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Book Reviews

COLLECTIVE BARGAINING LAW IN CANADA. By A. W. R. CARROTHERS, Dean and Professor of Law, University of Western Ontario. TORONTO: BUTTERWORTH AND COMPANY (CANADA) LIMITED. 1965. pp. 553. ($21.50).

Notwithstanding the considerable public attention accorded the major issues in labour relations in recent years, labour law, and the law of collective bargaining in particular, have not benefitted from a commensurate degree of legal analysis. For this reason, Dean Carrothers' further "contribution to Canadian jurisprudence in the field of labour law",[1] following only four years after his *Labour Arbitration in Canada*,[2] is certain to be welcomed by practitioners and students alike.

In his introduction, the author postulates a thesis which recurs throughout the text: collective bargaining in industrial relations is an instrument of social justice to be employed by labour and management to resolve their differences and at the same time, to promote industrial self-government. The proposition that social justice is the fruit of self-made arrangements, themselves the product of economic warfare, may seem, at first blush, inherently contradictory; it is based on the philosophy that collective action and countervailing forces in the open market are more likely in the long run to obtain results consistent with the generally accepted social and economic policies of our private enterprise and free competition system. This is a philosophy of justice not unlike that attributed by Professor Fuller in his imaginary case, "The Case of the Contract Signed on Book Day", to Mr. Justice Foster:

> If I were asked to define what I mean by justice as I understand it today, I should say that it is an ordering of men's relations to one another within a group in such a way that the following ends will be advanced: (1) The members of the group are enabled to satisfy their common and separate wants with a minimum of conflict and waste. (2) Goods, burdens and functions are distributed so that each man is treated in a way that bears a rational relationship to his needs, capacities and services. (3) The individual is protected against the interference of others (whether acting corporately or not) where that interference is not justified by the ends just described and would restrict the freedom of the individual to develop himself in the directions to which he is prompted by his own nature.[3]

The problem which this philosophy raises and which Professor Carrothers does not definitively answer is, at what point ought

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1 See McAllister, Review of A. W. R. Carrothers, The Labour Injunction in British Columbia (1958), 36 Can. Bar. Rev. 592, commented on by H. W. Arthurs in (1962), 40 Can. Bar Rev. 306.

2 Reviewed by Professor H. W. Arthurs in (1962), 40 Can. Bar Rev. 306.

3 Lon L. Fuller, The Problems of Jurisprudence, p. 306.

collective bargaining to be subordinated to some other more important public policy.

He does recognize that there are other legitimate interests which must be taken into account: the employer's freedom of entrepreneurial action, the individual employee's freedom of choice and action, the freedom of persons stranger to the collective agreement, yet contiguous to the dispute, and finally the public interest.

From the point of view of employees, an effective system of collective bargaining requires that they be free to form themselves into bargaining associations, to engage the employer in negotiation with the bargaining associations, and to test their economic bargaining power by invoking meaningful economic sanctions, including the strike, the picket and the boycott. These prerequisites are not achieved by the mere liberation of these "three freedoms" from legal disability; they must, in addition, be legally protected against the attacks of competitive rights and freedoms.

Our current collective bargaining regimes in Canada go only part way in securing to employees these prerequisites. The rights to combine into trade unions, to engage the employer in the negotiation of a binding agreement and to strike are recognized and protected by legislation. But the economic sanctions of picketing and boycotting have yet to be embodied in a deliberate legislative policy and are left to the "mercy of a jurisprudence of unknown content".

The author begins his consideration of the legitimate spheres of these competing interests with a historical survey of the development of the Canadian law of collective bargaining as a "unique blend of politics, attitudes, emphases and experiences to be found in the U.K. and the U.S."[4] and of "significant features peculiar to this country".[5]

He describes the important influences which have successively characterized the period since Confederation: first, the influence of the English common law precedents respecting civil conspiracy and the internal affairs of unions and of attempts in Britain at legislative reform; second, the divergence of the courses of action in the two countries and the development of the distinctive Canadian "fire-fighting" policy of postponing, in the public interest, the right to use the economic sanctions of the strike and the lockout until the dispute has been exposed to the mediation and conciliation services of the state; third, the influence, in the years following the great depression, of American precedents in the development of a policy securing the right of association free from employer and union intimidation, providing a procedure for settling questions of union representation and controlling the administration and re-negotiation of the collective agreement; and fourth, the post-war ambivalence regarding the degree and nature of state intervention in labour relations. While acknowledging what he calls a "unique blend" of

4 A. W. R. Carrothers, Labour Arbitration in Canada, p. 1.
5 *Ibid.*

English, American and Canadian techniques, Professor Carrothers never comes to grips with the problems for Canadian jurisprudence which follow from the fact that these distinct approaches in the different jurisdictions are founded on distinct policy judgments.

In Part II, the author presents "an analysis of the collective bargaining statutes in the eleven legislative jurisdictions in Canada, a study of the case law relating to the statutes, and a review of published decisions of labour relations boards made pursuant to powers granted in the statutes".[6]

At the heart of collective bargaining is the collective agreement, which is superimposed on the prevailing and traditional employer-employee relationship. But there are essential concomitants to a meaningful collective agreement: a policy of freedom of association and organization not corrupted by unfair labour practices; the provision for certification of unions as exclusive bargaining agents where they have a majority of employees in an appropriate unit as members; the imposition on the employer of a duty to bargain with the certified bargaining agent; the provision for the conciliation of disputes arising out of negotiation; the alternatives of invoking the ultimate sanctions —the employer's sanction to refuse to employ, the employee's sanction to refuse to work; and, procedure for the enforcement of the agreement.

In discussing each of these subject matters, Dean Carrothers has, unfortunately, adopted the traditional text-writer technique of stringing together a series of phrases and ratios culled from judicial and board pronouncements, with the result that this section reads like the Canadian Encyclopaedic Digest. Reference to his initial thesis is abandoned in favour of a strictly legalistic and non-doctrinal approach. The ratios, whether consistent or not and whether desirable or not, are set out as being the law, and as such, a form of gospel. Few words are devoted to discussion of where the law of collective bargaining is going and why. The reader who anticipates a critical analysis of some of the substantive issues in collective bargaining in terms of the originally stated philosophy will be disappointed by the narrative and expository treatment afforded these matters.

The difficulty of the task is, no doubt, compounded by the fact that each of the eleven jurisdictions may have its own unique statute or common law approach to a particular issue. Instead of relegating some of the less important variations to footnotes, the author lists in the main body of the text all the legislative, court and board approaches in all the jurisdictions. The result is that the reader often entangles himself in the numerous variations.

This is not to belittle the service which Professor Carrothers has performed in collecting and organizing in a systematic fashion all the relevant case and statute law and board decisions. It must be regretted, however, especially from a student's standpoint, that there

[6] P. vii.

is no reference to, or even mention of in the footnotes, the limited number of learned articles which have been written on collective bargaining, and this notwithstanding that perhaps a third of these are the author's own contributions. It is to be hoped that this oversight will be the first to be corrected in subsequent editions. One must also regret the virtual absence of any discussion of American jurisprudence except in the historical survey.

Part III, which is adapted from his earlier book, *The Labour Injunction in British Columbia*,[7] presents a critique of the common law of picketing and boycotting. Professor Carrothers deals with this difficult area of the law by subjecting it to an analytic classification, discussing in turn the torts of intimidation, defamation, watching and besetting, nuisance, trespass, civil conspiracy, including breach of contract, and inducing breach of a collective bargaining statute. He works from the premise that picketing and boycotting are unlawful in so far as they fall within these categories; though he also contends that the essence of the issue is greater than the law of nuisance or conspiracy, and is a policy decision to be made—suprisingly—by the courts.

Returning to his thesis, he argues convincingly that the labour relations statutes are incompatible and the case law irreconcilable because of defective perception, or lack of perception, of the nature of industrial conflict and the nature of the legitimate interests in conflict. One may readily agree with Dean Carrothers' description of the inadequacy of the common law tort categories, where he writes:

> At one extreme the common law tries to pour the comparatively new wine of industrial conflict into such old bottles as the law of defamation, nuisance and inducing breach of contract; and at the other extreme it has invented and continues to use such comparatively new and difficult containers as the tort of conspiracy to injure and unjustified interference with freedom to trade.[8]

But agreement is not as readily forthcoming for his solution, which is to assign to the courts the task of realigning the common law precedents with a recognition of the nature and legitimacy of the interests that compete in industrial conflict.

In concluding, Professor Carrothers analyses the ambivalent legal status of unions, and the conflicts of policy and principle which flow from the admixture of the common law of unincorporated associations and the statute law of collective bargaining. As a consequence, in some cases unions may sue and be sued in their own name as legal entities, while in other cases they may be a party only through a representative form of action. Another consequence is that matters which relate only to the internal affairs of a union may affect its status as a bargaining agent. One unresolved anomaly arising from the ambivalent attitude towards union status is a confused policy respecting democratic procedures in union government—procedures

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[7] *Supra*, footnote 1.
[8] P. 420.

which are not always compatible with responsible collective bargaining.

In short, Dean Carrothers' text provides a complete and authoritative statement of the black letter law, an excellent reference work for both students and practitioners and some perceptive and provocative studies on some of the problems in collective bargaining. It may be anticipated that this work itself may "play an influential role in the development of an emerging and as yet inchoate twentieth century industrial jurisprudence".[9]

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