bill 111, 1975, s. 10, which proposed new s. 37(12) and (13). These proposals were defeated at the committee stage, in part it would appear, because the Minister of Labour was not convinced of their merits.

Having expressed my feelings on the article, I will make some general comments which are not intended to conflict with the views expressed earlier. The general thrust is to set the chapter in its proper perspective and then to comment on how well, in fact, the other factors in the labour law area, (principally the Ontario Labour Relations Board) are performing.

Firstly, although Professor Weiler entitles the chapter "The Supervisor of the Administrative Process", his argument centres on the supervision of Ontario labour relations law, and some care might be taken in applying his conclusions to other areas of administrative law or to other jurisdictions.

Professor Weiler subtitles the chapter "The Supreme Court and Canadian Labour Law" and it is limited to the collective relationships regulated by such bodies as the Ontario Labour Relations Board. The chapter has little application to the law as it relates to the millions of unorganized (non-union) Canadian workers. It also has no particular application to such administrative agencies as the Unemployment Insurance Commission, which regulates some aspects of the law as it relates to persons employed in a collective relationship.

I wish to take exception with Professor Weiler's assertion that "free collective bargaining is the rationale of the existing legal structure"[3] and that "anyone acquainted with the evolution and present structure of modern labour legislation must recognize that this is the theory which underlies its many detailed provisions".[4] Taken together, these statements give the impression that our legislators felt that free collective bargaining was a desirable goal and thus enacted the present legislation to set up this free collective bargaining system. Since Professor Weiler deals mainly with judicial review arising out of the operation of *The Ontario Labour Relations Act*,[5] and since that statute enacts one of the freer collective bargaining schemes,[6] it should be examined briefly to see if it really does enact a scheme which leads to "free collective bargaining". Professor Weiler asserts that it is free on two grounds:[7] first, that employees are free to accept or reject the union as a bargaining agent, and secondly, that the government does not set or control the terms of the bargain.

With regard to the first freedom, note that under *The Ontario Labour Relations Act*, "trade union" has a particular meaning and if an organization does not meet these requirements, its members cannot avail themselves of the Act. If it is a trade union, an appropriate bargaining unit must still be deter-

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[3] P. Weiler, *In the Last Resort, A Critical Study of the Supreme Court of Canada*, (Toronto: Carswell/Methuen, 1974) at 123.

[4] *Id.*

[5] R.S.O. 1970, c. 232, as am. by S.O. 1975, c. 76.

[6] For comparison in Ontario, see the situation of the teachers (*The School Boards & Teachers Collective Negotiations Act, 1975*, S.O. 1975, c. 72), police (*The Police Act*, R.S.O. 1970, c. 351, as am. by S.O. 1972, c. 103), crown employees (*The Crown Employees Collective Bargaining Act*, S.O. 1972, c. 67, as am. by S.O. 1974, c. 135), and hospital workers (*Hospital Labour Disputes Arbitration Act*, R.S.O. 1970, c. 208, as am. by S.O. 1972, c. 152).

[7] *Supra*, note 3 at 123.

mined, subject always to the views of the Board (s. 6). A minimum percentage of membership in the union must be demonstrated (ss. 7,8) and sometimes the parties are subjected to an election campaign where management can campaign against the trade union, although the union and management are somewhat restricted in what they may do (especially by the unfair labour practices section, ss. 56-72). Should the trade union lose, it may not be free to reapply for some time (s. 92(2) (1)), and should it win, its victory may be subject to objection by the other parties before the Board, or to review before the courts.

Once the trade union is certified as the bargaining agent, Professor Weiler says the government allows the parties to make their own bargain. However, the union must give written notice to bargain (s. 13) and the parties must bargain in good faith (s. 14). The Act deems every collective agreement to include a clause recognizing the trade union as bargaining agent for the employees (s. 35(1)), and the agreement must provide that there will be no strikes or lockouts; any dispute arising during the term of the agreement must be resolved by arbitration. Should the agreement fail to contain these provisions the Act deems them to be included. If the arbitration clause is inadequate, the Board can change it (ss. 36, 37). Finally, the agreement must run for at least one year (s. 44). In the recent amendments, a provision was included providing that an employer must check-off union dues of the employees if (a) the union requests the provision be included in the agreement and (b) the employee requests that the dues be deducted (s. 36a). (Whether this last provision applies to future collective agreements only, or whether it can be forced upon an employer under an existing collective agreement is an open question, but it appears that a union can now, at its option, change an existing collective agreement. If a check-off provision is thought to be desirable there is no reason why the date of the signing of the agreement should have any decisive effect on the union's entitlement to it.)

As a further, and ongoing, example of the "freedom" of the workers to choose whatever union they may wish, the case of *Canron Ltd., Eastern Structural Division*[8] should be examined. The Canadian Workers Union (C.W.U.) is a relatively new union and applied in April, 1975, to take over as bargaining agent from the incumbent union, the Ironworkers[9]. The C.W.U. showed considerable support and obtained a vote of the employees prior to the holding of a hearing by the Board. The ballots have yet to be counted as

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[8] (1975) O.L.R.B. 421. It is possible to argue that the C.W.U. is a poor example to use to demonstrate a valid point in that the C.W.U. is some sort of aberration among trade unions — an organization not resembling a true trade union in any way. In my view, such an opinion is a value judgment on the proper role of a trade union which I am unable to share. It is only an aberration in the degree of difference between its views and those of more conventional unions and although I do not personally share all of its views I am of the opinion that the conventional unions are becoming too much a part of the *status quo* and failing to adequately perform a role as a catalyst for change in society, the C.W.U. therefore encounters more problems and problems of increased severity in attempting to deal with the Board and the existing social and legal structures.

[9] Note that employees are only "free" to change unions at certain times, s. 5, of *The Labour Relations Act* of Ontario.

the case has been delayed on a number of points and is headed to court on several issues. In the meantime, the Board has held numerous days of hearings to determine, among other things, if the union is a union, whether the vote was properly conducted, and so on. The C.W.U. has frequently requested that the votes be counted, presumably because if they lose they need not waste the time and money in fighting the case through the Board's procedures and into the courts. At this time no one knows whether or not it is all in vain. The important point, however, is that the workers at Canron are for all intents and purposes without any effective representation. The questions we must ask are whether they are free to choose who they want as their bargaining agent, and having made that choice, whether they are free to settle a collective agreement on any terms they and the employer would like to include.

One view of the term "free collective bargaining" might give the impression that those employees who wished to do so could negotiate as a group with their employer. One would then think that those who did not so desire would be free to continue individually or to band together with another group. This, however, is not the case. No collective action can take place unless a majority is in favour of it and selects a union (for they cannot bargain except through the vehicle of a union); the minority is free to do nothing but to protest. They must go along with the majority view.

Finally, we might question just how accurate the term "free collective bargaining" is in reflecting the process of negotiation that takes place. While no doubt, bargaining takes place and is very important to the process, it is characterized by an unusual show of force, a great deal of posturing and bluffing, and then, late in the game, after a great deal of ritualistic activity, an agreement is reached which either party and any well-informed observer could likely have guessed at weeks or even months earlier. Unfortunately, the name provides no mention of a part of the process sometimes considered the most important factor motivating the parties to reach agreement — the strike. Both unions and employers have argued that bargaining without strikes is not workable and since strikes are a method of inflicting economic harm on the other side, there is an argument to be made that our system should be called "free collective infliction of economic harm".[10]

The important point, I suppose, is not what the system is called, as long as everyone is agreed on what it is and how it operates. What is deceptive is the statement that free collective bargaining is the rationale for our present system. This tends to give the impression that our learned legislators looked over available systems and, seeing how good free collective bargaining was, enacted the present legislative scheme.

I submit the rationale behind our system is a desire by the legislators to give as little as possible, after the longest wait possible, (but often shortly

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[10] I do not suggest that strikes are of no value in and of themselves. I appreciate that the argument can be made that apart from being an important motivating factor, a strike as a form of conflict is a positive good. See for example, "The Significance of Human Conflict", in the Public Employee Relations Library, *Behavioural Approaches to Employee Relations* (#22) (Chicago: Public Employee Relations Library, 1970) at 6.

before an election), and only after a long and loud outcry by the interested parties. Thus, for instance, I submit that Ontario's recent amendments arose not from a realization that the amendments were meritorious in their own right and deserved to be enacted to ensure the better operation of the free collective bargaining system, but rather in response to lobbying by pro-union interests, the government's poor public support, and the impending provincial election. Perhaps a more obvious example is *The School Boards and Teachers Collective Negotiations Act, 1975*, which like the amendments to The *Ontario Labour Relations Act*, passed the last day of the session prior to the election, and only after hard lobbying by the teachers. This is the first statutory bargaining scheme for Ontario's teachers and followed a previous attempt of the Conservative government to set up a scheme which would end in compulsory arbitration, introduced in Bill 275, 1963. Bill 275 failed to gain enactment following, among other things, a massive rally of teachers and a march on Queen's Park to oppose it, and the opposition of the Ontario School Trustees Council and the Ontario Association of Education Administrative Officials.

Having discussed both what the system is (i.e., a highly regimented, technical, legalistic system[11] designed to give as little as possible to appease the workers), and its origins, it is worthwhile to examine how well the system is being administered by the body primarily responsible for the administration of the legislation — the Ontario Labour Relations Board.

The first point is that Professor Weiler seems to feel the tripartite Board is equally well suited to all issues coming before it and, as for the desired judicial intervention, only distinguishes between the types of mistakes involved[12] and not the substantial issue. The Board sits in panels of three, composed of one representative of employers, one of employees (unions), and a "neutral" chairman.[13] The normal dispute will involve a union on one side and management on the other. In that instance, the format is fine. However, when the dispute is between an employee and his union, the format of the Board is not as well suited for the impartial resolution of the issues. Suppose, for example, that an employee complains that the union refused to pursue his grievance, contrary to section 60 of *The Ontario Labour Relations Act*. To be successful before the Labour Relations Board he would normally have to convince two members of the panel that (1) he was treated unfairly by the employer and (2) that the union was thus wrong and arbitrary in dropping his grievance. He must thus convince one of the two "non-neutral" members that the particular party whose interests he represents acted illegally. Thus the situation is one where the two members other than the chairman or vice-chairman can, and have, voted together against the decision of the

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[11] I might point out that the police, civil servants and others do not come even as close to "free collective bargaining" as do those who fall under *The Labour Relations Act* of Ontario.

[12] Such as review of the administrative procedure, rather than the merits of the case.

[13] *The Labour Relations Act*, s. 91(9).

"neutral" chairman to defeat the employee's complaint.[14] The Legislature has apparently responded to this type of problem and due to the recent amendments the case may now possibly be heard by the "neutral" chairman or vice-chairman sitting alone.[15] This power to do so is both limited and discretionary and it is too early to determine how much use the Board will make of it or its effects. The point to be made is that although the Supreme Court may not be doing the best possible job in labour relations, the Board itself may be unsuited to handle some of its present tasks.

A similar point to be made about the Board is that although the Board is a fairly specialized tribunal, it makes little or no attempt on its own behalf to find out exactly what the effect of the Board's decisions will be or have been in the past. For instance, although given a wide range of remedies to cure "unfair labour practices"[16] little or no effort is made by the Board to determine how effective any particular remedy may be. Therefore, while the Board may deal with the area of labour law on a regular basis, there is little compelling argument that the Board knows better than the courts what ought to be done to correct unfair labour practices.[17]

A further related point is Professor Weiler's characterization of the Board as an administrative agency. "Administrative" is normally used to distinguish the body from a judicial one. Simply put, an administrative body regulates a specific area of society, often moving on its own accord, conducting inquiries and making decisions on the basis of policy considerations and a wide discretion. A judicial body waits for someone to bring forward a complaint which is heard using the adversarial system and the decision is based mainly on law and precedent. One which falls somewhere in the middle is often called "quasi-judicial". It is generally felt that administrative functions are not amenable to review by the courts in the same way that judicial func-

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[14] E.g., *Robert E. Gibb* v. *United Brewers Warehousing Workers' Provincial Board et al.*, Ontario Labour Relations Board file no. 5345-73-U., as yet unreported, where Vice-Chairman Boscariol dissented, being of the opinion that the complainant had made out a *prima facie* case of discrimination by the union in negotiating a new agreement. Members Bell and Hodges dismissed the complaint without hearing from the respondent, since they felt the evidence was not such that the respondent should be called upon to give an explanation. The decision does not make it clear as to the nature of the proceeding, but since the Board gave reasons only after being requested to do so, and from the use of the standard of a *prima facie* case, it would appear that it may be a consent to prosecute application under *The Labour Relations Act*, s. 90. If that is so, I can only guess at why an employee wishes to prosecute his union, but one suggestion might be that he feels he cannot convince the Board he has any more than a *prima facie* case, whereas he could convince a judge beyond a reasonable doubt.

[15] S. 91 (11)(a), enacted by S.O. 1975, c. 76, s. 24.

[16] *The Labour Relations Act*, s. 79(4). Note that this wide range has been recently increased so that the Board now "shall determine what, if anything" the guilty party "shall do or refrain from doing with respect thereto" and then gives some specific examples of the remedies, such as a cease and desist order, an order to rectify the acts complained of, to reinstate or rehire, and pay compensation.

[17] The matter of empirical research is one of general application and the Board has made no study to determine how effective the legislation it administers is in practice.

tions are. I will thus set out some features of the Board which cause me to believe the Board conforms much more closely to a judicial model than an administrative model.

The Board will and has decided important cases, in part at least by excluding certain testimony on the basis that it was hearsay and that its prejudicial value exceeded its probative value.[18] Following two votes of the employees at *Dorothea* and court action to compel the attendance by a Board official (who was not in fact called to testify), the case turned on whether or not a union representative could testify as to employee responses made to her concerning the employees' awareness of the company position with respect to the status of a particular employee.[19] The union claimed the employees were too frightened to attend the hearing and testify themselves.[20] Whether the decision to exclude the testimony is correct or not,[21] it seems to indicate that the Board views its own role as very much a judicial one, deciding cases brought before it on the basis of admissible evidence that the parties can adduce. In so doing the Board fashions rules as to admissibility in much the same manner as a court does. If the Board is to act essentially as a court does then it may be that its decisions are in fact amenable to judicial review.[22] There may be some cause for concern in that some of the people who appear before the Board lack confidence in the Board's impartiality. As might be expected the parties who appear before the Board regularly become familiar with the Board, and the Board becomes familiar with the parties. Thus, when new parties appear on the scene they may feel as if they are breaking into a

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[18] *Canadian Textile & Chemical Union* v. *Dorothea Knitting Mills Ltd.*, Board file no. 4880-73-R, as yet unreported. An interesting side note is the ringing dissent of Board member P. J. O'Keeffe which ought to be read by anyone interested in the increasingly legalistic stance of the Board. From an addendum, it would appear that this dissent is toned down somewhat from its first draft. Since the decision as issued included passages such as "the story . . . is indeed a sorry tale of the firing of a young female factory employee who was unfortunate enough to be named by her union as a scrutineer in a lawful employee representation vote. For her pains she was discharged, bullied by legal counsel, and her head 'spiked at the Tower gate' as a horrible example to other employes of the fate awaiting union activists", it would perhaps be unwise to speculate as to what was in the draft dissent.

[19] The same employee whom Mr. O'Keeffe says had her head "spiked at the Tower gate" etc., *supra*, note 18.

[20] Mr. O'Keeffe in his dissent, after mentioning threats to cut out an employee's heart, said: "In the light of this industrial horror and terror atmosphere, it would be foolhardy for any employee to come forward to give evidence with respect to any of the actions of this company." Decision, August 7, 1975, para. 30 at 26.

[21] Although I think it is probably wrong on policy and in principle, it is not obviously erroneous or completely unreasonable.

[22] A related point, worthy of passing comment, is that Professor Weiler states the Board is presided over by legally-trained chairmen. At the time that was written, it was correct, but the most recent appointee as a vice-chairman to the Ontario Labour Relations Board is the first non-lawyer to be appointed. How much this will affect the argument Professor Weiler adopts from Abbott, J., in *Barbara Jarvis* v. *Associated Medical Services Ltd. et al.*, [1964] S.C.R. 497, 44 D.L.R. (2d) 407, (that the Board is as capable of deciding cases as a judge, in part because it is presided over by a legally-trained chairman), would depend on whether this is to become a common practice, and how much value one puts on having legally-trained chairmen.

closed circle and the Board may have considerable trouble in coping with such sentiments. An excellent recent (and continuing) example is the relatively new Canadian Workers Union. The C.W.U., so it is alleged, is the "trade union puppet" of a Canadian communist organization, the Canadian Liberation Movement. In any event, the approach of the C.W.U. and its leaders is not that of the more orthodox trade unions. The C.W.U. espouses a more radical ideology than, and is opposed to, the international unions that generally control the labour movement and which have considerable representation on the Labour Board. Two of the C.W.U.'s recent certification applications[23] have provided considerable problems for the Board.[24] If the Board should continue to cope and to arrive at decisions in these cases that all the diverse parties feel are reasonable, ("right" being too much to hope for), then the Board shall have done an admirable job. However, I have little faith that such a result will be possible.[25] In circumstances such as these I think having some reasonable sort of review available to the C.W.U. (and the other parties) may be helping to increase the acceptability of the whole system to the parties.[26]

However, any reservations I may have about the present Board structure and the job it is doing do not in the least detract from Professor Weiler's analysis of the quality of judicial review we have in the past received from the Supreme Court of Canada. Should Professor Weiler's plea for judicial restraint not prevail, one can only hope that the quality of judicial decision-making may improve.

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[23] *The Canron Ltd. Eastern Structural Division* case, *supra,* note 8, and the *Frankel Structural Steel Ltd.* case (1975), O.L.R.B. 418.

[24] For example, numerous days of hearings, generally characterized by shouting and insults; the need to call in the police to retain order; the bringing of contempt proceedings against the Board's Chairman and Registrar; and pursuing witnesses through subpoenas to the level of the Ontario Court of Appeal to compel attendence.

[25] As an example of the parties' faith in the *Canron* case, at times three separate transcripts are being taken (by the Board, the Applicant, and the Respondent). In the usual cases no transcript at all is taken, so one can only assume that some use is intended for them, possibly in judical review proceedings.

[26] It may be that "Canadian" unions are less happy with the Board than are the international unions which are based in the United States. The Toronto *Globe & Mail* of September 24, 1975, reports on a press conference at which the President of the Canadian Textile and Chemical Union (C.T.C.U.) reportedly called the Board a "thieves' kitchen for company lawyers", and openly questioned the Board's impartiality. The complaint arises out of a "decertification" of the C.T.C.U. at Artistic Woodwork Co. Ltd. A strike by the C.T.C.U. at Artistic was recently a "cause celebre" in Toronto. The C.T.C.U. was the union involved in the *Dorothea* case, *supra,* note 18.