The Slippery Slope of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970

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The Supreme Court and Canadian Labour Relations
1950 - 1970
PAUL C. WEILER**

The Supreme Court of Canada was given final appellate authority in Canada at about the same time as a modern law of labour relations was beginning to emerge in this country. In no other field I have studied has the influence of Supreme Court decisions on Canadian legal doctrine been as widespread as in the area of labour law. At a time when many currents of Canadian opinion are advocating a changed status and wider role for the Court, it may be useful to examine in some depth the quality of performance which it has displayed in its contribution to this one body of law.

* This article is one of a series of studies which I am writing about the contribution of the Supreme Court of Canada to the development of Canadian law since 1949. This continuing project has been financed by a grant from the Canada Council made to my colleagues Dean G. E. Le Dain and Professor S. R. Peck and myself. My research assistants, George Adams and Paul Cavalluzzo helped me in the background research. I would also like to express my gratitude to my colleagues Professors Harry Arthurs, Dan Baum and Peter Hogg, who read an earlier version of the article and made many helpful suggestions for improvement.

** Professor of Law, Osgoode Hall Law School, York University, and sometime arbitrator in the Province of Ontario.
THE ROLE OF ADJUDICATION IN THE FASHIONING OF LABOUR LAW

As a prelude to this examination, I want to sketch my conception of the appropriate role for an institution such as the Supreme Court in developing Canadian labour law. This will furnish a framework for depicting and evaluating the actual work of the Court in the last twenty years. In summary terms, I believe that the Court should be very restrained in the innovations it introduces into the fabric of our labour law. Though this essay is not the place to canvass these views in any detail, I feel that there is a general consensus about this proposition in labour law scholarship.1 As with any brief formula, this advocacy of judicial restraint can be intelligently understood and applied in concrete situations only when we are aware of the underlying reasons for it. What are the distinctive characteristics of labour relations which warrant a high degree of judicial inhibition and self-control? The abstract elements which I am going to outline in answer to this query will be

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1 An excellent statement of this position is found in H. Arthurs, Developing Industrial Citizenship (1967), 45 Can. Bar Rev. 786, esp. 813-829; compare Bickel and Wellington, Legislation Purpose and the Judicial Process (1957-58), 71 Harv. L. Rev. 1 at 24-25:

Courts, no matter how closely confined to the detailed provisions of a legislative code, and perhaps even courts reviewing in the normal fashion the actions of administrative agencies, would always fall under the strictures of the statements we have quoted. But the point need not be pressed quite so relentlessly in order to condemn section 301. For that statute enacts no code, relies on none, and interposes no body of experts. It gives carte blanche, making the courts arbiters-in-chief of collective-bargaining contracts. Yet a half-century of often painful and disagreeable experience cries aloud that labor problems emphasize most dramatically the limitations of the judicial process as an instrument for the formulation of social policy. It is not likely that the common law of contracts will prove a more fitting source of rules to bridle the forces of labor unrest than the common law of property or the common or Sherman Act law of unfair competition, on which the courts have drawn in the past. The point is not that the courts will make what in political parlance would be called antilabor rules because courts tend to be conservative, or that they will not be antimanagement because so many of our federal judges were appointed by prolabor administrations. There will be some prolabor and some antilabor policies made and it is true that the political choice between the contending interests, which such policies represent, belongs with officials reachable at the polls, not with judges. But beyond that the point is that the courts will draw from a body of experience not germane to the problem they will face. Given their limited means of informing themselves and the episodic nature of their efforts to do so, they will only dimly perceive the situations on which they impose their order. Even if they do perceive, they will necessarily come too late with a pound of "remedy" where the smaller measure of prevention was needed. Their rules, tailored to the last bit of trouble, will never catch up with the next and different dispute. They will allow or forbid and be wrong in either event, because continuous, pragmatic, and flexible regulation alone can help. They will on most occasions naturally shy away from basing their judgments on what they are accustomed to regard as "political" factors incompatible with their disinterestedness, although these may form the only sensible context of questions before them. And they will thus find themselves resting judgment on trivia or irrelevancies. All this will not only, by its sheer volume, divert the energies of the courts from their proper sphere, but will also tend to bring the judicial process into disrepute by exposing it as inadequate to a task with which it should never have been entrusted.
the criteria for the judgments I will make about the work of the Supreme Court in this area.

The first set of characteristics concerns the quality of law the judiciary is likely to produce and the second group is concerned with the legitimacy which will be attributed to this product. Perhaps the most important characteristic of Canadian labour law policy is that its major thrust is legislatively enacted, and in a direction that is quite inconsistent with the antipathy of the common law toward unions and collective bargaining. It is true that there remain large enclaves of the common law within this basic statutory framework, and, as we shall see, the conflict between the underlying values of the common law and those of the statutes places a severe stress on usual judicial techniques. In trying to solve these problems, though, individual judges cannot buttress their own experience by the customary judicial recourse to a body of traditional legal learning and principle which is still valid for the modern world.

Second, individual judges and courts are only rarely involved in the industrial relations field. The primary administration of most of the law takes place in a specialized labour relations board or a labour arbitration board. Those few cases which do reach the court tend heavily to reflect the pathology of the collective bargaining systems—the apparent abuse of union economic coercion, or union control over the individual, or aberrations in the administrative process. A court necessarily lacks a feel for the variety of situations into which it might insert new doctrines or policies. In order to develop a deeper understanding, it would have to study reported decisions of labour boards and arbitrators or academic writings which collect and analyze the latter. Because this practice is almost unheard-of, the efforts of the courts continually betray the dangers of ‘absentee management’.

Thirdly, the adversary process in our courts is not aptly designed to overcome these deficiencies, even when they are recognized. In fact, the adjudicative process in labour relations is even more limited than usual in depicting the “policy facts” which are necessary for intelligent innovation. Most judicial decisions emerge from proceedings brought by a motion in weekly court, supported simply by affidavit evidence, often only from one side. The court does not have a chance to explore an issue in its concrete depths and to perceive its complex nuances in a record prepared through an adversary process operating at its peak.

Finally, I would add that these tendencies are all cumulative in detracting from the quality of judge-made law. The court is not able to compensate for its lacks in one direction by appealing to strengths in another.

Perhaps a more important deficiency of judicial policy-making in the field of labour law is the lack of legitimacy it inevitably exhibits. The nineteenth and early twentieth century judges had strongly favoured employers in their bid to stem the development of union power and had gradually and grudgingly moved to a stance of non-intervention when unions rode other
social forces to a position of strength. In the 1940's, the Canadian legislatures filled this legal void more or less comprehensively, and delegated the primary interstitial role of elaborating the statutory policy to administrative bodies. This historical trend strongly suggested the need for continued judicial restraint.

Institutional considerations reinforce the desirability of reliance on the legislature for innovation and reform. The issues usually involve major assumptions of policy and principle which are at a fairly high level of visibility. It is realistic to assume that these policies will form part of a party programme, figure in an election campaign, and receive ample legislative time for meaningful reform. The area is marked by a high degree of polarization between important economic interest groups. Almost all changes in the law will at least indirectly affect the balance of power between these groups, and each side is quite capable of gaining the ear of the government and making its wishes known.

It seems appropriate to require the side which wants a change in the law favourable to it to secure such a reform from the representative institution in society. This will likely produce the kind of bargaining and compromise of competing interests which is necessary for the perceived authority of a law which is designed to control, often against their perceived interest, the behaviour of large groups. Labour relations does not exhibit the degree of consensus, of shared purposes and established principles, which furnishes the premises for the kind of impersonal and objective reasoning that are necessary for legitimate law-making by appointed, tenured, and unresponsive judges (who, I might add, are rarely drawn from the same social strata as union members).

These are the social and institutional parameters into which we can fit the legal problems posed for the Supreme Court in the area and which will help us to evaluate the solutions they have promulgated. It is obvious that they point in quite a different direction than would a similar analysis of the propriety of judicial creativity in tort law or the criminal defences, for example. As we shall see, though, the demands of judicial restraint in the industrial relations area are quite complex, and the general principle does not by itself serve to resolve concrete issues. Moreover, each of these criteria of judicial competence speaks with varying weight to different kinds of legal questions, and we may well find exceptional situations where judicial inhibition is not an appropriate response. For the reasons I have sketched, though, I believe these will be exceptions to the usually appropriate stance of the Court.

BEHAVIOURAL DIMENSIONS OF THE SUPREME COURT'S LABOUR LAW DECISIONS

Before analyzing the reasoning and legal significance of the opinions of the Supreme Court in detail, I want to present, in tabular form, several
behavioural indices of the area as a whole. This will provide a comprehensive framework which will give some perspective to my critical examination of specific decisions. I would add that these tables are part of an ongoing study of trends in the work of the Court and can themselves be fully assessed only when presented as part of the completed study.  

The first table is intended to depict, in chronological form, the activity of the Court and the individual judges during the whole period.

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* Dissenting in part
O — Opinion in majority
O — Opinion in dissent
C — Joins opinion by Cartwright
There have been fifty-one cases during the twenty-year period, less than three per year. However, there were only fourteen cases in the first ten years and there have been thirty-seven cases during the Sixties. Labour relations law is becoming a more important part of the work of the Supreme Court as is graphically illustrated by the fact that there were a total of fourteen decisions in the last two years of the period, the same number as in the whole of the first decade.

At the same time, there has been a substantial decrease in the Sixties in the number of opinions written and dissenting votes registered in the cases. There were forty-six opinions and fifteen dissenting votes in the fourteen cases in the Fifties and only fifty-nine opinions and fourteen dissents in thirty-seven cases in the Sixties. Of the fourteen decisions in 1968 and 1969, eleven were unanimous and there was only one opinion in each. There has, thus, been a radical increase in solidarity in the Court (only one unanimous decision in the Fifties compared to twenty-four in the Sixties) but, as we shall see, this has not been accompanied by the writing of longer, more detailed, and more sophisticated opinions.

Though there was generally a much greater degree of individual participation by all of the judges in the Fifties, Rand and Kerwin JJ. had the greatest degree of involvement, each appearing in twelve of the fourteen cases and writing nine and seven opinions respectively. Cartwright, Fauteux and Taschereau JJ., who were judges throughout the Fifties, participated in thirty-three, twenty-three, and twenty cases respectively, and wrote, in order, sixteen, nine, and three opinions. Cartwright J. wrote six dominant opinions, all in the Sixties. Eight of the opinions written by Fauteux J. were in Quebec cases (all except Globe Printing) and Taschereau J.'s opinions, all in the Fifties, attracted only one concurrence. Martland J. has the highest degree of participation in the Sixties, thirty out of thirty-seven cases, but he wrote only six opinions, of which five were dominant. Strangely enough, he never once registered a dissenting vote. Ritchie and Abbott JJ., who wrote in five of twenty and seven of nineteen cases respectively, tended also to write influential opinions only in cases that emerged from their home regions of the Maritimes and Quebec. By far the most interesting judicial work in the Sixties has been that of Judson J. He participated in twenty-six cases and wrote fourteen opinions, ten of which were the majority opinions in the decision. He also wrote four dissenting judgments, one more than Spence J., who was the only other judge to write more than one dissent.

Though there has been a radical decrease in the number of opinions written per case, the average length of opinion has remained the same—very close to five pages each. Of course, this means that the actual discussion of the legal problem has declined in the Sixties because there is only likely one opinion in which the factual and procedural background of the case can be outlined. A rather crude test of the degree of complexity and sophistication of the legal reasoning in an opinion is the number of authorities cited and discussed. In the Fifties, there was a total of 150 citations in the 46 opinions

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3 Cases are fully cited infra where they are discussed in detail.
4 In his dissent in La Compagnie Paquet (1959).
5 All in western cases, though these are not, by any means, all the western cases.
in 14 cases, while in the Sixties there were 158 citations in 62 opinions in 38 cases. Though there is a certain degree of duplication in citation in the several opinions in one case in the Fifties, there was still a much greater reference to the total legal background in this period. Moreover, it is vitally important to remember that the cases in the Fifties comprised almost the total corpus of Supreme Court decision-making in the labour law field and there should have been a much greater reference to authority in the later years when there was a substantial body of opinion upon which to build. Instead, in 13 non-constitutional labour cases in 1968 and 1969, there was a total of only twenty-five citations in 17 opinions, almost all of which were directed to issues of judicial review rather than the substance of labour law. This is an important factual tendency to remember when we later focus directly on the kinds of decisions the Court was rendering at this time.

The next tables attempt to characterize the substantive policies reflected in the votes of the judges and the decisions of the Court over the whole period. I do not think it is unfair to suggest that the tacit assumption concerning Canadian courts, especially among academic commentators, is that the judiciary as a whole is rather unsympathetic to both unions and administrative agencies in their decision-making. The following tables raise a substantial doubt in my mind as to whether such an impression is valid for the Supreme Court.

The second table depicts the voting and decisional pattern in cases involving direct conflict between union and employer:
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* Voted for Union in part
+ Pro-Union
— Anti-Union
(—) Inconsistent Vote
I have excluded six cases where there was an important inter-union conflict even though the employer sided with one of the unions. I have also excluded five cases where the point at issue is the right of the individual union member and/or employee against the employer. There may be some debate about a very few of my inclusions or exclusions, but the forty cases in the table do reflect, I believe, the real dimensions of pro- or anti-union sentiment.

Of these cases which presented the Court with a choice between union and employer interests, the Court decided twenty-two in favour of the union and eighteen in favour of the employer. In the Fifties, these were divided eight to three in favour of the union and in the Sixties it was fifteen to fourteen for the employer. Up until 1969, the Union predominance had continued but in this final year of the period under study, the employer won seven cases out of seven. It is too early to say whether this is indicative of a real shift in sentiment for the future. However, over-all, this data is not indicative of any ideological bias against Unions on the part of the Court.

Of course, simple tabulation of votes and decisions cannot be decisive regarding judicial attitudes because it does not tell us anything about either the merits of the case or the significance of the decision rendered by the Court. If those decisions which reached the Court are not a fair sample (perhaps because Unions fought only those cases which they should have been strongly favoured to win on the law and facts), then statistical inferences may be distorted. Similarly, if the Union won relatively unimportant factual disputes but lost the major issues of principle, then again a review of judicial decisions alone will be deceiving. Only after a full review of the law and policy in the cases can one venture some conclusions about the direction of the work of the Court.

Stronger inferences can be made about the attitudes of individual judges from behavioural analysis of their voting patterns. At least by comparison with other judges on the court, we can discern continuities by comparing the reaction of various judges to the same fact-pattern. This at least is the theory behind the scaling of judicial votes. Unfortunately, any such inferences must be rather weak in the case of this Court because of differences in the makeup of the panel on different cases and because of the high degree of unanimity in voting (especially in the Sixties, where there appears to be a conscious effort to submerge dissent and to join behind the one opinion for the majority).

It seems clear that Rand J. and Judson J. are the pro-union members of the Court. Rand J. voted against the Union only in Orchard and Poje, and never directly for an employer. As we shall see, his conclusions in favour of the Union position in Newell, Globe, and McKinnon required a rather strong attitude in favour of the trade union movement. Judson J. voted

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6The cases are *B.C. Hotels* (1955); *Forest Industrial* (1962); *Zeballos* (1966); *Canadian Ingersoll-Rand* (1968); *Stedlebauer* (1969); *Tuyauterie* (1969).

7The cases are *Orchard* (1957); *McKinnon* (1958); *Stern* (1960); *Oil Chemical and Atomic Workers* (1963); *Hoogendoorn* (1968).

8I do find it interesting that a total of eleven cases out of fifty-one during the period were somewhat outside the usual primary focus of industrial disputes.
against the Union only in Dinham, Gaspe and three arbitration cases decided at about the same time. Again, as we shall see, his votes in favour of the union in the three B.C. successor entity cases, in OCAW, Gagnon, Hoogendoorn, and Northcott required substantial efforts on his part against strong opposing arguments.

Locke J. was equally strong in his attitude in favour of the employer, never once voting for the Union in a divided case (though he did go along in Newell) and making strenuous efforts for the employer in Aristocratic, Syndicat, and Traders. I would also assess Fauteux J. as relatively anti-union, as he voted for the employer in all eight divided decisions in which he participated (including Syndicat, Smith and Rhuland and Burlington Mills). Cartwright J. was quite balanced, dividing 15-12 in favour of the employer. It is difficult to say much about the other judges in the Sixties because of the almost total lack of dissent in the period, especially its latter part.

The next dimension which I want to consider in the Court’s work involves the degree of judicial deference to, or distaste for, the decisions of administrative agencies and boards. The third table depicts the attitude of the Court to Labour Board decisions:
### TABLE C:
JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY SCALE

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<th>Year</th>
<th>Company/Case</th>
<th>Judson</th>
<th>Abbott</th>
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- + Pro Agency Decision
- - Anti Agency Decision
(+ ) Inconsistent Vote
(- - ) Inconsistent Vote
There were twenty-seven such cases. The Labour Boards were upheld seventeen times, thirteen unanimously, and were reversed ten times, seven unanimously. The Boards’ record was 4-4 in the Fifties, and 13-6 in the Sixties. Again the evidence does not so far support any anti-agency trend but the same caveats stated earlier about inferences from pure decisions apply equally here. The British Columbia Board won eight of eight, the Quebec Board won five of seven, the Saskatchewan Board won two of three, the Ontario Board lost all three and the Canada Board lost both its cases (both involving the extension of federal constitutional authority in Quebec, both reviewed in the Quebec courts, and ultimately reversed by Quebec appointees to the Supreme Court).

Among the individual judges, we now find a real difference between Rand J. and Judson J. The latter voted fifteen times in fifteen cases to uphold the administrative agency, and as we shall see, pitched many of his opinions on the exclusiveness and unreviewability of the authority of the Board, not simply his agreement with them on the merits. Rand J., however, was much more influenced by his pro-union stance and was quite willing to over-ride an administrative decision which was adverse to the union. By contrast, Locke and Fauteux JJ. were relatively unimpressed by administrative decisions, voting to quash the decision in all divided cases, though they were much less pronounced in their attitudes than Judson J.. Other judges were fairly mixed in their voting patterns, though Spence J. is quite interesting. In the case of the real trend toward unanimity in the Sixties, he voted for the agency in dissent in Barbara Jarvis and against it in dissent in Zeballos. As we can see from his opinions in these cases, and in Galloway and Hoar Transport, he was very concerned to preserve the control of judicial review but prepared to exercise it by a sympathetic reading of the opinion and reasoning of the administrative decision.

Another reviewing problem involved the role of the court in the administration of the collective agreement where labour arbitration was established as the alternative and primary recourse for dispute settlement. There were a total of eleven cases in the area which reached the Court, nine involving grievance arbitration and two, interest dispute arbitration. Two of the grievance arbitrations led to direct suits in court, one by a party desiring a remedy to enforce the award, and one by a party who had lost in arbitration. Both interest-dispute arbitration awards were quashed in review, as were four of the seven grievance arbitration awards which were reviewed. There is no doubt that the degree of deference to arbitration awards is much less than is the case for Labour Board decisions and this is graphically illus-

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8 Eight were from B.C., seven from Quebec, three from Ontario, three from Saskatchewan, two from the Canada Labour Board, and one each from New Brunswick, Nova Scotia, Prince Edward Island and Alberta. Manitoba and Newfoundland escaped scrutiny.
9 In my judgment these were Globe Printing (1953), Smith & Rhuland (1953), Alliance (1953). They will be discussed in detail later on.
10 Munger (1964), L'Hopital St. Luc (1962).
11 Northcott (1967).
12 Dinkham (1959).
13 Union Carbide (1968); Hoogendoorn (1968); Port Arthur Shipbuilding (1969); Hoar Transport (1969).
trated by the fact that Judson J. wrote the opinion which established judicial review of arbitrators' awards, quashed three decisions on the merits and provided the alternative avenue of direct access to the courts. We can only speculate as to the reasons for this difference in attitude since, as we shall see, his opinions do not enlighten us.

I think it is true that a constant theme in the cases is the Court's desire to preserve its own jurisdiction to review administrative or arbitration decisions as well as to open itself up to direct claims for relief by litigants. We must remember this fact in appraising its deference to specific administrative decisions because a major significance of its opinions is to legitimize judicial review by lower courts which may not be as restrained in reviewing labour boards on the merits. Another continuous thread throughout the period is the Court's extreme sensitivity to claims of individual employees against unions, employers and both. The Court's decisions have, without exception, sustained these claims.

SUPREME COURT AND COLLECTIVE BARGAINING LEGISLATION

The chief legal development in Canadian, post-war, industrial relations was the enactment in the middle and late Forties of comprehensive legislation which legitimated and shaped collective bargaining between employer and union. Of critical importance in assessing the Supreme Court's role in the elaboration of these legislative schemes is the fact that in each case the primary responsibility for the development of the law was given to a specialized administrative agency. The Supreme Court, though, as the apex of the ordinary court system which would continue to supervise this administrative work, still had an important part to play in formulating the labour policy of our law. The vast bulk of the case law which is the subject of this paper involves the interpretation of collective bargaining legislation, and almost all of these cases entailed the review of an earlier Labour Board decision. What is the nature of the contribution made by the Supreme Court in this area?

There are three different kinds of problems which the cases reveal. First, how should the substantive issues be decided in the light of the relevant statutory language? Should the Court adopt an imaginative and innovative approach to assessing this language in the light of the underlying legislative

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15 Port Arthur Shipbuilding.
16 Port Arthur Shipbuilding, Union Carbide and Hoar Transport. I might add, at this stage, that these three cases involved review of arbitration boards chaired by law professors at Osgoode Hall Law School, two by the author of this article.
17 Northcott.
18 Orchard, McKinnon, Stern and O.C.A.W.
19 Northcott.
20 Hoogendoorn.
21 Excellent historical accounts of these legal enactments are contained in A. Carrothers, Collective Bargaining Law in Canada (Toronto: Butterworth's, 1965) chapters 4 and 5; and, H. Woods and S. Ostry, Labour Policy and Labour Economics (Toronto: MacMillan of Canada, 1962) chapter 3.
policies which animate the statute? Second, what should be the procedures through which the various Labour Boards would implement the law? In balancing the needs of flexibility and ease of administration against the demands of fairness in hearing the position of affected individuals, how closely should the Labour Boards be required to approximate the familiar adversarial procedures of the established judicial institutions? Finally, a question which cuts across both of those previously mentioned, what should be the attitude of a Court to the fact that it is deciding a matter which has already been passed on by a Labour Relations Board? How deferential (if at all) should a Court be to the opinions of the specialized (and presumably expert) tribunal, which the representative legislature has chosen to be the primarily responsible agency, and whose decision it has hedged about with as many protections as human ingenuity could devise.

Though it rarely rises to the level of explicit recognition in the Canadian legal mind, I do want to emphasize that the Court had an important choice as to the direction it would take in answering the last question. There is no doubt that the legislature in enacting a Labour Relations Act intends certain legal rules to be followed in certification, unfair labour practices, etc. However, a viable concept of law does not inevitably entail, either in logical or constitutional terms, that legal rules be ultimately administered in the ordinary courts. In fact, the Canadian legislatures demonstrated about as clearly as possible their wish that the administrative agency have the final say in giving legal meaning to the general language employed in the statute. The most important issue in this area was how much the Supreme Court would defer to this legislative judgment.

Not until 1953 did these questions reach the Supreme Court of Canada, and then the Court was presented with a rare judicial opportunity. Four different cases, involving four different Labour Boards, raising each one of these themes at least once and without any constraining judicial authority, were argued within a month in early 1953, and all of the decisions were issued on the same day in June. The Court could have used the specific problems in each of the cases in this quartet to illuminate the competing principles and policies of judicial review and development of the collective bargaining policy of our law. It could have formulated its own attitude in a systematic and rational fashion and thus given real guidance and direction to the lower courts and Labour Boards. In my judgment, these decisions—however defensible they are within their own narrow compass—are a total failure in this respect. Perhaps the best index of this fact is that, although there are no other relevant Supreme Court precedents which could have been used for enlightenment, no one of these decisions refers to any one of the others. The Court’s conception of its role was purely adjudicative, oriented towards the disposition of a specific dispute, rather than the task of intelligently developing a coherent fabric of general law.

In an important note Lyon, Comment — Metropolitan Life, to be published in (1971) 49 Can. Bar Rev., there is an explicit defence of this basic and tacit assumption of the Canadian legal environment. It would require another article to show why I believe that such a relationship between law and the ordinary courts is neither inevitable nor always desirable. Hence I will simply proceed on the assumption that the Supreme Court faced and then made a basic institutional choice in their first few cases in the labour relations area.
The first case with which I will deal is *Globe Printing*, in which the lower court judgment of Mr. Justice Gale was one of the better and more comprehensive opinions in the whole area of judicial review of labour board decisions. His decision was extremely influential in establishing the proposition that such decisions could be reviewed by way of certiorari, notwithstanding the best efforts of the draftsman to devise an effective privative clause. He also contributed to the development of the grounds for review, especially in respect of breach of the principles of natural justice. What I find most attractive in the opinion, though, is the sense that the judge attempted to gain a real appreciation of the type-situation in labour relations terms. Moreover, he sought this insight from a most obvious but rarely used resource—the related and analogous decisions of the Board itself. He used these decisions in order to define the framework within which he ultimately held that the Board's ruling in this specific case was in breach of natural justice.

Yet the heart of the issue ultimately eluded all of the decision-makers in the case, and not least the Labour Board itself. The Union had applied for certification and presented documentary evidence that a majority of the employees in the bargaining unit were members of the Union. In the month between the date of application and the date of hearing, it appeared that many of these members purported to resign from the Union. The Company, which was prevented by Board decisions from investigating this matter itself, sought to cross-examine the Union officer at the hearing but was not permitted to do so. The Board refused to investigate the matter for itself, saying merely that evidence of resignations from the Union was irrelevant and need not be discovered or elicited. It certified the Union without a vote on the basis of its majority membership among the employees. In these circumstances, Gale J. characterized the Board's error as a breach of natural justice because, while it granted a hearing, it refused to allow the Company a reasonable opportunity to present its case.

However, the problem was much more complicated than that. One can sense three underlying policy factors in the Board's determination. First, the administration of the Act required some cut-off point at which membership was to be determined and efficiency of administration required that it be some time before a Board hearing. Second, it was vital that the employer not learn at this stage who had joined the union, even though this might hamper its full presentation of its case, because of the dangers of job discrimination against the union members. Third, the Board wanted dissident

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25 The background to *Globe Printing* and the substantive problems which developed throughout the case can only be barely sketched here. The Union was certified without a written Board opinion. The ensuing litigation itself is a fascinating episode in Canadian legal history and deserving of in-depth treatment as a case-study in the legal process. Some of the policy and legal problems presented by the type-situation are ably canvassed in J. Finkleman, *The Ontario Labour Relations Board and Natural Justice* (Kingston: Industrial Relations Centre, 1965) 31-38.
employees to present their own case against majority union membership in order that it ensure that resignations, petitions, etc. had not been employer-inspired. The Board, at this time, early in the administration of the statute, was just beginning to articulate these considerations for itself and it received little help from the very vague language then used in the statute — “member in good standing”. Although related to the problems of natural justice, because of its effect on the employer's opportunity to make a full case against the union application, the gravamen of the Board error (if any) is a mistaken interpretation of the substantive provisions of the statute. If it had allowed on cross-examination, but ignored as irrelevant, the evidence of resignations, the substantive question would remain. Only if the Board was legally in error in its substantive judgment, and only if such an error of law is one that is reviewable on certiorari, could the Court legitimately quash the Board decision.

In the Supreme Court of Canada, this latter characterization seems to have been tacitly adopted by the Court (with the aid of the Ontario Court of Appeal). The judges speak of “declining jurisdiction” (Kellock J. and Fauteux J.), or “exceeding jurisdiction” (Kerwin J.). Still, no one clearly recognized that the Board was alleged to have made an error of law in interpreting the requirements of the statute, which led it to refuse (decline) to investigate a legally relevant factor, and thus eventually make an order of certification beyond its jurisdiction. If the Court had compared this case with other members of the 1953 quartet, Alliance on the one hand, a true natural justice case, and Canada Safeway on the other hand, a true legal and perhaps jurisdictional issue, it would have more aptly characterized the problem before it. It is only fair to add that a real difficulty in the case was the lack of an opinion from the Board attempting to explain its reasoning, and the total absence of argument to the merits in the courts. The decision of the Union to rest its case on the privative clause is some confirmation of the problems in adequately informing the court, through the adversary process, of the labour relations background against which the statute is to be interpreted. Fortunately the legislature ultimately stepped in to reverse the Supreme Court decision on the merits. It must surely be the case, though, that deficiencies in the argument for a verbally implausible reading of the statute heavily influenced the Supreme Court's attitude to this vital case in defining the judicial response to a privative clause.

Even with this background, a clear conflict of opinion did emerge concerning the issue of reviewability. Kellock J., who voted to quash all four decisions, stated:

A provision such as s.5 of the statute prohibits the court from questioning any decision which has been come to within the structure of the statute itself, but the statute does not endow the Board with power to make arbitrary decisions. The legislature must be taken to have been quite familiar with the principles applicable to decisions of inferior tribunals when questioned in the courts. It has not used apt language if it intended, as it cannot be presumed to have intended, to place either of the parties to such a proceeding as that here in question in a

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26 This was the situation in the Canada Safeway case which is discussed immediately below.

27 The Labour Relations Act, R.S.O. 1960, c.194 am. by S.O. 1960, c.54, s.35(2), presently s.77(j).
position permitting of no relief no matter how arbitrary any particular decision of its creature, the board, may be.\textsuperscript{28}

Cartwright J. (dissenting) held that any error in holding resignations irrelevant was non-reviewable because it was within the Board's jurisdiction, though he gave no reasons why. Rand J. formulated an intermediate attitude to reviewability in these terms:

\ldots The Board is admittedly a body with a limited jurisdiction, but a jurisdiction that, in many cases, depends upon the determination of questions of law as well as of fact \ldots

Every such enactment, consciously or subconsciously, lies with a general and vague but nonetheless real scope of action within which the body created is contemplated and intended by the legislature to act; and the privative provision, s.5, is designed to exclude the control of the courts within that area. In the absence of a clear expression to the contrary, we are bound by the principle that \textit{ultra vires} action is a matter for the superior courts: the statute is enacted on that assumption. Any other view would mean that the legislature intended to authorize the tribunal to act as it pleased, subject only to legislative supervision: but that is within neither our theory of legislation nor the provisions of our constitution. The acquiescence of the legislatures, particularly during the past fifty years, in the rejection by the courts of such a view confirms the interpretation which has consistently been given to the privative clause.

The real controversy lies in the determination of the boundaries of that contemplated scope; and when, as today, administrative bodies are regulating civil relations which formerly were not within the cognizance of the law at all, by what rule or standard are we to test the jurisdictional validity of their decisions? \ldots I doubt that the test can be anything less than this: is the action or decision within any rational compass that can be attributed to the statutory language? \ldots

But decisions of this nature on matters of fact and erroneous rulings in the course of a hearing are not, under this statute, for the courts; it is to the legislature that complaints against them must be addressed. It is to no purpose that judicial minds may be outraged by seemingly arbitrary if not irrational treatment of questions raised: these views are irrelevant where there is no clear departure from the field of action defined by the statute.\textsuperscript{29}

In the next case, \textit{Canada Safeway}.\textsuperscript{30} Rand J. elaborated on this thesis somewhat. Here the British Columbia Labour Board had certified a union to represent employees of the Company who operated machines that collected and correlated data about its operations. A bargaining unit under the Act could not include "a person employed in a confidential capacity"\textsuperscript{31} and the Company argued that this excluded these employees because they had access to and handled confidential information. The Board felt that such an extensive interpretation of the exclusion in the Act was inconsistent with its policy in the light of the emergence in business practice of large office organizations.\textsuperscript{32}

Even clerks who handled mail would be disqualified.

In reviewing this decision, Rand J. pointed out the complex character of the issue of when an employee is in a "confidential relation", especially when related to changing social and business conditions. He also felt \ldots the effects of a denial to this group of the privilege of being represented by a certified union must be taken into account in interpreting the statutory

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\textsuperscript{29} Id. at 28, 29 and 30, 3 D.L.R. at 572-73, 53 C.L.L.C. at 157.


\textsuperscript{31} \textit{Industrial Conciliation and Arbitration Act}, R.S.B.C. 1948, c.155, s.2(1) (a).

\textsuperscript{32} The Board's reasons were given in a letter enclosing a copy of the certificate to the solicitor for the respondent.
language.” Then, without any reference to his language in the *Globe Printing* case, he stated that “The task of evaluating all these considerations has been committed by the legislature to the Board; and so long as its judgment can be said to be consonant with a rational appreciation of the situation presented, the Court is without power to modify or set it aside.”

In this case, Rand J. was in the majority in upholding the Board, and Kellock J. in the minority in voting to quash it. The latter's very legalistic opinion relied on a Law Dictionary definition of “confidential”, held that this constituted the plain meaning of the language used by the legislature, and that considerations of collective bargaining policy, and the implications of social facts for it, were quite irrelevant. “Although it is for the Board to determine whether or not a particular person is brought within the statutory definition, the Board may not misconstrue that definition.” Any such error of interpretation is an error of law on the face of the record and reviewable on certiorari.

The attitude of Rand J. was, however, quite different in the other two cases in the quartet. In *Alliance*, he went out of his way to disagree with the Quebec Labour Board on an important substantive matter which was not at all necessary for the specific decision. The Union had begun an illegal strike and the Board, without notice or hearing, cancelled its certificate. (In fact, the order of cancellation was prepared even before the application for it was received from the employer.) The Supreme Court unanimously held that this was a breach of the principles of natural justice because it failed to hear the Union position on whether an illegal strike was “cause” for cancellation of the certificate, especially where other remedies and sanctions were specifically provided under the Act for the unlawful conduct. Rand J. went beyond this ground to hold that breach of the Act (including an illegal strike) could not be grounds for cancellation of the certificate. In this I think he has a very good argument but the question his previous two opinions required him to ask, but he did not ask, is whether the Board's decision was “within any rational compass that can be attributed to the statutory language.” As to this I think there can be no doubt that it was.

In the final case, *Smith and Rhuland*, the Court was asked to quash a Nova Scotia Board decision which refused certification to an otherwise qualified Union because of its alleged “Communist domination”, and to order the issuance of the certificate. Rand J. here held that word “may” gave the Board a discretion in deciding whether to certify or not. However, he then decided that the Board was not “...empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization.” His reasons

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34 Id. at 54-55, 3 D.L.R. at 649, 53 C.L.L.C. at 175.
35 Id. at 55, 3 D.L.R. at 650, 53 C.L.L.C. at 175.
38 Id. at 100, 3 D.L.R. at 695, 53 C.L.L.C. at 166.
were that Communist affiliation was not illegal and the Labour Board should be required to trust in the good sense and judgment of the members of the Union in rejecting the "dangers from the propagation of the communist dogmas" of their leaders. Again Rand J. failed to cite or quote his language in *Globe Printing* and *Canada Safeway*, or to try to show why the Board conclusion was not only *wrong* but *irrational*, or that it was the kind of decision which was peculiarly within the competence of the Court to quash.

Rand J. attracted the concurrence of Kerwin J. and Estey J., while Kellock J. wrote a separate opinion which quashed the Board decision because he held they had no discretion at all to refuse certification to a Union which satisfied the statutory conditions. His opinion consists merely in a detailed parsing of legislative language and does not address itself to the question of what might be the costs in other cases of refusing a discretion. Cartwright J. and Taschereau J. dissented, holding that this was a bona fide exercise of discretion and its correctness was not reviewable. Fauteux J. agreed with Cartwright J. and thus made no attempt to reconcile his decision that the Board properly exercised its discretion here, with his decision quashing a substantive error of law in *Globe Printing*.

These cases are disappointing, then, in their failure to make a good beginning at formulating a coherent view of the Court's role in developing the legislature's collective bargaining policy. On the other hand, I must add that the decisions rendered were fair and, I believe, substantively correct. They are not at all anti-union or anti-collective bargaining, and the Court is quite willing to allow the Labour Boards a certain measure of innovation. Though the Labour Boards are not treated with any great measure of respect, certainly their performance in *Alliance* was unworthy and in *Globe Printing* was inadequate. *Canada Safeway*, where the Board made only a meagre attempt to support its policy, was still upheld, *Smith and Rhuland* is a direct repudiation of a Board policy which was rationally defended, but then the Court was merely telling the Labour Board that it must obtain clear legislative authorization before it stigmatizes political associations as it did. This is precisely the kind of situation when deference to a specialized administrative agency with its own narrow interests is not appropriate for a generalist Court which is required to defend our society's basic values. The same is true of the demands of natural justice which were blatantly infringed in *Alliance*. The real and recurring problem is defining the proper ambit of review in cases ranging from *Globe Printing* to *Canada Safeway*, and this the Court clearly failed to do. The main objection to the Court's performance, then, lies in its failure to found its otherwise acceptable decisions on broader principles which would shape the further development of our law along the same lines.

Each of the three basic themes was the subject of many further decisions. About the problem of natural justice and Board procedure, we can be quite brief. Four cases have raised the question of whether a sufficient opportunity

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40 *As in Canada Safeway*, supra note 30.
41 *Compare L. Jaffe, Judicial Control of Administrative Action* (Boston: Little, Brown, 1965) 589 ff. on the rationale for judicial review and where it is appropriate.
was granted an affected party to present its case and in not one case has the Court sustained the objection. Two earlier British Columbia cases — Traders’ Service42 and Forest Industrial43 — Judson J. delivering the opinion of the Court in each instance, seemed to give the Boards wide control over their procedures, though the concrete situations were quite innocuous. The same can be said of Canadian Ingersoll-Rand,44 where the Company just did not attempt to appear in time. However, in Komo Construction,45 the Court went to the extent of holding that no hearing at all was needed where a pure question of law was raised on the Company’s objection. Fauteux J. relied on Forest Industrial, which certainly appears to be a totally different kind of case. In any event, the Court’s attitude is certainly one of great tolerance for the procedures adopted by the Board for reasons of its own efficiency.

Most of the cases which reach the Court involve the substantive interpretation of the labour legislation. All statutes necessarily leave many questions unanswered. The draftsman cannot foresee every conceivable future issue, nor can he always adopt language which clearly expresses the legislature’s wishes about those issues he has foreseen. In deciding concrete disputes which arise, the Labour Board must develop the appropriate rules for these situations by elaborating the framework created by those provisions which are clear in meaning. These legal decisions may be taken to Court by the losing party who asks that they be reversed. The Court must ask itself if it agrees with the Board on the legal merits and/or if it is the kind of decision in which it is appropriate for the Court to review the Board.

Three questions arose in 1955 and 1956 which illustrate the kinds of marginal but important disputes which arise in the interpretation of statutes. In British Columbia Hotels,46 the question was whether a small segment of the employees in a multi-employer unit which was represented by one Union could break away and apply for separate certification through another Union (against the wishes of the majority in the larger, established, and certified unit). The Court agreed with the British Columbia Board that it could. In Marshall-Wells,47 the question was whether a Union representing the employees of one Company could compel the latter to negotiate with a bargaining committee which contained employees (union members) of its competitors. The Court agreed with the Saskatchewan Board that it could. In F. W.
the question was whether the Saskatchewan Board could properly refuse to decertify a Union, when all the statutory conditions were fulfilled, simply because the employer furnished financial and moral support for the employee application. The Court held that it could not refuse to decertify in this case but the opinion is somewhat vague about whether it is primarily based on a rejection of the Board's findings of fact in the case. Locke J. does state, though, that the Board could not refuse to give effect to the request of a majority of the employees for decertification, notwithstanding that the employer had helped in their assertion of their rights. He stated this as a proposition of law despite his belief that the Board did have some reasonable discretion to reject such a decertification application if, for instance, it was too early after the certificate was granted.

Two things strike the reader about each of these cases. First, the Court treats each issue as one which it has the right to decide of its own motion and irrespective of the opinion of the Board. The question which the Court asks is whether the Board decision, in its opinion, was correct, not whether it was rational. Second, the Court's opinions are very poor and very sparse. No authorities of its own are cited and there is little or no argument one way or the other, based on either legal or policy considerations. The Court does not exhibit the realistic sense of the labour relations type-situation which was characteristic of Rand's opinions in the 1953 quartet, and does not seem to appreciate that this might be relevant.

The appointment of Judson J. in February 1958, seemed to change the situation somewhat. His more liberal attitude to procedure has already been noted. In 1959 he wrote one of the best opinions in the whole area in *La Compagnie Paquet*. The issue here was whether the check-off clause (the Rand Formula) was a "condition de travail" such that it could be a binding part of a collective agreement. In disagreeing with the very legalistic view that this clause involved merely the financial administration of the Union, and not the conditions under which an employee must work, Judson J. offered a classic explication of the nature of the collective agreement, the relationship between the latter and the contractual rights of the individual employee, and the compulsory character of the Union representative capacity. He clearly held that a Union was given exclusive bargaining authority for the group, irrespective of individual consent, and that the terms it negotiated bound everybody in the unit, whether they were union members or not and whether they liked them or not. He refused to make formal distinctions between different provisions or to bring into the law of collective bargaining private law concepts which he felt would frustrate the operation of the Act. Instead, he looked at the real nature of a check-off clause, its significance for employees, and the fact it has come into common use in collective agreements, and held that it was the kind of provision which the Act contemplated

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would be negotiated by collective bargaining representatives with the usual statutory results.\footnote{The opinion of Judson J. is reminiscent of his very fine work in Fleming v. Atkinson, [1959] S.C.R. 513, which is probably the best tort judgment of the twenty-year period. I have discussed it in detail in the article cited supra note 2. Unfortunately, the Paquet holding was artificially distinguished in Building Services Employees v. L'Hopital Saint Luce and Jewish General Hospital, [1962] S.C.R. 776, aff'd [1960] Que.Q.B. 875 (Que.C.A.). The panel did not include Judson J. and did not give reasons.}

Judson J. also demonstrated this creative, innovative attitude in the 1962 case of Oliver Co-op Grower's Exchange.\footnote{B.C. Labour Relations Board v. Oliver Co-operative Growers Exchange (1963), S.C.R. 7; rev'd (1962), 32 D.L.R. (2d) 440 (B.C.C.A.).} Here the Court upheld the decision of the British Columbia Labour Board to use a section allowing it to reconsider and vary its own decisions to support a substantive right to continued certification by a new union created out of the merger of nine locals. His attitude towards the nature of what he called the "plenary, independent power" claimed under Sec. 65(2) is expressed as follows:

It is, in my opinion, a very necessary power to enable the Board to do its work efficiently and the present case affords an illustration of the need for it. Employees in a certain industry, organized in nine locals, decide to combine in one local of a new union to perform exactly the same function as the fragmented union and to present a continuity of interest, property, management, representation and personnel.

When met with an application by a successor union, what useful purpose could the Board serve by compelling decertification proceedings for the nine old locals and an application for certification of the new local 1572 when all this could be done on notice to the interested parties under s. 65(2)? The essential problem before the Board was one of representation of a group of employees and concepts concerning change of entity, derived from the law of companies, afford no assistance to its solution. Obviously Local 1572 was a new and different association of employees but it was a successor union.\footnote{Id. at 12.}

In White Lunch,\footnote{B.C. Labour Relations Board v. White Lunch Limited, [1966] S.C.R. 282; rev'd (1965), 51 D.L.R. (2d) 72 (B.C.C.A.). This case is discussed in detail in Hickling, An Employer's Inheritance in Labour Law (1967-68), 9 Cahiers de Droit 462 at 474-78. The kind of imaginative work which can be inspired in lower courts by creative Supreme Court decisions such as White Lunch is exemplified by Canadian Brotherhood of Railway Transport and General Workers v. B.C. Airlines Ltd. (1970), 70 C.L.L.C. 14,064 (B.C.S.C.).} the same question arose, but with respect to the successor employer. Though Judson J. sat on the case, Hall J. wrote the opinion, following the Oliver Co-operative case. His equally liberal attitude is evidenced by the following passage:

The respondent's main contention is that s. 65(3) does not give the Board jurisdiction to amend the orders previously made in the manner done on February 13, 1962. Counsel for the respondent, citing well-known authorities, emphasized that the provisions of the Labour Relations Act being in derogation of common law rights should be strictly construed. On the other hand, counsel for the appellants urged that the Labour Relations Act was remedial legislation and should be liberally construed.

Whatever merit the arguments of the respondent had at the beginning of labour relations legislation, it seems to me that in the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes, is legislation in the public interest, beneficial to employee and employer and not
something to be whittled to a minimum or narrow interpretation in the face of
the expressed will of legislatures which, in enacting such legislation, were aware
that common law rights were being altered because of industrial development
and mass employment which rendered illusory the so-called right of the individual
to bargain individually with the corporate employer of the mid-twentieth century.54

Finally, in Zeballos,55 the Labour Board used this same power to cancel
a representation vote between an incumbent and a new applicant union, and
to certify the latter, because the Company put into effect higher wages under
a new Agreement negotiated with the incumbent during the representation
campaign. In an opinion written by Martland J., the Board is held empowered
to make these decisions, and the sentiment of the Court has apparently
changed radically from a case such as F. W. Woolworth.

On the other hand, developments in the Court were not totally unmixed.
Two important decisions, Barbara Jarvis66 and Burlington Mills,37 were issued
on the same day, March 23, 1964. In the latter, the Quebec Labour Board
excluded from the bargaining unit employees under 16 years of age, thus
giving the Union a majority representation, and then certified it. Abbott J.
(Taschereau and Judson JJ. concurring) held that the decision of what was
an appropriate bargaining unit, and who should be included or excluded, was
within the sole jurisdiction of the Board and could not be questioned in
Court. He distinguished Alliance and Globe Printing (though he did not
mention Smith and Rhuland or F. W. Woolworth). Fauteux J. wrote a dissent
in which Cartwright J. concurred.

In Barbara Jarvis, the Ontario Board held that it had the power to order
reinstatement of a person who was discharged for union activities though she
was a supervisor and thus could not be an “employee” for purposes of collect-
ive bargaining under the Act. The legislation used the term “employee” in the
collective bargaining sections and the term “person” in the sections protecting
the right to engage in union activities. This time Cartwright J. and Fauteux J.
attracted Taschereau, Martland and Hall JJ. to the opinion of the former
(Ritchie J. agreeing in a separate opinion) to hold that people who could
not be “employees” could not be protected under the Act. “Person” was
given a wider meaning only to the extent of protecting a prospective
“employee” who was not as yet hired. This alleged error of law was held to
be reviewable because it went to the jurisdiction of the Board and thus could
be reviewed under Globe Printing and Alliance. No reference was made to
Burlington Mills, nor was any test laid down as to how to distinguish a
jurisdictional error from one that is not.

54 Id. at 292-293.
55 Zeballos District Mine & Mill Workers Union v. B.C. Labour Relations Board,
407, 64 C.L.L.C. 15,511; aff’g [1962] 35 D.L.R. (2d) 375 (C.A.). The extensive
opinions in the Labour Board decision are reported in (1961), 61 C.L.L.C. 16,218
(O.L.R.B.).
57 La Commission des Relations Ouvrières de la Province de Quebec v. Burlington
Three dissenting opinions were written, a brief one by Abbott J., who found the Board decision right and, in any event, unreviewable, and one by Spence J., who thought the Board decision was reviewable but also was right, on the merits. The latter two were excellent opinions on both the substantive issue and on the issue of reviewability. It is interesting that only those who hold the Board decision correct really delve into the legal question of whether it is reviewable even if it is wrong. Equally interesting is the fact that the debate between Judson and Spence J. centres around the significance of three recent administrative law decisions, all outside the collective bargaining context, which were written by Judson J. himself. In effect, Judson J. interprets the development of certiorari law as preventing the Court from labelling what, in its view, is a substantive error in interpreting the provisions a jurisdictional error, and then quashing the decision irrespective of a private clause.

I believe Spence J. is correct in arguing that the precedents discussed need not be read as requiring Judson J.'s conclusion, and it is obvious that he does not want to deprive the Court of the right to quash decisions which he finds erroneous. Spence J. subsequently stuck to this opinion in Galloway against Judson J., and then voted to reverse what he thought was an erroneous Board decision in Zeballos. The difficulty with Spence J.'s argument though, is that he also gives us no rational test for distinguishing jurisdictional and non-jurisdictional errors for purposes of review. He nowhere asks why one kind of allegedly invalid decision should be reviewable and another not? At least Judson J. has given us the beginning of a test in a quotation from Mr. Justice Dixon of the High Court of Australia.

The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary constitution, the interpretation of provisions of the general nature of reg. 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing

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58 Mr. Justice Abbott stated in very pithy terms his attitude toward judicial review of labour board decisions.

The primary purpose of the Labour Relations Act is to promote harmonious industrial relations within the province. A board such as the Labour Relations Board, experienced in the field of labour management relations, representing both organized employers, organized labour, and the public, and presided over by a legally trained chairman, ought to be at least as competent and as well suited to determine questions arising in the course of the administration of the Act as a Superior Court judge.

In enacting s.80, the Legislature has recognized that fact and has indicated in the clearest possible language that the workings of the Board are not to be unnecessarily impeded by legal technicalities. The duty of the Courts is to apply that section, not to attempt to circumvent it. Jarvis v. OLRB, [1964] S.C.R. at 506, 44 D.L.R. at 412-13, 64 C.L.L.C. at 845-38.


its proceedings or the exercise of its authority or has not confined its acts within
the limits laid down by the instrument giving it authority, provided always that
its decision is a bona fide attempt to exercise its power, that it relates to the
subject matter of the legislation, and that it is reasonably capable of reference to
the power given to the body.63

This is quite reminiscent of the language of Rand J. quoted earlier and
it is remarkable (but typical of the Court) that his formulation is not utilized.

If, however, the law of judicial review is to incorporate the distinction
between jurisdictional and non-jurisdictional errors of law, on any coherent
theory of such a distinction, I feel that the issue in Barbara Jarvis would be
jurisdictional. The result of the decision of the Board is to extend its power
and the reach of the statute into quite a distinctive field of relationships. It
is very different from most of the cases which have reached the Court and
which are concerned with subsidiary legal problems in the administration of
the certification process. If the point of a theory judicial review which is
limited to jurisdictional errors is to confine the authority of the administrative
agency within certain key boundaries, then the situation in Barbara Jarvis is
one in which review by an impartial court of this important extension of the
Labour Board is warranted.63 It is unfortunate that the Court did not use
this case, and the contemporary “successor” cases as examples of “review-
able” issues which would have begun the process of giving some content to
the standards which are supposed to limit the power of the reviewing court
itself. The unfortunate effects of this failure are exemplified in the last case
I will discuss — Metropolitan Life Insurance.

The real deficiencies in Barbara Jarvis concern the techniques of statu-
tory interpretation adopted by the majority, which are not responsive to the
arguments made by the much more adequate approach of Spence and Judson
J.J.64 The majority reasoning was confined to the linguistic and analytical
level. Even at that level, though, there is no certain answer to the contention
that “person” is clearly wider in connotation than “employee”. It is true that
“person” might be designed to include only potential employees, but it could
have been given the wider meaning contended for by the Board. Since each
reading is linguistically reasonable, the Court ought to show that the objectives
and structure of the statute support the meaning it imputes to the language.

As the minority pointed out, the distinction between “person” and
“employee” makes real functional sense, because the latter term is used with
reference to the certification provisions of the Act, the former in the unfair
labour practice area. The reasons which justify exclusion of non-employees
from certification and bargaining do not necessarily support their exclusion
from the protection against discrimination on account of union activities. It
is true, as the dissent in the Labour Board itself pointed out, that union
activities by supervisory personnel might interfere with proper performance
of their job. However, if there is real evidence of this (and the Board found

at 845-41-42. Quoted from R. v. Hickman (1945), 79 C.L.R. 598 at 614.
64 Judson’s opinion is of the same quality as his work in La Compagnie Paquet,
supra note 49.
there was not in this case), discharge is justified for the legitimate reason of job-related inadequacies, and not directly on account of union membership. Moreover, the area of “persons” excluded from “employee” status is much wider than the “supervisor” category which was the subject of *Barbara Jarvis* itself. It seems inconsistent with the imprimatur placed by the legislature on the values of collective bargaining and freedom to engage in union activities that individuals be subjected to penalties for such participation simply because they are as yet excluded from certification. But if there are good reasons for this result, we will not learn them by reading the majority opinion.

The final decision of the Supreme Court in this area, *Metropolitan Life Insurance*, displays all of the worst aspects of the process of review of Labour Board decisions in the Court. The inadequacies of the Court's work in this case are particularly inexcusable given both the Board's effort to squarely confront the legal and policy issues involved in the certification process, and the illuminating lower court opinions of Fraser and Laskin JJ. on the appropriateness of judicial review of the decision. In each of these respects, the Court was much more favourably situated to deal with the issues than in *Globe Printing*, sixteen years earlier. The sparsely reasoned Supreme Court decision, reversing the Board at the behest of the Company, was unanimous, and the only opinion was delivered by Cartwright J. on behalf of Martland, Ritchie, Spence, and Pigeon JJ. It is cause for some lament that Judson J. was not assigned to this case so that those lawyers and judges who read only the decision of the highest court in a particular case would not be deprived of some insight into the complexities of a problem the Supreme Court dismissed so casually.

The Union, the Operating Engineers, applied for certification on behalf of the building maintenance and cleaning personnel of the Company. Under the terms of the union constitution, the employees were not qualified to join the Union. Unequivocal and undisputed evidence showed that other non-qualified employees had been admitted to full rights of membership irrespective of the formal terms of the constitution. Certificates had been issued on this basis to this Union for similar units on several previous occasions. All this was founded on a long-standing practice of the Ontario Board of interpreting the term “member” for purposes of the certification section as requiring a uniform minimum standard irrespective of the constitution, and then accepting the practice and testimony of responsible union officers in determining the eligibility of those who satisfied the conditions (signing the application form and paying an initiation fee). I shall not enter into a discussion of the policy merits of these actions of the Board but it is of critical importance in construing the provision that this was a long-standing, widespread, established practice of the Board in interpreting the section, and that the legislature had not seen fit to reverse it despite its several periodic reviews of the statute. As

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66 The background and the legislative consequences of the Supreme Court decision are recounted in detail in a Comment, (1970) 28 Fac. of L. Rev. 109.
we shall see, the approach adopted by the Court enabled it to avoid this difficult question of statutory interpretation — the significance to be attached to long-standing administrative interpretation of a statute which has apparently been tacitly ratified by the legislature. The sensitivity of the interpretive techniques of the Court in divining the statutory policy is perhaps best indicated by the hasty reversal of the decision in the legislature — even retrospectively to undo the real harm it was causing.

Although phrased somewhat differently, both Fraser J. and Laskin J. A. adopted basically the same point of view towards judicial review of the error. In doing so, both (and especially Fraser J.) extensively reviewed the relevant case law in the Supreme Court, the lower courts, and in the English tradition. A developing trend was perceived and adopted which I would state in the following terms. The certification provisions in the Act set out a series of legal requirements which, when satisfied, authorize the Board to issue a bargaining certificate. Certain procedures must be fulfilled by the parties and the Board. There must be a proper “trade union”, “employee”, “member of the Union”, “appropriate bargaining unit”, sufficient percentage of membership, a representation vote, etc. The Board, which primarily administers the statute, must decide whether in fact these conditions are satisfied and may, in certain marginal or penumbral cases, have to determine the proper meaning to be imputed to the general language of the statute. Any such decision involves conclusions of law which a reviewing Court may or may not consider justified in the light of the language and structure of the statute. If the alleged error of law appears on the face of the record, then it is reviewable via certiorari, although the court may or may not exhibit a degree of deference to the conclusions of the expert administrative tribunal. If there is a privative clause in the Act, though, all such errors of law are unreviewable unless they affect the “jurisdiction” of the Board, because they are “collateral” or “preliminary” to the function or inquiry which has been confided to it. A very strong privative clause appears in the Ontario Act and thus it is important for the Court to determine, for purposes of this case, the appropriate distinction between jurisdictional and non-jurisdictional errors. For this purpose, the provisions of the Act and the analogous decision of the Court in other certiorari cases, as well as the rationale for the distinction, must of necessity be the primary basis for the Court’s decisions about whether it is empowered to review.

There is absolutely no such analytical definition of the problem in the decision of the Supreme Court. Its reasoning can be summarized as follows. The Board asked itself whether the status of the employees in the Union

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67 One might compare the contrary attitude evinced in Co-operators Insurance Association v. Kearney, [1965] S.C.R. 106, a tort decision discussed in detail in my article cited supra note 2. Here the court held that failure of the legislature to reverse a well-known Court of Appeal decision when it re-enacted the statute meant that it approved of the law represented by the decision. If that was a valid argument in that case, then, a fortiori, it must be true here, given the relationship of the O.L.R.B. and the Department of Labour in proposing legislative revisions.

68 The Labour Relations Act, R.S.O. 1960, c.202, ss.1(1) (ga) and 77(4) new by S.O. 1970, c.3, ss.1 and 2.
satisfied the conditions it had established in its own practice; it should have asked itself whether the employees were "members of the Union within the meaning of Sec. 7(3) of the Act"; hence it failed to ask itself the question remitted to it; hence it "stepped outside its jurisdiction" (a new, barbaric phrase in the law of judicial review?), and the privative clause does not prevent the certificate being quashed. The Court does not find it necessary to deal with the authorities and thought it sufficient to refer to certain pages in a recent House of Lords decision\textsuperscript{69} and to the \textit{Globe Printing} case.

The reasoning of the Court was pure nonsense, as is indicated by passages throughout the judgment. The Board asked itself the right question — the meaning of the term "member" in Sec. 7(3) — but it arrived at a different answer than this Court. It felt that "member" for purposes of certification meant someone who satisfied its own conditions.\textsuperscript{70} The Supreme Court tacitly assumed that "member" in the statute meant a person who satisfied the formal conditions in the Union constitution, perhaps under the "contract" theory of union membership enunciated in \textit{Orchard} and \textit{Faramus}.\textsuperscript{71} Perhaps the Court was right, but some cogent argumentation might have been helpful. It is intellectually disreputable for the Court to charge the Labour Board, which spent several pages in an opinion discussing the question, with failure to ask the question, simply because the Court disagreed with the answer.

The result of this tactic, though, is that we have regressed to the stage of \textit{Globe Printing} in trying to create a coherent, reckonable law of judicial review. At the heart of the function of a Labour Board under collective bargaining legislation is the certification process. Besides the plethora of lower court Canadian decisions dealing with the problem of defining the Board's role in interpreting the vitally important conditions for certification, we have several Supreme Court decisions on each of the points. \textit{Globe Printing} dealt with the question of "membership in a trade union" and the effect of resignation. The decision was reviewed and quashed. \textit{Canada Safeway} dealt with the interpretation of the term "employee" — in particular the exclusion of employees "in a confidential relation". The decision was reviewed and upheld. \textit{Smith and Rhuland} dealt with the question of a proper "trade union". It was reviewed and quashed. \textit{B.C. Hotels} dealt with the question of the "appropriate unit". It was reviewed and upheld. \textit{Trader's Service} dealt with the question of whether there was an "employer-employee" relationship between the union members and the Company. It was held unreviewable because it was the main issue for the Board to decide, not "collateral" to its jurisdiction. \textit{Burlington Mills} dealt with the question of the appropriate bargaining

\textsuperscript{69} \textit{Ansimmic Ltd. v. Foreign Compensation Commission}, [1969] 2 W.L.R. 163.

\textsuperscript{70} One can see this quite clearly from its decision in (1967), 67 C.L.L.C. 16,026 at para. 11. The Court meted out the same treatment not long before to the arbitrator's opinion in \textit{Port Arthur Shipbuilding}, discussed infra.

unit. It was held unreviewable. Noranda Mines\textsuperscript{72} also dealt with the appropriateness of the bargaining unit, this time with reference to the timing of certification during a period of rapid build-up of the work force, and the Court held this question to be within the jurisdiction of the Board and thus unreviewable. Stedlebauer\textsuperscript{73} dealt with the question of whether the union was a "proper bargaining agent" (in a situation which raised the same functional problem as Metropolitan Life). The Board decision was reviewed and quashed.

It is impossible to perceive any real pattern in these decisions. Perhaps the Court does not really care about the issue of reviewability. If it agrees with the decision, it is unreviewable. If it disagrees, it is reviewable and will be quashed. If this is the Court's attitude, one wonders who is to keep the Court itself within its proper jurisdiction and in compliance with the relevant law binding on it. Perhaps these cases can be explained in terms of the existence of a privative clause barring review for simple error of law but allowing review for jurisdictional errors of law. This latter theory post-dated Globe Printing and would reconcile Canada Safeway and B.C. Hotels with Trader's Service and Burlington Mills. Moreover, the Court adopted the distinction between jurisdictional and other legal errors in an opinion of Martland J. in Stedlebauer, and this case was referred to and discussed by Laskin J.A. in Metropolitan Life. The failure of the Court even to mention it in its own opinion in the latter case is totally inexcusable. I feel the distinction between jurisdictional and non-jurisdictional issues, based on substantive legal requirements in the statute, is not ultimately tenable. Perhaps constitutional law (Eastern Bakeries),\textsuperscript{74} matters of basic public policy (Smith and Rhuland), natural justice (Alliance) or procedural requirements (Trader's Service) can be handled in that way, but no defensible grounds have been articulated in respect of the typical kind of question. Either a principle of full review, or no review, or review only in terms of the "rational compass of the statute" must be adopted if we are to have any law in this area at all.\textsuperscript{75} It seems safe to predict that only the Supreme Court can give us this kind of principled direction, but recent indications are that we will have to wait some time for it. It is also sad that the cavalier attitude which we will see exhibited towards ad hoc labour arbitration boards has apparently infected the Court's approach to these permanent administrative agencies, which had hitherto been treated with somewhat greater deference and care.


\textsuperscript{75} The kind of analysis which is vital to a rational system of judicial review is depicted in such papers as Abel, Appeals Against Administrative Decisions: In Search of a Basic Policy (1962), 3 Can. Public Admin. 85; Winter, Judicial Review of Agency Decisions, [1968] Supreme Court Review 55.
In no area of collective bargaining law is the articulation of, and adherence to, the proper role of the judicial process so difficult as in the field of strikes and picketing. The cases which arise are paradigm instances of the pathology of the on-going system of collective bargaining and thus create a grave danger that the courts will have a very distorted view of the functional demands of such a system. Second, the process of rational adjustment of competing interests has broken down, and the parties have decided to resort to weapons of self-help in the economic struggle. Not only may the Courts not perceive the legitimacy of occasional conflict and warfare within the total system, but there is also the danger that its decisions will provide an unjustified imbalance in such a conflict by limiting the weapons available to one side or the other.

In functional terms, how should the Court characterize strikes and picketing — the weapons used by unions in their industrial conflict with employers? A strike is a concerted withdrawal of labour which is designed to inflict economic harm on the employer in order to coerce him into accepting the union demands. Not only is such a tactic not inherently undesirable but in fact it is a logically required component of a system of free collective bargaining. It is true that it may be economically wasteful to society and a not so very rational method of resolving differences between the parties. However, as long as the employer is permitted to utilize the powers of passive resistance afforded by the laws of property in an equally irrational and coercive way, it is unfair for a Court, which has no warrant to impose a settlement of the dispute, to deprive the union of its own weapons of response. Peaceful picketing is primarily significant as a means by which a union which cannot successfully shut down an employer through a primary strike, may organize a boycott through appeals to loyalty. As long as unions adhere to the ordinary criminal and tort law which is applicable to everyone, judicial restraint would require that the court not impose on unions any special limitations which would distort this economic struggle.

Such an economic analysis suggests that the most desirable response would seem to be judicial neutrality. The Court should leave any significant policy-making to the legislature where both sides have a sufficient group leverage to be able to obtain statutory reform if this is warranted by public opinion. There are, however, several flaws in this approach. In the first place, our legislatures have been unwilling to provide a comprehensive framework within which the pathological side of collective bargaining can be analyzed (in noteworthy contrast to its exhaustive regulation of the on-going system of bargaining). Especially in the area of picketing, most Canadian governments appear anxious to avoid the self-inflicted wounds that would likely result from legislative action in this emotion-laden field.

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78 I have relied on several comprehensive studies of the law of industrial conflict, including especially: Carrothers, supra note 21, Part III; I. Christie The Liability of Strikers in the Law of Tort (Kingston: Queen's University, Industrial Relations Centre, 1967); and H. Arthurs, Tort Liability For Strikes in Canada (1960), 38 Can. Bar Rev. 346.
Second, the Court cannot really remain neutral — for it cannot decide not to decide. The common law of torts includes a set of doctrines — purportedly of general application but as a practical matter largely confined to, and developed almost solely within, the labour context — which can be utilized, especially by management, in limiting the economic and tactical leverage of its opponent. As we shall see, the doctrines in question are verbally expressed at a very high level of abstraction which leaves ample room for judicial elaboration of the law, in the light of the judges’ personal attitudes towards the parties in conflict.

Developments in the post-war era made the decisions of the Supreme Court of critical importance. The English courts, who originally formulated the torts and generally shaped the growth of our common law, severely restricted the reach of their doctrines in controlling union activity. The legislatures in Canada formulated a regulatory scheme which purported to legitimize collective bargaining and to channel it within defined institutions and standards, and these policies were radically different from legal attitudes prevalent at the time the tort doctrines were first being used to hamper union activities. And, as I have said earlier, the doctrines themselves were expressed with no functional relationship to the industrial relations context and the legislature refrained from giving any unequivocal direction in its otherwise comprehensive statutory framework. In such a doctrinal setting, the Court logically had to support one side or the other in elaborating the established legal standards, simply because it was institutionally required to decide the instant case on the basis of general reasons.

It is surprising to note that this very complex legal situation, which has generated so much litigation in the lower courts, and which involves large organizations (unions and employers) with long-run institutional interests in the state of the law, should produce only four decisions in twenty years by the Supreme Court concerning the legality of picketing (several other decisions in the present era involve remedies for, or the peripheral effects of, strikes). Perhaps the reason for this is that most of the litigation actually involves suits for an interim injunction, although, in form, the legal rules create a right to damages in tort. Whatever the explanation might be, these four cases come in two pairs which form a fascinating contrast in the judicial process. The first two, Newell and Aristocratic, occurred about 1950, at the beginning of the post-war period, and immediately after the legislative stamp of approval was firmly placed on collective bargaining with unions. The second two, Therien and Gagnon, were decided around 1960, after a decade of judicial experience with the established collective bargaining systems, which perhaps re-

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77 The high-water mark in English law was the two cases of Crofter Handwoven Harris Tweed v. Veitch, [1942] A.C. 435; Thomson D.C. v. Deakin, [1952] Ch. 646 (C.A.).
Aristocratic was concerned with the picketing of several outlets of a restaurant by a union which was certified to bargain on behalf of the employees in only one of them. The picketing was quite orderly and peaceful (usually by only two pickets parading on the front sidewalk) and apparently it was rather effective in reducing restaurant business. The union had asked for certain terms in an agreement which had been rejected by the employer and by a majority report of a conciliation board. The union did not take a strike vote, presumably because by this time no employees in its unit still belonged to the union; furthermore it still wanted a union shop for these employees as a term of the agreement. The union engaged in picketing the restaurants in order to force acceptance of its original bargaining proposals and the degree of its support among the employees was perhaps registered by the fact they all continued to work. Of course, the union had never been certified or evinced any interest in the two other outlets which were picketed. We do not have here the common situation of striking employees who are picketing an employer who has been able to resist them and their union by hiring strike-breakers.

The concrete factual situation, then, did not present a very sympathetic picture to the Court, and there were several legal doctrines — both statutory and common law — which could have been used to proscribe this conduct. In fact, the majority of the British Columbia Court of Appeal did just that. The third judge, a dissenter on the British Columbia Court of Appeal, disagreed, as did a 5-2 majority on the Supreme Court of Canada. It is not necessary to dwell on the legal issues in nice detail for our purposes. The legislation could have been interpreted as requiring a strike or ratification vote of the employees before any economic pressure was appropriate, whether or not that pressure took the form of a strike. The Criminal Code dealing with “watching and besetting” could have been interpreted as inapplicable to peaceful picketing which had as its object economic coercion. The law of nuisance could have been used to characterize as tortious the union activity in front of the stores as a tort because it interfered with the profitable enjoyment of property. The picketing of the other outlets, where there were no bargaining rights could have been termed an illegitimate and economically harmful intrusion into the private affairs of the employer and his employees, in which the Union had no business involving itself. In fact, each one of these positions was adopted by some judge in the hierarchy, and most were adopted by several or all of the judges who voted against the Union.

There were good legal reasons, of course, in favour of the opposite conclusion with respect to each issue and those reasons were eventually adopted by the Supreme Court majority. Much more decisive in this case, or at least so it seems to me, were the basic attitudes towards the union activity of picketing which were brought to bear by the judges. The British Columbia Court of Appeal majority (especially O'Halloran J.A.) and the Supreme Court dissent (written by Locke J.) characterized picketing as inherently illegal at common law because it was a coercive technique which affects the enjoyment of private property and caused economic harm to employers. Any picketing is a common law “nuisance” if it is likely to be effective in bringing
pressure to bear on the employer. These judges required that the activity find specific legal authority in legislation, and then interpreted the relevant legal possibilities in a reasonable, but fairly strict fashion against the union contention. Locke J. exhibited his usual attitudes toward unions in following the very restrictive 19th Century precedents.

The Supreme Court majority, by contrast, assumed peaceful picketing to be *prima facie* legal unless it were prohibited by statute. The common law doctrines, such as nuisance, which were protective of property were not to be used to restrict peaceful economic coercion by unions. They adopted the same “strict construction” attitude towards the legislation but this time in the opposite direction. It is fascinating to observe that the Court majority was explicit in accepting the fact that this may have represented a change in the attitudes of the law and that such a change was required by developments in the Canadian society and its mores. The judges were quite candid regarding the policy reasons which motivated them, for Kerwin J. stated:

> It is difficult to reconcile all the statements that appear in the several opinions expressed in these cases but I think one fact emerges and that is that the approach to labour questions has changed materially down through the years. This change of approach is evidenced particularly in the decision of the House of Lords in *Crofter Hand Woven Harris Tweed Company Limited v. Veitch* (1942), A.C. 435. Such an approach places workmen and unions in a position, comparable at least to some extent to that held by employers, and does not relegate them forever, even at common law, to the conditions existing at the time of the *Statute of Labourers*, the *Combination Acts*, the English Acts of 1824 and 1825, in 1899, or even in 1906 the date of the *Ward Lock* decision. It was said, at page 506 of the *Reners* case, that the judgments in the *Ward Lock* case and the *Lyons* case concur in the view that watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority. Picketing is a form of watching and besetting but that still leaves for decision, in each case, what amounts to a nuisance. Whatever might have been held some years ago, in these days the actions of the appellants did not constitute a nuisance.82

Rand J. indicated a similar approach:

> There was clearly a trade dispute as well as a grievance in this case and the information conveyed by the placards as clearly was relevant to the patronage of the restaurants by consumers. The question, then, is whether the mode of persuasion followed was authorized. How could information be effectively communicated to a prospective customer of such a business otherwise than by such means? The appeal through newspapers or at a distance might and probably would be utterly futile. The persons to be persuaded can, with any degree of certainty, be reached only in the immediate locality, and I must take the legislature to have intended to deal with the matter in a realistic manner. What was attempted was to persuade rationally rather than to coerce by insolence; there was no nuisance of a public nature, and the only annoyance would be the resentment felt almost at any act in the competitive conflict by the person whose interest is assailed. That those within the restaurant, either employees or patrons, were likely to be disturbed to the degree of apprehensive disquiet already mentioned, could not be seriously urged. Through long familiarity, these words and actions in labour controversy have ceased to have an intimidating impact on the average individual and are now taken in the stride of ordinary experience; but the information may be effective to persuade and it is such an appeal that the statute is designed to encourage.83

The Court majority seemed to adopt the task of taking positive steps in the law in favour of the Union, but doing so in order that the end result might be a policy of legal and judicial neutrality in the economic contest be-

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83 *Id.* at 785-86, 3 D.L.R. at 790-91, 51 C.L.L.C. at 43.
between union and management. It is fair to say, though, that the doctrinal basis for the adoption of this policy was not very carefully laid. There were three different majority opinions, each concentrated on different facets of the law, and all dealt more with the minutiae of the British Columbia legislation than the basic tort doctrines which had been relied on in the lower courts, most notably the law of civil conspiracy.

Each of these tendencies was reproduced in *Newell*, which was decided at about the same time. The Union had a contract with a general contractor (H.H. Ferguson Ltd.) for a large project by which the latter agreed to respect the provision in the Union constitution that non-union men would not be allowed to work with it on the same projects. A sub-contractor (Cooper — also a unionized employer) itself sub-contracted a job to the plaintiff who ran a small plumbing firm for which he himself worked. Newell had formerly had a contract with the Union but various troubles and disputes led him to break off relations. When the defendant Union officer learned of Newell's presence on the job with his non-union plumbers, they protested to the officers of Ferguson Ltd. and Cooper Ltd., and intimated that the latter would have difficulty in finding men to work on its larger part of the job. The plaintiff was told that he would have to use only union men or lose the job. He approached the defendants but they gave him no help in arranging union membership for his men or a collective agreement with his firm. Finally he was forced to sign a release with Cooper which absolved the latter from all liability for the termination of their sub-contract on which Newell had already taken some preliminary steps. Because the plaintiff had no real chance of opposing Cooper Ltd. in this situation if he wished to do future business in the Hamilton area, he was left with his suit for damages against the Union officers for inducing breach of contract without justification.

Again, this was not a very appealing situation from which to view the Union's claims for freedom in pursuing its own objectives to the economic detriment of others. This time a unanimous Court was willing to allow the Union the power to make and follow its own policies about Union membership, bargaining, and work practices without any interference from the law. Apparently the policy of this Local was to negotiate only with the Master Plumbers Association in the area (of which Newell was not a member) and thus the defendants had no control over admission of Newell's employees to membership in the Union. In any event the Union was not only unwilling to aid Newell in resolving his problems with them, but also was unwilling to allow him to work on this job while a solution was sought. The question was whether the Courts would afford him relief from such a Union decision.

Technically his claim required that there be a breach of contract between Newell and Cooper which was induced by the conduct of the defendants without sufficient legal justification. The Court was very charitable to the Union, and more than a little ingenuous, in the way it characterized the facts in respect to the first two issues. While technically it may have been true that Cooper Ltd. did not breach its contract with Newell, obviously the

84 Moreover, the relevance of the Supreme Court precedent *Reners v. The King*, [1926] S.C.R. 499, 3 D.L.R. 669, which had imposed strict limitations on even peaceful picketing, was not adequately dealt with.
latter lost the benefit of his expected performance and was forced to release Cooper Ltd. only because of the latter's superior bargaining position in the long run. The purpose of protecting contractual rights from harm surely must encompass this kind of situation if the reach of tort is to make sense. Similarly, the Court held that the defendants did not induce Cooper's action because they merely stated a fact when they intimated that there might be difficulties in providing union members to work beside non-union plumbers. I think it is fair to say that only a lawyer can appreciate the nice distinction between making a prophecy and a threat when such a statement comes from a Union official in this context.

Again this is a situation where the attitude of the Court towards the activity of the Union is much more important than the niceties of the legal doctrine within which the situation is viewed. Both Rand J. in the Supreme Court and Laidlaw J.A. in the Ontario Court of Appeal were expressly willing to find justification for the Union conduct even if the requirements for the prima facie tort were satisfied. I have no doubt that the other opinions are really based on the same assumption of the legitimacy of the Union objective. Surely the technical rules would not have been applied in this way if the same conduct and the same harm had been produced by an effort to extort money from Newell, for instance. Why does Rand J. think that the union is justified in putting its own limitations on Union membership and unionized contractors and in refusing to allow those who have not met its standards to work on large projects such as these? His answer is quite succinct and candid:

What they did was, at most, to refuse to authorize the union men to work on the job or to persuade them not to do so while a certain condition of things existed. There was no act of which, on the foregoing conception of legitimate conduct, the appellant could complain. A building contractor who, in the conditions of labour organization today, contemplates available labour as unaffected by its own special interests, proceeds on a false assumption; he is familiar with the everyday refusal of union employees, for a variety of reasons, to enter upon work. The market of labour is, therefore, restricted by considerations of competing interests which are now part of the accepted modes of action of individuals and groups. Why does he not allow the existence of contractual rights with third parties to limit union freedom to pursue these policies? His answer is equally forthright:

Does the exercise of those rights become illegal by declaring the reason for it or by stating the conditions necessary to a willingness to work, when that reason or those conditions relate to an existing contract? It would seem to be obvious that it does not. If, when a contractor has entered into an obligation of the sort here, individuals cannot ascribe to that fact their decision to remain as they are, then their freedom of contract is so far denied; and the statement of that reason in the circumstances of this case is not to be converted into an inducing offer to remove the objectionable fact . . .

If this were not so, by unitedly declining to associate themselves with non-union workers, the respondents and their workmen would involve themselves in illegality brought about by the mere fact that the desire of the building contractor for their labour was stronger than that of observing the contract with Newell: by the offer of work made them, they became involved in the necessity of either accepting it with its objectionable conditions, or of avoiding collective refusal, or

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paying damages. To state that proposition in relation to the circumstances with which we are dealing is, I think, to answer it.87

Again, the same deficiencies in the legal implementation of these judicial policies can be discerned. There is no opinion of the Court as a whole and only Rand J. is frank about the existence and importance of such policies, and even he refrains from dealing in any substantial way with the relevant cases and doctrinal details which could be exploited for the opposite conclusion. There is no reference to any of the lower court decisions in Canada to the contrary and how the Court thought its conclusions meshed with them in a coherent way.88 The result has been that Newell is one of the most ignored and uninfluential decisions the Court has ever given considering that it contained fairly extensive opinions dealing with an important question in an often-litigated area.

One such contemporary lower court decision was Fokuhl v. Raymond89 which was decided in 1949 by the Ontario Court of Appeal, shortly after the same Court decided Newell but before the latter reached the Supreme Court. Laidlaw J.A. decided this case for the plaintiff, against the Union officials in a situation which is strikingly similar to Newell. The Union had a policy of dealing only with electrical sub-contractors, rather than general contractors. Austin Co., was a general contractor which was in breach of this policy on a project and was told to desist. Austin reached a hurried agreement with its own superintendent, Fokuhi, to make the latter an electrical contractor. Fokuhi hired away 20 of Austin’s men, and had Austin compensate him for his pay-roll and other costs, along with a fee of $50 (later $75) per week. The defendant denounced this as an obvious subterfuge to avert his Union’s policy and ordered Fokuhi’s so-called employees off the job, an order which they obeyed. Thus Fokuhi was prevented from performing his contract with Austin. It should be added that the men were perfectly happy with their status under Fokuhi, as was evidenced by a petition presented to the Union; but, they were forced to follow instructions to maintain their all-important Union membership.

In this case the Court found the Union officers’ conduct to be a tort and enjoinable though it had difficulty in finding doctrinal reasons. Inducing breach of contract was inappropriate because Fokuhi was in breach of the contract and thus Austin should have been the plaintiff to invoke the doctrine.90 However, Roach J.A. held the action was intended to cause Austin to break off the contract, as it probably was, and anticipation of the breach warranted the injunction. Laidlaw J.A. reversed directions from Newell and held that the tort vis-a-vis Austin was an unlawful act committed for purposes of harming Fokuhi. Though conspiracy was not pleaded, and seemingly was necessary to invoke the “unlawful means” test, Laidlaw J.A. did not worry about any such technicalities in denouncing such an unwarranted infliction of

87 Id. at 398-99, 2 D.L.R. at 300-301.
88 The Court again fails even to deal with an earlier precedent of its own, United Mine Workers v. Williams (1919), 59 S.C.R. 240, and thus did not adequately define the new direction in which it was moving.
90 A case in which these doctrinal niceties were ignored is Hersees of Woodstock v. Goldstein, [1963] 2 O.R. 81 (Ont.C.A.), 38 D.L.R. (2d) 449, criticized in H. Arthurs, Comment (1963), 41 Can. Bar Rev. 573.
harm on the plaintiff. Again, the judges' perception of the equities of the situation was a much more potent influence on the decision than the very abstract and malleable tort doctrines. Unfortunately, because the Supreme Court ignored Fokuhl when it decided Newell, it did nothing to give substantive content to the rules it felt appropriate. Fokuhl remained alive in our law, and has been a much more significant guide to the future legal pattern in the area.

The truth of this last statement can be gathered from a review of the case of Therien,91 which involved a situation which was strikingly similar to both Newell and Fokuhl, but which occurred almost a decade later. Therien was an independent contractor who ran a small trucking business and supplied trucks and drivers to large construction projects. At the time he had an arrangement with City Construction Company wherein he drove one of the trucks and his employees drove the others. City Construction had a collective agreement with the Teamsters whereby it agreed to use only union members where they were available. Therien's drivers joined the Union but he did not. The Union business agent told Therien and City Construction that he must join the Union or put a union driver on his truck or the job site would be picketed. As a result, City Construction first stopped using his truck and then the others supplied by him. There was no contractual breach, rather a termination of the loose, informal, and unwritten arrangement between them.

Therien sued the union for the damages from his loss of a profitable relationship with City Construction caused by the illegal conduct of the union. Such conduct was alleged to be illegal because it was coercion intended to force Therien to join a union (which was prohibited by Section 6 of the Act) and union membership was impossible for him legally, as an employer, because of Section 4 of the Act. These sections were relied on by the lower courts in finding the union conduct actionable, although it seems that the more rational interpretation of the union's objective is that it wanted a union member driving the truck. If Therien found it impossible to join the union then he would have to hire a member to drive the truck for him, if there was one available for that purpose. This, after all, is the point of a union shop clause in a collective agreement and the latter should not be able to be subverted by the device of making truck-drivers into independent contractors and employers.92 In any event, Locke J. (who wrote the basic judgment in the Supreme Court) found that, although this coercion was a wrongful act, it did not cause the injury complained of, and that a cause of action must be found elsewhere.

The Court based its conclusion on a grievance procedure and arbitration clause which was included in the agreement as a result of the statutory prohibition of strikes as a means of settling contract disputes. This was buttressed by the further statutory provision that failure to adhere to the Agreement was also a violation of the Act. There was some debate about whether the

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91 Supra note 80.
92 One may recall the example of this device in Fokuhl, supra note 89. For a sympathetic treatment of the trade union problems and objectives in this area, see H. Arthurs, The Dependent Contractor (1965), 16 U. of T. L.J. 89.
union shop clause in the agreement actually applied to independent contractors, and the Court found that while City Construction was willing to arbitrate the dispute the Union was not. The action of the union business agent in threatening a picket line (and thus a strike) was therefore held to be illegal under the statute. Furthermore, Locke J. said that there was a common law right of action against one who pursues his self-interest through illegal means which interfere with another man’s method of gaining his living. Statute law, as well as common law was, therefore, available as a way of satisfying the “illegal” element in the tort.

The attitude of the Court to the technical legal issues raised by this case was cavalier, to say the least. It is true that what Llewellyn calls the “fireside equities” of the situation were not particularly edifying from a union point of view. There was a real question of the scope of the Union shop clause and its application to Therien. There was no doubt that the latter was a real contractor, independent of City Construction, and had been an employer for some time. Moreover, he did agree to have all his men belong to the defendant Local. We are not apprised of the economics of putting a union driver on Therien’s truck in his stead, but we may assume that it would create real difficulties for such a marginal business. The union was prepared to allow him to join the union but he was quite correct in asserting that this was technically illegal. Rather than try to have the merits of the case sorted out by an impartial arbiter, the union took the law into its own hands and used its more than adequate power to impose its will upon the small, helpless, trucking contractor.

The fact that the latter presents a very appealing claim to a court of justice does not warrant judicial distortion of the doctrines which it is supposed to follow. What were the doctrinal problems here? Therien had sued the union itself rather than its officers or members and there was a real question of whether such an entity was suable in tort, at common law. Therien had not sued in conspiracy, and there was no induced breach of contract. These are the conventional torts which limit peaceful but economically harmful union activity. The union conduct consisted of a threat to breach the collective agreement and Therien had no rights under the contract or standing to demand arbitration of the union complaint under it. The statute itself, which was also relied on to determine the illegality of the union’s conduct, neither made the conduct actionable in tort nor made the union an entity which was capable of being sued in tort. Moreover, it did provide its own internal system of remedies against the union for conduct which was in breach of the statute, and these had not been resorted to by Therien or City Construction.

I do not mean to suggest that these legal difficulties could not be resolved in a rational way in the light of established principles. The problem though, is that the Court made no effort at all to grapple with the issues of substantive liability, and its reasoning about the suability of the union is not really appreciative of the complexities of the problem. As to both issues, the decision of Orchard v. Tunney was on point. Both Rand J. and Locke

in that decision had certainly implied that, in Manitoba, unions, as such, could not be liable or suable in tort. Here Locke J. just said that the matter was not strictly raised in that case and Orchard was only an authority for what it actually decided. There were differences in the British Columbia statutory history which justified distinguishing the Manitoba case in any event.\footnote{See Edwards, Therien, Nipissing Hotel — And Then What? (1964), 3 Osgoode Hall Law Journal 77.} As to the more important question of the basis of tort liability, Orchard had a somewhat more extended review of the authorities which led Locke J. there to the conclusion that intentional use of unlawful means to interfere with another's business, which causes pecuniary damage, is actionable whether against a single person or a body of persons. Amazingly enough, Locke J. does not cite his own opinion in Therien as an authority for this point, despite his extensive references to it on the other issue.

The last act in this sequence is the case of Gagnon,\footnote{Supra note 81.} which arose shortly thereafter. Here the defendant union officials approached the management of the plaintiff and asked to be recognized as the bargaining representative of its employees without the formality of Board certification. The Union offered to prove it had majority support through evidence of signed cards. The Company refused to bargain with the Union without certification. Instead of obtaining the latter, the defendants set up a picket line which all the non-supervisory employees respected and thus work stopped on the construction project. The issue was the legality and actionability of recognition picketing causing a strike.

The first question was whether such a strike was legal under the Labour Relations Act\footnote{R.S.N.B. 1952, c.124.} which prohibited strikes before certification and bargaining by an "employee in a unit". The union argued that by the choice of this limited language, rather than simply saying "no employee shall strike", the legislature intended the prohibition to apply only to those union employees who availed themselves of the certification machinery under the Act. The Court had little difficulty in disposing of this linguistically possible but functionally implausible interpretation of the scheme of strike prohibition in the Act (although Judson J. dissented).\footnote{But compare the U.S. developments recounted in Meltzer, Organizational Picketing and the N.L.R.B.: Five on a Seesaw (1962), U. of Chi. Rev. 78.} I might add that Locke J. seemed to think the union did not represent the employees, that the latter had no dispute with their employer, and that this exacerbated the union conduct. Perhaps the best evidence of the relationship of the employees to the Union or their employer is their unanimous refusal to go to work.

The more important question for our purpose is the relevance of such a breach of statute to a suit under the common law of torts. The majority judgment of Ritchie J. (with Kerwin C.J. and Cartwright J.) follows Therien to the effect that breach of the Labour Relations statute constitutes an "illegal" means for purposes of the common law of torts (notwithstanding that it is neither criminal nor directly actionable) and thus there need be no enquiry into the existence of a statutory tort. Ritchie J. however, finds the
common law tort to be conspiracy, which was not pleaded or utilized in Therien. Locke J. who wrote the Therien judgment, now ignores this approach altogether and reverts to his dissenting Aristocratic opinion to again find peaceful picketing to be an actionable private nuisance, which is not protected by statute as it was in Aristocratic. He seems intransigent in his attitude that picketing which causes damage (and thus is effective) is per se illegal unless given special statutory protection, and thus ignores the gravamen of the majority opinions in Aristocratic.

Nor could the Court contend that these legal complexities were not raised because the dissent of Judson J. highlighted each of them. He pointed out that, at common law, this picketing and strike would be perfectly legitimate activity (at least after the House of Lords decision in Crofter Veitch). The claim of civil conspiracy for breach of statute was dropped in Aristocratic (although perhaps there was no breach in not taking a strike vote, because there was only consumer picketing). Therien, as he showed, was not based on conspiracy, but simply on the unjustified and intentional infliction of economic harm (he was wrong, though, in interpreting that decision as based on the union’s object being illegal coercion of Therien into the union; it was really based on the failure to use the arbitration avenue under the collective agreement). There was no independent substance to the tort of conspiracy, or any reliance on criminal offences or nominate torts to characterize the defendant’s conduct as “unlawful” means. The Court was simply making every collective breach of the Labour Relations Act a tort, and Judson J. said that the failure of the legislature to authorize this remedy, while allowing prosecution directly, rendered such a judicial extension of case law unwarranted. Judson J. does not refer to Newell which was an even better support for his argument.

It should be evident from the foregoing that the tort law doctrines to which the Court was appealing in the usual industrial relations context have very little, if any, independent content which channels the course of the Courts’ decisions. I am, of course, talking about peaceful union activity which does not offend against the nominate torts or criminal laws proscribing violent interference with person or property. It is true that the union officials were pursuing the institutional and economic interests of their members and organization through a process of coercion rather than rational persuasion, but it was coercion only in the sense that it involved the application of economic power which had been created by the allegiance and loyalty of individuals to the objectives of the labour movement. In the application of their own economic power to the competitive struggle in which the labour movement found itself, the union was doing nothing more than participating in the established market economy as a countervailing force to the growth of market power on the part of the employer side of the bargain.

At the beginning of this period, the Court was quite willing to allow such a physically peaceful economic battle to be carried on within very wide channels. Statutes were interpreted to be the least restrictive as possible of the right to strike and picket (Aristocratic). Even where a prima facie tort

98 Supra note 77.
causing harm was shown, the Court was very sympathetic to the objectives of the union movement in finding justification (Newell). Toward the end of the decade, the tide changed, and the Court appeared quite concerned about the exercise of union power in the pursuit of its aims. Rather than dealing with the issue in realistic terms, as involving a question of competing interests and values which require a policy judgment about the degree of judicial regulation which was to be imposed, the Court retreated to a very abstract level of legal conceptualism. In Therien, Locke J. spoke of illegal interference with the right to make a living. In Gagnon, Ritchie J. spoke of a conspiracy to pursue lawful ends through unlawful means.\(^9\) However, Locke J. later phrased his judgment in terms of private nuisance, picketing being an interference with the enjoyment of property (though the plaintiff's property interest was a rather ephemeral easement to work on the land). Only Judson J. was realistic in pointing out that what the Court was doing was exactly what it said it was not doing, which was the creation of a cause of action in tort, for breach of the Labour Relations Act. He said that they should not have done that because it was unwarranted, but he did not say why. The majority, because they did not at least explicitly recognize what they were really doing, did not even purport to enquire into the issue of justification.

What are the arguments which might have been made about a new tort action based on a breach of collective bargaining legislation? In principle, I believe that Therien and Gagnon are quite compatible with the usual development of tort law. Real economic harm had been intended by the union and suffered by the employer and it is the function of tort law to provide monetary compensation for this. Of course, economic harm is an insufficient basis of tort liability because there must be reason for holding the union conduct to be unjustified. For reasons I stated earlier, it is not consistent with a limited judicial role in this area that Courts create new "primary" rules condemning union tactics. However, here it is the legislatures which have created these rules and have done so by providing the alternative, more rational procedures of certification, arbitration, etc., which Courts could not create. Though the legislature has provided its own forms of remedy, it seems quite appropriate for the Court to use these new statutory rules as the basis for its remedy in dealing with the distinctive problem of compensating the injured victim (at least where this is not specifically prohibited by legislation).

This is the kind of reasoning which I feel is warranted in terms of the principles of tort law, but there are several practical arguments against the conclusion. First of all, the remedy provided by the legislature for breach of its own primary rules is quite distinctive because of its discretionary nature, and perhaps this is a good index of what the proper attitude to the rules should be. Although the statutory prohibitions on strikes are general in character, in order to support the alternative dispute-settling procedures, there are real inadequacies in the practical effect of these procedures, especially in the construction area. It is no accident that construction unions in cases such as Therien and Gagnon have used self-help in obtaining

\(^9\) It should be noted that only Therien can be used in Ontario because conspiracy and Gagnon run afoul of the Rights of Labour Act, R.S.O. 1960, c. 354, something which is often ignored by Canadian courts: see Christie, supra note 76 at 102-03.
recognition, or enforcing their version of a collective agreement, on a short-lived project where official remedies prove useless long after the facts. Perhaps the same reasons which have led Courts to tell unions that they must use these procedures irrespective of their inadequacy should also have led them to tell employers to use the statutory remedy for the illegal strike or supporting picketing. It may be that even purely remedial action by a court is an illegitimate supplement to a statute that obviously represents a whole series of compromises between these competing interests.

There are other practical deficiencies in the work of the Court in this area even assuming its legitimacy. Technical breaches of the Act trigger total liability for strikes and picketing under the Court's doctrines where the exercise of informed Board discretion would likely have filtered out such breaches. Perhaps the best examples of this are cases where non-compliance with strike vote procedures designed to sound majority sentiment leads to liability for a strike which enjoys unanimous support among these same employees. Finally, and perhaps most important, the real operational significance of the judicial innovation in this area has not been to provide the tort remedy in damages but rather to establish a legal basis for injunctions supported by the criminal contempt power. Not only are the legislative restrictions on criminal sanctions completely out-flanked, but the whole process is subjected to the endemic abuses of the adversary process which have been so well-documented in the labour injunction field.

Whatever might be said as to the merits of this dispute (and, on balance, I accept the defensibility of the results in fact reached in Therien and Gagnon), there can be no doubt of the deficiencies in the process by which they were reached. Rather than focus in this way on the realities of the step it was taking, the Court has used common law torts which were devised in a totally different policy context. It uses these doctrines in order to arrive at conclusions by an apparently inexorable process of logical and conceptual reasoning which pays no attention at all to the underlying rationale of what it is doing. The result may be similarities or differences in decisions which cannot be justified by the common sense of the situation. If the tort is conspiracy, rather than illegally causing economic harm to a person in his calling, then only union activity in breach of the statute will be reached, and not similar employer activity. If the standards for justification of inducing breach of contract are much more stringent than those of the above torts then the accident of a contract breach rather than a contract termination will be decisive in a case, irrespective of the significance this has for the legitimacy of the union activity in question.

Even more important is the failure of the Supreme Court to give direction to the lower courts in the task of creating a coherent body of law in this area which has been left uncodified by the legislature. A very important lack has been the absence of any citation in any of these cases of lower court opinions which focus on much the same issues. All of our provinces have the same kind of collective bargaining statutes and, except for British Columbia in 1959, none had sought to regulate the use of picketing by unions

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100 See Jacobson Brothers v. Anderson (1962), 35 D.L.R. (2d) 746 (N.S.C.A.)
in any important way. For each case that arrived in the Court, there were several lower court precedents which were relevant to the issues posed. The arguments which might have been made were well canvassed there or in the extensive law review comment which strikes and picketing cases have engendered. None of this was used by the Court at all to set out the functional limitations of what it has done or wanted to achieve. The Court quite clearly should have been aware of the tendencies towards judicial intervention in favour of employers and against unions. In realistic terms, the intervention of the Supreme Court was actually limited to the supplementation of the statutory standards of behaviour by a private "tort" remedy for an injured person. Viewed in this very limited way, its decisions perhaps were justified. However, the vague doctrinal phraseology used in the opinions did not articulate any such functional restraint in the language of labour relations.

For example, we have not been apprised of the present nature of the relationship of Aristocratic to Gagnon. If the former held that peaceful picketing is prima facie legal, what were the significant facts in the latter case which made it illegal? Was it critical that the picketing in Gagnon triggered an illegal strike, and, absent this, picketing or other coercive activities for the same purpose are legal? Or is the important fact that the statute provided a legal and rational alternative avenue to obtain certification and bargaining rights — an interpretation which would also proscribe consumer-directed recognition picketing, harassment tactics during conciliation, etc? The opinions in Gagnon are of no help at all in assessing these lower court decisions.

Perhaps the worst example of the deficiencies of abstract doctrinal analysis, which is unrelated to the realities of labour relations policies, is the Ontario Court of Appeal decision in Hersees of Woodstock v. Goldstein. Here the Union was certified, had bargained, and was in a lawful strike situation. Instead it chose to bring pressure to bear on the employer-manufacturer by secondary picketing of the retail outlets which continued to sell its products. The only difference between this case and Aristocratic is that the retail outlets picketed in the latter case were owned by the same company which was the employer at the primary locus of the dispute. Now, there are many arguments which can be made pro and con secondary picketing and it is a very complicated matter even to draw the distinction between the secondary and primary picketing. But what is very significant, is that the Ontario legislature had recently rejected the explicit committee recommendation to make secondary picketing per se illegal and had contented itself with prohibiting picketing which causes an illegal strike. Yet the Ontario Court of Appeal in this case found the Union conduct illegal on the basis of a very mechanical application of the doctrines of civil conspiracy and inducing breach of contract. It went further to hold all secondary picketing to be illegal on the grounds of public policy, without reference to Aristocratic or any Supreme

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103 Supra note 90.
Court cases dealing directly with the point. Yet one cannot criticize the Ontario Court of Appeal for failing to adhere to the policy directions set by the Supreme Court because there was no such coherent policy in the cases.

Besides the question of the basic legality of union bargaining tactics — strike, picketing, boycott — there are several further issues which are raised concerning remedies for unlawful union activities, the incidental effect of the strike, etc. Some of these are considered elsewhere. There are two further decisions — Royal York Hotel and Winnipeg Builders' Exchange — which raise in an interesting fashion the problem of reconciling the new statutory and social frame-work with the old common law doctrines.

In Royal York Hotel the employer was charged with unlawfully threatening its employees with discharge (and then actually discharging them) for exercising their statutory right to participate in a timely and lawful strike. There was no dispute about the facts. The statute protected employees against discharge, or threats of it, for participating in lawful activities of the union. The Company successfully argued to the magistrate that there was no common law right to strike in breach of a term of a contract of employment, that it must be implied that any such contractual right required termination of the employee's individual contract of employment, and that thus the Company's letters could not amount to a threat of dismissal. It is difficult to understand how this conclusion is compatible with Section 1(2) of The Labour Relations Act which explicitly provides that "no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as a result of a strike or lock-out." Such, in any event, was the conclusion of Judson J. who held that strikes were lawful under the Act, because of, and after the statutory conditions were satisfied, and that Section 1(2) was logically inconsistent with requiring an employee to quit employment before striking. He refused to decide anything else.

The lower court opinion of McRuer J. A. is much wider in its implications. Following, inter alia, Newell, he held that the right to strike, in

104 The Court did rely on dicta in a Supreme Court of Canada decision — Patchett v. Pacific Great Eastern Ry. Co., [1959] S.C.R. 271, 17 D.L.R. (2d) 449, 59 C.L.L.C. 15,414 — but this case was concerned with a totally different problem, and the remarks made about the illegality of the secondary picketing there occurred in the context of an unlawful strike, with nominate torts of trespass, intimidation, etc., and, apparently, a completely unwarranted picketing of the employer's premises. Needless to say, the Court of Appeal did not display the kind of sophisticated perception of secondary activity which one can find, for instance, in Lesnick, The Gravamen of the Secondary Boycott (1962), 62 Col. L.Rev. 1363.

105 Imbleau v. Laskin and Polymer Corp., [1962] S.C.R. 338; affg (1961), 28 D.L.R. 2d) 81 (Ont.C.A.) is concerned with the implied power of an arbitrator to award damages for an unlawful strike during a collective agreement. United Steelworkers of America v. Gaspe Copper Mines (1970), 70 C.L.L.C. 14,009, involved a damage suit in court for an illegal strike where there was no collective agreement. Alliance, supra note 36, raised the question of the implied power of a Labour Board to decertify a Union for a strike in breach of the Act. Poje et al v. A.-G. for B.C., [1953] 1 S.C.R. 516, 17 C.R. 176, was a criminal law case dealing with the procedural requirements for conviction for criminal contempt where the contempt consisted in refusal to obey a labour injunction.


principle, was lawful at common law. He left open the question of whether discharge for striking was legitimate at common law. However, under the statutory framework of collective bargaining, the security and expectations of employees have been developed, through seniority, pension funds, group insurance, etc., all of which are dependent on continued employment. Although the statute may not have created a right to strike, it recognizes that it exists by the limitations it imposes on the activity. It is inconsistent with the theory of a strike under the Act that a person thereby ceases to be an "employee" and thus enjoys no protection against dismissal. The whole course of development of labour legislation for half a century led him to the conclusion that employees lose their special status only if they go back to work, take employment elsewhere, die, or become unemployable.

The response of those members of the Supreme Court who dealt with these broader implications, is a little disappointing. Both Locke and Cartwright JJ. assumed that limitations on the right to strike in the individual contract of employment must be adhered to before it can be lawful, and thus protected under the Act. One might query if it is consistent with the statute that the employer unilaterally promulgate notice provisions (14 days in writing) which could deprive a union of its right to determine the timing of a strike. Similarly, Locke J. held that an employee could be replaced by an employer while he is on strike, and that the replacement could continue after the strike ends. In doing so, he followed the case of *MacKay Radio* in the United States, but failed to give the issue the attention it deserves.

In the second case, *Winnipeg Builders' Exchange*, it was the union which relied on a common law doctrine that the company now asserted was inconsistent with more recent statutory developments. On discovering the use of non-union glassworkers by a sub-contractor on a building site, an officer of that union picketed the project with a sign which stated simply that there were non-union glaziers on this project. As a result the jobs were completely shut down when no employees crossed the picket line. An injunction was issued requiring all the various unions, their officers, and the employees who had signed agreements on the construction site, to refrain from striking. Several issues of law were raised in the lower court, especially by Freedman's dissent, including the questions of whether individual refusals to cross a picket line or go to work constituted a "concerted strike", whether the unions participated in or authorized these employee decisions, and whether a negative injunction should issue in these terms. At the Supreme Court level only the latter issue was dealt with. No one questioned that the picketing was unlawful if it induced an illegal strike in order to coerce the non-union glaziers into joining a union, and the complexities in the law examined earlier were not adverted to.

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Freedman J. A. appealed to the common law principle that contracts of employment were not specifically enforceable and that a negative injunction against striking was tantamount to a positive requirement that the men go to work. While accepting the basic common law principle, the Supreme Court agreed with the Manitoba Court of Appeal that it was developed in a context quite removed from modern industrial relations. Cartwright J.'s unanimous opinion held that the development of modern labour legislation, with the statutory prohibition on strikes during the term of a collective agreement, required the aid that injunctions could give to after-the-fact remedies such as prosecutions or damage actions. He points out quite rightly the difference between barring collective action by a group of employees and prohibiting truly individual decisions not to continue at work. He might also have pointed out that the same statutes authorize mandatory directions against employers, by Labour Boards and arbitrators, which specifically enforce the contract of employment. In any event, the decision is quite well-reasoned and correct, and a good example of the Court reworking the common law in the light of related statutory changes. It is rather unusual that so perceptive a labour law judge as Freedman J. A. dissented on this point. This case exemplified my impression that, in this area of labour law, the Supreme Court decisions have usually been sound, and they have not become tangled in ancient concepts and doctrines which have become irrelevant to modern day industrial relations. The same cannot be said for some of the reasoning in the opinions which are written to justify the Court's renovation of the older law.

THE INDIVIDUAL AND HIS UNION

Most analyses of labour or collective bargaining law, whether legal, behavioural, or policy-oriented, assume that the only essential conflict is between union and management. The reports of judicial and administrative decisions in recent years attest amply to the contrary. Equally compelling is the occasional existence of conflict between the union and the individual employee, with the employer either being favourable to one side or the other, or remaining perhaps a neutral bystander. Several cases involving intra-union conflicts have reached the Supreme Court in the period under investigation, and they indicate clearly the impossibility of viewing the collective bargaining area along one dimension. They raise precisely the same problems as do picketing cases but from an opposite stance as far as the Unions are con-
cerned — the issue of judicial workmanship and role in a hotly-disputed and legislatively-avoided area.

Perhaps the most important cases which directly focused the issues in the Supreme Court are those which deal with the right of a union to expel its members. Here, the received legal doctrines were very favourable to the notion of a trade union as a purely voluntary, domestic, unincorporated association which should be able to attend to its own affairs without any interference by the Courts. The development of collective bargaining policy, both legislatively and as a reflection of the social facts of private institutions, renders such a legal attitude quite remote from real life. The role of the union as a collective bargaining agency, permitted to negotiate agreements which make union membership a condition of employment, has been fostered by statutory policy. A statutory arbitration process is also provided, binding on both employer and employee, in order to ensure that employees who lose their union membership also lose their job. Leaving the union leaders as the sole legal masters in their own house can produce great injustice which can no longer be justified by the reasons which originally warranted associational autonomy and a judicial "hands-off" attitude. As long as the law permits employment status to be dependent on union membership, the union must accept some measure of legal control over its membership decisions.

On the other hand, there are still important objections to the judicial imposition of these controls. Legal intervention in favour of the employee may serve to uphold individual claims for procedural fairness and democratic freedoms but it also restricts union authority and power and thus hampers the efforts of the union in winning economic security and benefits from the employer. Unions are often engaged in a struggle for their institutional existence in a bargaining relationship and feel it of paramount importance to demand membership solidarity behind their leaders. I do not deny that there are often good grounds for over-riding this claim in favour of the individual member's right to dissent, but I would suggest that there are real problems in the legitimacy of judges making their preferences law.

Some of the other dimensions of the judicial structure do not so strongly militate against an active role for the courts. As so many of these cases involve issues of procedural fairness, the courts may feel some confidence in applying established legal values and principles in their reasoning. Moreover, it is not nearly as meaningful for the courts to require individual dissidents to seek legislative reform and to deny access of the one-man lobby to adjudication for a new remedy against the injustice of abuse of union power. Judges should not be unduly swayed by some of the horrendous examples of abuse which do reach the court and as a result curb union power at whatever cost necessary to conform to established law. On the other hand, they should

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115 A classic analysis of this doctrinal attitude is Chafee, The Internal Affairs of Associations Not For Profit (1930), 43 Harv.L.Rev. 993.
116 E.g., see the comment by O'Halloran J.A., in Kuzych v. White, [1950] 4 D.L.R. 187 at 191:
A man has a right to work at his trade. If membership in a union is a condition attached to working at his trade, then he has an indefeasible right to belong to that union. It must be so, or else the union can have no right to agitate for a closed shop ...
not be totally passive and simply apply old doctrines no matter how outmoded they may be, leaving all remedial efforts to the legislature. An adequate response requires that courts try to walk the fine line between these opposing positions and attempt to do justice in the individual case, but without effecting any more than incremental change in the slowly-developing legal doctrines and categories.

The Oil, Chemical and Atomic Workers decision, which dealt with the constitutionality of legislative intervention, deserves mention prior to dealing with the vital issue of union membership. The British Columbia legislature passed a law prohibiting all use of union dues for political purposes and prohibiting check-offs under a collective agreement without an affidavit from the union to acknowledge compliance with this law. The constitutional question of whether this was valid provincial legislation dealing with labour unions or was an unconstitutional interference with freedom to associate and participate politically in the federal sphere is not germane to this article. I think that the objectives of this legislation are quite legitimate and should be open to enactment by the government responsible for collective bargaining. On the other hand, this was precisely the kind of over-reaching and discriminatory type of law of which courts are often guilty in this area. Of importance for my purpose is the very intelligent perception of union status articulated by the Court within the legislative framework for collective bargaining and the implications this has for the issue in question. Martland J., for the majority in the Oil, Chemical and Atomic Workers Case, states that unions have exclusive bargaining authority for all employees in the unit, that they are given the power to coerce union membership and payment of dues, and that this carries a corresponding obligation to fairly represent all of their constituents. He also held that the legislative contributions to this status and power entailed a corresponding right to regulate its exercise as occurred here. Unfortunately, as is so often the case, the Court has not utilized this kind of general analysis to solve some of the other relevant problems it has faced.

Two cases dealing with union expulsions of individual members — Orchard v. Tunney and S.I.U. v. Stern — reached the Court in the period being investigated. Both cases held for the individual member without a dissenting vote, although there was some question about the remedy in the Orchard decision. What makes these cases of even greater jurisprudential interest is the existence of a Privy Council decision, White v. Kuzych.

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120 Supra note 71.
which found for the Union on an appeal directly from the British Columbia Court of Appeal, after the new Supreme Court Act made the Court the final appellate body in Canada.

Kuzych was a Union member who had vociferously opposed the principle of the closed shop though this was the policy the Union expressed in its by-laws, and incorporated in a collective agreement covering the plaintiff's place of employment. He was charged with certain vague offences which amounted, in effect, to disloyalty to the Union (and were coloured by previous suits against the Union and an unsuccessful bid for the presidency). A committee investigated the charges, found Kuzych guilty, and recommended his expulsion. The Union local voted to adopt this recommendation. Kuzych sued the Union and various of its officials for damages and for a declaration that he was still a member of the Union. He won $5,000 at trial and was upheld at the Court of Appeal. However, the Privy Council reversed the decision because Kuzych had not availed himself of the right to appeal to the parent Federation, a requirement created by his contract of membership in the Union. The Privy Council treated the issue as simply one of the interpretation of the ordinary meaning of the Union constitution and applied this interpretation as the simple terms of a contract. This approach defeated the plaintiff's claim, irrespective of the merits of the basis of the expulsion, the obvious defects in procedure and bias in the process by which the expulsion was carried out, and the effect it had on his employment status.

The problems with the Privy Council decisions are twofold: first, its specific conclusion ignores the reasons for the application of an "exhaustion of internal administrative remedies" doctrine; and second its general assumption that the Union constitution represents the terms of a contract between the Union member and his fellows (including the officers) flies in the face of reality. Recognition of the social facts that membership in a vast international union requires pure acquiescence in a contract of adhesion, that the union position is largely created by statutory law, and that the significance of union membership is much more related to external employment opportunities than internal union position, have made the Privy Council attitude one to be limited and evaded as much as possible by Canadian courts.

There are two distinctive problems raised by this issue of expulsion. First, what kinds of procedural standards must a union adhere to in finding a member guilty of an offence and employing the sanction of expulsion? Second, what are the substantive grounds on which such a decision may legitimately be made? Other themes connecting the labour law cases are equally important here. What kind of effective remedies can be made available to the individual employee in his difficult plight? What should be the attitude of the Court to the traditional doctrinal basis of the action as one of contract? How legitimate is it for the Court to take the important step of modernizing its doctrines, putting the legal relationship on a functional basis, and taking the policy steps necessary to bring legal doctrine into line with social fact? What should the limitations on judicial action be in such a politically sensitive area?
The challenge to the Canadian judiciary was thrown out in the very fine opinions of the Manitoba Court of Appeal in Orchard. Tunney was expelled from a Union for conduct detrimental to the welfare of the Union, namely that he made allegations concerning the secretary-treasurer's misuse of funds. As a result, he lost his job and other employment opportunities. He sued, and received damages in tort (including exemplary damages) against the union as well as the individual defendants. This recovery was based on the grounds that his expulsion was procedurally defective, irrespective of the fact that he did not exhaust internal remedies. The decision of the union executive to suspend Tunney temporarily, before his trial, was found to be clearly illegal and unauthorized, and the subsequent trial process was found to be riddled with procedural defects.

The Union argued that any irregularity was quite irrelevant because the plaintiff did not appeal to the International Union as required by the constitution and in accordance with Kuzych v. White. The Court of Appeal deprived the original trial body of jurisdiction, thus making its decision null and void, and appeal quite unnecessary. The tacit assumption of this "legal" justification appears to be the belief of the Court of Appeal that only in a fictional sense is a Union constitution an agreed-to contract and that limitation on judicial remedies should be enforced only where the substituted internal appeals are fair, reasonable, and practicable, which was not the case here. It held that the basis of the action should be in tort, rather than contract, because union membership should be acknowledged as a status whose destruction (at least with malice) is tortious. This had the effect of loosening the law of damages, easing the legal defensibility of a suit against the property of the union (as well as the individual defendants), and, perhaps, enabling the Court to take a much more critical attitude towards the Union constitution, which need no longer be the decisive basis of the employee's claim. The attitude of the Court of Appeal appears to be very much coloured by its view of the abuses of union power against its members which are encountered in the cases, and its treatment of the received law is very pragmatic and free-wheeling.

The response of the Supreme Court to this set of opinions was somewhat mixed. On the one hand, the judges emphatically repudiate the notion that the law should recognize a new status of union membership which can be protected by the law of torts. To the extent that the parties have by contract created any particular incidents of such a status, the latter is unnecessary. To the extent the incidents of the status go beyond the contract, the Court would be engaged in making unwarranted legislative policy. On the other hand, if we look at what the Court did, it held that the individual officers can be liable in tort for damages caused to an employee by being expelled from the union and losing his job as a result. The executive may, by intra vires torts, make the union responsible for these damages (though not here where the conduct of the union officials was totally unauthorized and ultra vires). It was also held that damages, including punitive damages, could

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be assessed on a tort law basis, and that, on the true construction of the constitution here, there was no decision of the local executive board "to be appealed from" and thus there can be no duty to exhaust internal remedies from a nullity (despite *Kuzych v. White*).\(^{124}\)

It seems to me that the Court left the question of union liability in tort as an entity partially open, because they did analogize this situation to one of ultra vires action by corporate directors. Rand J.’s opinion is somewhat hesitant and tentative, but informed by a good situation-sense and grasp of the relevant legal principles. He is not quite prepared to have the courts take over the job of creating democracy within unions, recognizing as he does the endemic risk of abuse of union power because of the embattled nature of its enterprise. Retention of the “contract” theory does limit the reach of judicial intervention, especially by unrestrained lower courts, but it does not totally preclude the common law affording some remedy for an initial denial of membership.\(^{125}\)

This conflict in judicial attitudes is even more symptomatic of the problem area of substantive grounds for expulsion. For a court to impose on the union a set of procedural standards is, first of all, quite consistent with its usual practice in the area of natural justice and, secondly, one which does not involve the very overt choice of values that is implied by “substantive due process”. I would also suggest that preventing judicial review of union decisions on the latter grounds is less important for the kinds of abuses which affect individuals than is review in terms of procedural natural justice. Rarely will Union constitutions which are expressed in general terms explicitly authorize any blatant abuse of democratic values. The typical problem involves very general language, such as conduct unbecoming a union member or disloyalty, which is so open-ended as to allow easy manipulation by the decision-maker in the instant case. This problem is easily dealt with by a Court which can restrictively interpret the general language to reach the appropriate end. (I might add that several Courts or Boards have failed to use this technique in cases where expulsion has been based on the member being a Communist;\(^{126}\) criticizing the Union leaders;\(^{127}\) or working against the closed shop.\(^{128}\) A different attitude was evident in a case which dealt with the alleged offence of communicating with outside officials such as Members of Parliament.\(^{129}\)

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\(^{124}\) There is one very grave problem in Locke J.’s judgment when he said in dicta, that discharging Tunney was not a breach of contract by the Company. The arbitral opinion of then Professor Laskin in *Orenda Engines* (1958), 8 L.A.C. 116 is preferable in holding that the Company must have reasonable grounds for believing the union member to be validly expelled in order to justify his discharge. In fact, perhaps employer liability should be strict with a right to reinstatement in any event, and perhaps damages, with the Company obtaining indemnity from the Union.


\(^{128}\) See *Kuzych v. White*, supra note 122.

However, sometimes constitutions may clearly hold various forms of dissent to be an offence. From the point of view of the union, complete loyalty to its leaders, policies and philosophy, may be essential in order to do effective battle in a hostile environment, not only for its specific objectives, but also for its existence. Even an expert Labour Board, administering statutory language, has refrained from holding that the use of discipline and expulsion is illegitimate even in the light of our society’s wider commitment to such liberal-democratic values as freedom of belief, expression and association, and control of elected officials. There is some authority for a review of a union’s constitutional provisions on the grounds of public policy, reasoning by analogy to local by-laws rather than to ordinary unincorporated associations.

These important issues reached the Supreme Court in the case of S.I.U. v. Stern, but the opinion of the Court was very disappointing, especially by comparison with Orchard v. Tunney. In this case, the Union expelled the plaintiff for having patronized a beer parlour in the York Hotel despite a Union boycott of this hotel. The reason for the boycott was the policy of the hotel not to rent rooms to seamen. The Court held that the Union did not have the power under its constitution to order such a boycott and, even if it did, it is doubtful whether such a power could validly be enforced. There is little or no discussion of the reasons why either of these conclusions could be defended and it is apparent that the Court is simply saying that such a boycott, for such a purpose, is so offensive to its own sense of the appropriate uses of union power that it will read neither the union constitution nor the law as permitting it. If the boycott was illegal on either of these grounds, it was short work for the Court to order that the expulsion was invalid. The interesting part of the award was its justification of a mandamus order against the Union to reinstate the plaintiff to his full rights of membership, on the ground that this was a “duty which is not of a merely private nature”. The Court does advert to the development of union power, the closed shop, and the effect this has on the need for union membership, and orders mandamus to enforce this Union duty.

A second facet of the problem of the relationship of the union and the individual employee is concerned not with the question of membership or expulsion, but rather with the issue of the quality of union membership. The Supreme Court has not had the opportunity of dealing in any significant way

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130 In Walker v. McAnally Freight-Ways, supra note 117.
133 Supra note 121.
134 At [1961] S.C.R. at 688, 29 D.L.R. (2d) at 34, C.L.L.C. at 323, there is a very dangerous dictum to the effect that immunity from the criminal law relating to agreements in restraint of trade applies only to union activities “designed to promote legitimate endeavours of the working classes” and not in cases of “combinations absolutely foreign to such endeavours.” The critical problem, though, is who is to decide what is “legitimate” — the unions, the courts, or the legislature. See Arthurs, The Dependent Contractor, supra note 92.
135 This foreshadows the reasoning which underlay the OCAW decision, though it was not cited in the latter case.
with the real issues of internal union democracy but it has made one important contribution to the question of the duty of fair representation of all members of the bargaining unit in the administration of the collective agreement. This occurred in the *Hoogendoorn* case which was concerned with the right of an individual employee to participate in arbitration hearings affecting his economic interests, where the union position was opposed to his own.

The complex problems in *Hoogendoorn* can only be appreciated by first reviewing a sequence of two cases in the Ontario Court of Appeal. Hoogendoorn was an employee who was opposed to his bargaining representative on religious grounds, and, despite the existence of a compulsory dues check-off in the Agreement, he refused to authorize deduction from his wages. There had been some ambiguity in the agreement about the application of this requirement to Hoogendoorn, and a wildcat strike occurred over his continued presence in the plant. The parties negotiated a new clause and constituted a special arbitration hearing with a single umpire in order to get a quick, clear, and authoritative decision on the nature of the company's obligation under the clause. The arbitration hearing dealt with a policy grievance brought by the union to obtain the interpretation. The arbitrator viewed the clause which made the authorization "a condition of their continued employment" as placing the onus on the company to obtain the authorization from Hoogendoorn or any other employee and to discharge him or any other employee if he refused to sign it.

Hoogendoorn was not given notice of the hearing and did not participate in any way and, as a result, moved via certiorari to quash the award because of non-adherence to the standards of natural justice. Laskin J. A. in the Court of Appeal wrote the opinion which denied his claim. He relied on two assumptions. First, there was nothing inconsistent with statutory law or policy in the negotiation of the particular provision. The union was given the power of negotiating this clause irrespective of the wishes of a dissenting minority whose alternatives were to conform, or organize and persuade a majority, or leave. Second, the union's bargaining powers extended also to the administration of the agreement through private, contractual arbitration which it and the Company paid for and controlled. It had the right to obtain authoritative interpretations of its agreement through the process of policy grievances which were provided for this purpose. It is true that Hoogendoorn's interests were potentially affected by the hearing and decision and that it was his particular case the parties had in mind. However, it was determined he had no more right than any other employee to intervene in the arbitration hearing and that no right of intervention could be afforded to any employee.

136 Except at second hand in *OCAW*.


138 There was one previous Supreme Court of Canada decision in the application of check-off clauses, *United Mine Workers and Dominion Coal Co. v. McKinnon*, [1958] S.C.R. 217, 6 D.L.R. (2d) 449; aff'd (1957), 8 D.L.R. (2d) 217 (N.S.C.A.) and (1956) 5 D.L.R. (2d) 48; but, it was concerned with a very different legal issue.
Laskin J. A.'s opinion left ambiguous whether there would ever be such a right of intervention, but the direction of his opinion seemed clear, to this reader at least. He stated that the plenary power of the parties to negotiate the terms of their agreement included the power to bargain about whether the individual had any right of access to their arbitration tribunal and that he had no right here.\footnote{130 (1967), 62 D.L.R. (2d) at 180-81.} He felt that the legislation assumed that the parties to the agreement could be trusted to furnish all the necessary considerations to the arbitrator for his decision.\footnote{140 Id. at 179.} It comes as some surprise, then, to read his decision some months later in Bradley,\footnote{141 Bradley and Ottawa Professional Fire Fighters Association [1967] 2 O.R. 311 (Ont. C.A.), 63 D.L.R. (2d) 376, 67 C.L.L.C. 14,043.} where the opposite conclusion is reached. Here the arbitration hearing was concerned with a seniority grievance relating to promotions. The company had promoted six men and the Union took six individual grievances regarding this decision. Five of the grievors succeeded and the arbitrator ordered them installed in the higher-rated jobs. This meant that the temporary incumbents were replaced without benefit of notice of the hearing, or the right to present their own case to the arbitrator. Laskin J. A. held that this was inconsistent with natural justice and quashed the award.

Bradley was not appealed to the Supreme Court but Hoogendoorn was. The Court agreed with Wells J.A.'s dissenting opinion in the latter case and quashed the decision. What is interesting about all of the opinions in Bradley (Ontario Court of Appeal) and Hoogendoorn (Supreme Court of Canada) is that they never ask the question "should the individual employee ever have a right to participate in the arbitration hearing?" Instead, they are simply concerned with the second question "when should he have such a right?" and, in particular, can Bradley and Hoogendoorn be distinguished, all on the tacit assumption that Bradley is correctly decided. Only in the judgment of Wells J. A. is the Paquet\footnote{142 Id. at 171; Paquet is cited supra note 49.} case mentioned and it is dismissed without comment. The O.C.A.W. case is never cited and its relevance apparently not seen. Both these cases had clearly laid down the over-riding character of the union's bargaining control in the negotiation of collective agreements. The theory is that the union must have the power to speak for all the employees and to be the sole spokesman with the employer in order that it be able to negotiate a meaningful agreement with the unified employer organization. Splintering of the countervailing power of the employees is to the long-run detriment of the group, and individual rights and interests are subordinated to this purpose.

Several functional questions have to be asked about the relevance of this decision to the administration of a collective agreement. Is it necessary that the union be given power to settle grievances before arbitration (or even during it) in order that the employer be able to rely on the union to control excessive employee complaints and also in order that the union be able to trade off grievances to obtain the largest marginal return? If the Union's exclusive bargaining control extends to the grievance procedure, should it also extend to arbitration? Is it significant that in adjudication the basic decision is authoritatively made by a third party and the bargaining power of the union

\footnotesize{\textsuperscript{130} (1967), 62 D.L.R. (2d) at 180-81.}  
\footnotesize{\textsuperscript{140} Id. at 179.}  
\footnotesize{\textsuperscript{141} Bradley and Ottawa Professional Fire Fighters Association [1967] 2 O.R. 311 (Ont. C.A.), 63 D.L.R. (2d) 376, 67 C.L.L.C. 14,043.}  
\footnotesize{\textsuperscript{142} Id. at 171; Paquet is cited supra note 49.}
is not such a compelling interest? Perhaps the sense of fairness in the right of the employee to participate in all adjudicatory hearings affecting his economic interests should be deemed most important here. Yet there are significant costs in time, flexibility and efficiency in allowing affected employees to participate. There were six employees in *Bradley*, and if all participated in one hearing (or there were six separate hearings), much of the value of the arbitration process could be lost. The adversary quality of adjudication requires real limits on the number of participants. A representation order or other such device is not necessarily adequate because there may well be internal differences in the right to promotion among these employees (only five of the six succeeded in *Bradley*).

Of course, this difficulty would be solved if the Courts were to devise meaningful standards for limiting the right of participation, and this is the issue in the conflict between *Bradley* and *Hoogendoorn* in the Courts. In effect, the Supreme Court disagreed with Laskin J.A. and decided that the Courts must penetrate beneath the form of the grievance and look at the substance of the issue. This might make more sense in functional terms, but would cause greater difficulty in administering the law with certainty at the arbitration level and in avoiding reviewable errors. The trouble with Laskin J.A.'s approach though, is that his tacit assumptions in *Bradley* led to all the judges posing the wrong questions in *Hoogendoorn*. In *Bradley*, he said that if the employee's substantive benefits are affected, they are entitled to protect them if the union will not. He held that the employer has no authority or power to protect the individual employee's interests even though he will naturally vigorously defend his own decision. Yet this ignores his earlier statement in *Hoogendoorn* that the legislature assumed (quite rightly I believe) that the parties — union and company — will furnish the arbitrator with all the necessary considerations for his decision.

What the Courts should ask in the *Bradley-Hoogendoorn* situation is whether this assumption is always likely to be true. Is the company interest the same as the employee interest, or are there differences which may require the individual to participate independently, assuming that the union is opposed to his interest? One cannot simply ask the question whether the employee is significantly affected by the decision, because the relevant point is whether his position is represented adequately by one side or the other. An employee may be dissatisfied with the union representation in a discharge case, for instance, even where it is on his side. Surely he does not have the right to participation through his own counsel in that case. If we are not going to get into the morass of evaluating the adequacy of representation in particular cases, we must make broader assumptions as to where there is probably a unity of interest between union and employee or company and employee. In most cases where the union is opposed to the employee, the company will be on his side. The best evidence of this is that they have not settled the grievance and, instead, have gone to the trouble and expense of arbitration (and, up to now, there are no legal limitations developed on the power of union and company to compromise individual grievances adversely to the employee as long as this is done in good faith). On such a standard *Hoogendoorn* may be doubtful, but for different reasons. *Bradley* is clearly a case where the functional reasons for natural justice in the labour relations context required that the arbitration decision be upheld.
In conclusion, then, the Supreme Court has not been unduly burdened by doctrinal baggage in doing what it believed was justice for the dissident employee whose job interest is affected by the decisions of his union. It reached very fair conclusions in Orchard and in Stern, though it is hard to see the practical significance of its quashing the award in Hoogendoorn. It has been suitably restrained in its intervention in this area and has been careful to limit the kind of doctrinal tools which might be used by lower courts who might be less reluctant to curb union authority. The opinions of the Court have not contributed much in the way of analysis or illumination of some of the difficult competing values in this area, but this may be a deliberate and desirable refusal to add to some of the ill-advised judicial rhetoric which these “trouble cases” tend to trigger. Fortunately, it appears that our legislatures are moving to exercise their responsibilities for this rather troubled branch of labour law.

THE LAW OF THE COLLECTIVE AGREEMENT AND LABOUR ARBITRATION

Not until 1960 was the Supreme Court of Canada asked to intervene directly in the area of the administration of the collective agreement. Since then, it has become increasingly involved, at the behest of the company, the union, and the individual employee. In a behavioural sense, the Court was not systematically favourable to the union, the company, or the individual employee, but it did become progressively more interventionist. The desirability of such a stance is perhaps moot, but there can be no doubt about the lack of quality in the arguments advanced by the Court in favour of its position. There were few opinions and dissents, little or no discussions about legal issues, few case citations of relevant authorities, and little or no coherence perceivable in the decisions. Everything deficient about the Court's performance and perception of its role is reflected in this sequence.

In sum, then, after staying completely out of the labour arbitration process for a decade, the Court in the Sixties began, slowly, to take a much more active stance. Within a year at the end of the period, it heard five cases, and quashed four decisions. It has laid the foundations for the exercise of a very far-ranging degree of control over labour arbitration, both on its own part and on the part of the Courts below. This has raised very serious questions about the desirability of the intrusion in the first place and, secondly, about the quality of the Court's performance of its new function of Supreme Court of Labour Arbitration. Simply to see in tabular form these rather crude indices of the sophistication of its work in the area is rather disconcerting. What follows is a somewhat more detailed examination of the cases themselves.

There are three different problem areas into which the cases can be grouped. The first deals with the question of whether any review of arbitration awards should be available under certiorari proceedings. Second, if there is review, how extensive should it be? What attitude will the Court take in interpreting collective agreements and how much deference will it pay to the judgment of the arbitration board? Finally, how will the Court co-ordinate the powers of arbitration boards in the administration of the collective agreement with those theoretically enjoyed by other institutions—especially the Courts and Labour Boards?

One of the most interesting facets of the whole area is the fact that all of these questions are directly related to the law laid down by the Privy Council decision in *Young v. C.N.R.* In effect, the Privy Council there held that collective agreements could not be the basis of legal action in the courts for wrongful dismissal, and that the appropriate remedy for employer conduct in breach of the agreement was a strike. Because of this hostile attitude of the common law courts, and because of public distaste for unnecessary industrial strife during the term of an agreement, the response of post-war legislatures was to render such strikes illegal and to require private arbitration (or another form of peaceful but final settlement if such could be devised) as the means of resolving disputes in the administration of the agreement. Gradually the Courts, especially the Supreme Court, have overcome their hesitation in involving themselves in the area and, as we shall see, bid fair soon to take complete control. In this process of gradual rejection of the *Young* rule and attitude, it is fascinating to note that the latter case is conspicuous by its total absence from citation in all of the opinions in the era.

The functional question becomes, then, whether the Courts should stay out of the area once the legislatures have decided there should be adjudicative settlement of disputes, and have decided to utilize arbitration for this purpose. The issue of the continued validity of the *Young* decision was directly raised by *Dinham*, the first case in our sequence. The plaintiff here sued the company for damages for the termination of his services pursuant to a compulsory retirement plan. The company had been certified by, and signed a collective agreement with, a union and had then instituted the mandatory retirement age of 65, as part of a new pension scheme. The union grieved on behalf of Dinham and many other equally affected employees and lost in the arbitration proceeding. Dinham then lodged a personal suit in the ordinary courts, arguing that the seniority clause, and the “no discharge without cause” provision, rendered the company's decision to terminate his services improper. In effect, he was suing on his individual contract of employment, which incorporated the substantive provisions of the collective agreement, the only difference from *Young* being the intervening decision of the arbitration board. The attitude of the Supreme Court was rather curious. As noted earlier, it did not even mention *Young*, and did not say that such an action was improper. Instead, Mr. Justice Abbott held that the arbitration decision was binding on the employee, as well as the

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union and company, because it was within the Board's jurisdiction, was
according to law, and did not purport to alter or amend the agreement.

Though the Court said it should not review the decision on the merits,
it then went on to express its opinion anyway and agreed with the arbitrator
on an extremely debatable question, and without any real canvass of the
issue. The opinion stated that, since the compulsory retirement age was
not mentioned specifically in the agreement, the function of management in
setting such an age was not limited. Abbott J. briefly, and rather superficially,
mentioned the seniority clause but completely ignored the "no discharge
without cause" provision (which was the basis of the decision for the
employee in the Quebec Court of Appeal). In effect, Dinham's employment
was terminated against his will because of his age. Surely the company
is no more entitled to say that this is a retirement, instead of a discharge,
than they can say that an employee quit instead of being fired. The question
on the merits is whether it is a sufficient cause for discharge that an employee
reaches a compulsory termination age which is uniformly applied to everyone.
This is the first indication of a very unfortunate habit the Court develops in
this decade — issuing casual ipse dixits about complicated and difficult
matters of principle about whose implications it is obviously not well-
formed.

The next important case in the development of a role for the Court
is Howe Sound, where a Company sought review of an arbitration award
by way of the prerogative writ of certiorari. In Rivando, the Ontario
Court of Appeal had held that such review was available. The legal question
was whether labour arbitration involved a statutory tribunal, because only
bodies of the latter kind fell within the traditional rules defining the avail-
ability of this remedy. Judson J., then an Ontario High Court judge, had
pointed to the private, ad hoc, party-nominated and controlled features of
the process and held that such review was not possible. The Court of Appeal
reversed on this question because resort to this quasi-private process was
required by statute and enforced by the Labour Board and Minister of
Labour. Howe Sound, though, arose out of British Columbia and its legis-
lation required "provision for final and conclusive settlement without stop-
page of work, by arbitration or otherwise of all differences between the
parties." The fact that this choice was available to the parties led the
British Columbia Court of Appeal and the Supreme Court to distinguish
Rivando and hold certiorari unavailable. No functional inquiry was addressed
to the question of whether there was any meaningful alternative to arbitration,

148 I have reviewed this issue and the relevant cases in Weiler, Labour Arbitration
and Industrial Change at 9-10 and 27-28. One can discern something of the impact of
the dicta in Dinham by reading the subsequent arbitral decisions in Dominion Tar &
Chemical (1960), 10 L.A.C. 331 (Hanrahan), Dunham Bush (Canada) Ltd. (1964),
13 L.A.C. 270 (Lang), and Ontario Malleable Iron (1967), 19 L.A.C. 1 (Palmer).
147 Howe Sound Co. v. Int. Union of Mine, Mill and Smelter Workers, [1962]
146 Re International Nickel Co. of Canada v. Rivando, [1956] O.R. 379 (Ont.C.A.),
2 D.L.R. (2d) 700, 56 C.L.L.C. 15,263.
140 Labour Relations Act, S.B.C. 1954, c. 17, s. 22(1) [emphasis added].
especially when the Minister of Labour was given the statutory power of inserting an arbitration provision in the agreement.\textsuperscript{150}

The Court did not have to decide the validity of \textit{Rivando} itself. Not until \textit{Port Arthur Shipbuilding}\textsuperscript{151} was the question raised. Cartwright C. J. in \textit{Howe Sound} had said that judicial review under the common law or the Arbitration Act\textsuperscript{152} would still be available in the absence of the prerogative writs. In \textit{Hudson Bay Mining},\textsuperscript{153} the Court dealt with review of a decision under the Manitoba Act (the same in the above respect as the British Columbia Act) which had been initiated by originating notice of motion to make a declaration about the proper construction of a written document. The trial judge and the Court of Appeal both adverts to and approved this procedure after \textit{Howe Sound}. The Supreme Court dealt with the merits and ignored the question. Hence, when \textit{Port Arthur Ship-Building} raised the issue of review under the Ontario legislation, the matter might have been considered academic. Yet the Court considered the problem sufficiently important to ask for rearagement about it and interest was heightened by the fact that Judson J., traditionally very loath to extend judicial review, and the author of the trial judgment in \textit{Rivando}, was sitting on the Court. It was a matter for some surprise, then, that Judson J. wrote the unanimous opinion which approved \textit{Rivando}, and neither mentioned his earlier contrary decision nor dealt with any of the reasons in favour of it.\textsuperscript{164} In fact, he went much farther in an attempt to rationalize the whole area by holding that, irrespective of the use of the Arbitration Act or certiorari, the Courts have an asserted common law power to quash arbitration awards. Because the issue is simply one of looking at the agreement and the award, the notice of motion procedure is appropriate and it is quite irrelevant to the question of whether the award can be quashed that the motion does or does not contain a reference to certiorari.

On balance, I believe this final decision to be correct, at least in the light of the principles of judicial review generally applied in Canadian administrative law. The addition of judicial review does involve substantive costs in formalities, money and delay. However, arbitration boards are ad hoc creations of widely varying quality, the parties are forced to resort to the process and sometimes to accept a chairman against their wishes, and there is no other body able to maintain control and ensure some uniformity of decision-making except the Courts. If Labour Relations Boards can be reviewed by the Courts, then there is no good reason inherent in the collective bargaining process for exempting arbitration boards who deal with legal

\begin{footnotesize}
\textsuperscript{150} Polymer, supra note 105, raised precisely the same issue under the federal legislation but was decided on another ground.


\textsuperscript{152} R.S.B.C. 1960, c. 14.


\textsuperscript{164} Judson J.’s performance here is completely out of line with his early behavioural patterns. His opinions favour review of administrative decisions, are adverse to unions, and are legalistic and thinly-reasoned. One perceives the limits of judicial behaviouralism in trying to predict or understand such a set of aberrations from consistent earlier trends.
\end{footnotesize}
questions of interpretation of both agreements and related statutes and common law doctrines. A substantial change has occurred between Young and Port Arthur Shipbuilding, and, whatever reasons there may have been for the earlier rule, they no longer obtain. One might have wished that some explicit attention had been paid to these underlying functional factors which appear to be the real reasons for the decision, but the results are probably correct in any event.

Yet the gaps in the reasoning process always return to haunt the results. Once the Court decides the easy question about whether any review at all is possible, there remains the difficult question of how much review and what kind of review. If we try to understand the arguments for and against judicial review of arbitration awards in a rational and non-ideological fashion, the picture that emerges is an ambiguous one. Appeal to another authority is needed to correct egregious errors, to prevent undue extension of arbitral power, to integrate the narrow expertise of arbitrators into the general values of the legal order, and to be a check in the background which reinforces the arbitrator’s own desire to limit himself in these ways. Against this are, first of all, the practical costs referred to earlier. Much more important, though, is the real danger of “absentee management”. Interpretation and elaboration of collective agreements usually involves the exercise of judgment about difficult legal issues and requires some experience of, and sensitivity to the labour relations context in which the problem appears. When one of these decisions occasionally reaches the Courts, they see only a small part of the process, and perhaps only those cases which present a rather distorted view of the general problem. In the effort to deal with these concrete instances in opinions which use general and authoritative language, the necessarily uninformed Court can work great harm on the ongoing process. In fact, this is what judicial review by the Supreme Court appears to be doing now.

Perhaps the best such example of this tendency is the substantive decision in Port Arthur Shipbuilding Co. itself. The employees had been discharged for deliberately being absent from work to take temporary employment with a competitor at higher wages. The Arbitration Board held that discharge was too serious a penalty for this offence, in all the concrete circumstances, and substituted lengthy periods of suspension. Two legal questions were raised for review of the merits of this decision. First, does the arbitrator have the power to take into account the relative seriousness of the penalty and relate it to the blameworthiness of the conduct in deciding whether the penalty selected is “just”, “proper”, or “reasonable”? Or, is he simply directed to finding that the employee has given cause for some form of discipline, following which management has a completely unfettered discretion in selecting the sanction it feels proper? Second, if the arbitrator has the power to quash a form of discipline because it is too severe in the circumstances, does he have the power to select the appropriate sanction himself, pursuant to his mandate to make a final and binding settlement of the dispute? Or, on the other hand, should he simply reinstate the employee with full compensation, notwithstanding his infraction, simply because the company has itself erred on the side of severity?

I have reviewed the legal impact of this decision in much greater detail as chairman in the labour arbitration case of SKD Mfg. Ltd. (1969), 20 L.A.C. 231 (Weller). The references to relevant arbitration decisions are collected there.
In a little over a page of reasons on the substantive issue, and without any citation of relevant legal authority, Judson J. reversed the arbitrator’s award. The language of his opinion, especially the sentence “Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration”, led some arbitrators to interpret the decision as an authoritative mandate to accept the most stringent limitations on their jurisdiction. Happily several arbitrators have refused to take this language out of the context of the concrete fact-situation in the absence of a clearer and more authoritative statement. The Ontario legislature has stepped forward to ensure that no such authoritative statement can affect its labour relations.

What is important, though, are the deficiencies in the quality of reasoning adopted which can do real damage to labour relations that a set of busy legislatures cannot easily repair.

There are three notable gaps in the opinion of Mr. Justice Judson. First, he never once explicitly draws the analytical distinction between these two quite different legal issues raised by the case. Hence we never really know whether his language is intended to deny the arbitrator an implied power to substitute a penalty, or whether he is interpreting the explicit language of “reasonable cause” as carrying no reference to the seriousness of the penalty in relation to the offence. The first conclusion, though debatable, is still plausible. The second is almost unthinkable. Judson J. does not tell us which he intends, and one wonders if he ever fully appreciated the distinction himself.

Second, Judson J. never addresses himself to the question of what role the arbitrator should play in a discipline case. He says they are not supposed to exercise a full appellate function over the exercise of management discretion within the rights of the latter. Yet what are these rights, and how extensive should that discretion be, and why should arbitrators not exercise an appellate function? Surely it is incongruous that discharge can be “reasonable” if it is imposed on an employee with lengthy seniority and a good record simply because he has committed some minor offence which usually warrants a penalty warning on his record. Should we simply trust the discretion of management to ensure that such injustices never come about? Yet, anyone with experience in reading arbitration awards or deciding arbitration cases knows that they do occur and that the only defence against their occurring more often is the expectation that arbitrators will reverse them if they do.

This brings us to the third gap. There is no reference to, nor any hint of familiarity with, the highly-developed system of arbitration law of which this decision was a part. A consensus of arbitrators held that they had the power under the normal arbitration clause to review the seriousness of a penalty and substitute a lesser one if they decided that it was proper to do so. A whole host of subsidiary doctrines and practices enlarged this basic assumption. These included the doctrine of the “culminating incident”, the use of employment records which collated seniority, age, work performance, disciplinary history, etc. in evaluating severity of discipline, and reference to provocation, duress, inequality of penalty, etc. in mitigating discipline. Perhaps

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157 One good example is the factual situation in Woods v. Miramichi Hospital
it is charitable to assume that the Court, if apprised of the significance this casual statement could have, would not blithely have overturned this complete doctrinal system. The trouble with absentee management by judges, though, is that they are not familiar with these implications of what they are doing and that they will not usually be troubled later on by what they have done. Yet, their authoritative statement is in the reported opinion, and its intrusive force may have consequences far different than were intended by the Court.

It is difficult to decide how the *Port Arthur Shipbuilding* opinion should be interpreted. Its brevity, its failure to refer to the general legal questions and authorities, and its constant reference to particular arbitration awards perhaps warrant a charitable interpretation that it was merely a reversal on the facts of the instant case. Yet one wonders how charitable it is to impute such an intention to the highest appellate Court in our country which has allowed an appeal on an issue which generated exhaustive and scholarly opinions in the lower courts. Moreover, Judson J. appeared to agree with the opinions of Brooke and Schroeder J.J.A. below, and one essential facet of these decisions was that an arbitration board had no power to substitute a penalty, pursuant to its remedial powers under the statute and the Agreement. An important basis for the argument in the lower courts was the *Polymer* decisions of Laskin J. and McRuer C.J. which were approved without much comment in the Ontario Court of Appeal and Supreme Court of Canada. Not only is this decision on the very analogous issue of an implied power to award damages (in order to give a final and binding settlement to a dispute) not discussed, it is not even mentioned.¹⁵⁵ Such a performance is simply not good enough on the part of a Court which has just decided that it is going to exercise something like full appellate review over arbitrators.

I might add that, on the merits, I do not believe that *Polymer* and *Port Arthur Shipbuilding* can be functionally distinguished. Both deal with issues left untouched by the parties and raise the question of the appropriateness of arbitrators elaborating the agreement of the parties. If it should not do so for the one, then it should not for the other. In fact, I believe that a creative role for arbitration is both necessary and desirable in this area which may be described as the definition of the remedial system of arbitration itself. This includes questions such as the authoritativeness of precedent, the use of extrinsic evidence, the adoption of theories of interpretation, allocation of burdens of proof, admission of evidence, and the scope of remedial authority. As to none of these do the parties usually agree to a specific conclusion, yet answers are necessary in order to flush out the statutory and contractual scheme of labour arbitration. Surely arbitrators must have the power to propose the answers and, if the reviewing Court disagrees, it must give good reasons why the answer is totally undesirable on the merits.

There are two other cases which were decided at approximately the same time as *Port Arthur Shipbuilding*, and involved another problem from the

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¹⁵⁵ Nor was the article by Palmer, *The Remedial Authority of the Arbitrator* (1960), 1 Current Law and Social Problems 125.
same "family". Union Carbide\textsuperscript{159} and Hoar Transport\textsuperscript{160} both dealt with the effect of a breach of procedural time limits on the eventual arbitrability of the grievance. In both cases the arbitration board held that the breach by the union should not have the effect of totally voiding the grievance of the individual employee and that, instead, the arbitrator should develop a more appropriate remedy in favour of the company and against the union. Unlike Port Arthur Shipbuilding, the parties had directed their minds to this issue to some extent, and the actions of the respective Boards raised some important policy problems respecting freedom of contract and the arbitration process.

Unfortunately, the very brief opinions of the court treated these issues as self-evident and requiring little or no reasoning in justification. They did not advert to the technical distinction developed in labour arbitration between "mandatory" and "directory" time limits (one which was reflected in the opinions which were reviewed). Hence they left quite unsettled the question whether "avoidance" of a grievance was an automatic "penalty" for breach of a time limit, or whether one must be specifically provided for in the agreement. Nor did they examine the functional significance of legislative requirement of arbitration of disputes,\textsuperscript{160} its explicit distaste for technical and formal arguments under the statute,\textsuperscript{161} or the practical significance of a penalty visited on an employee for the default of a Union which in no way harmed the Company.\textsuperscript{162}

Additionally, from the point of view of judicial review, Hoar Transport and Hudson Bay Mining (delivered less than a year before) are impossible to reconcile. In the latter case, the arbitrator had held that the collective agreement required the “stacking” of the Canada Pension Plan on the private, agreed-to plan rather than their integration. Martland J. held that the decision could not be reviewed, even though he might think it incorrect, because it is an "interpretation" of the agreement. (He then went out of his way to add that he did agree with the decision, probably being unaware of the fact that there was real disagreement in the reported arbitration decisions,\textsuperscript{163} and thus creating the same kind of dangers as the dicta in Dinham.)

\textsuperscript{160} Weiler v. Hoar Transport Co., [1969] S.C.R. 634, 4 D.L.R. (3d) 449, 69 C.L.L.C. 14,180; aff'd (1968), 67 D.L.R. (2d) 484. Since I was the author of the two arbitration awards reversed in these decisions, I will not review the specific, legal merits of these cases in any detail. However, it is necessary to depict the problems and conclusions they present in order to give a comprehensive picture of the work of the Court in the area.
\textsuperscript{161} Labour Relations Act, R.S.O. 1960, c. 202, s.34, as am. by. S.O. 1970, c.85, s.12.
\textsuperscript{162} The analogous decision of Galloway Lumber Co. v. B.C. Labour Relations Board, 48 D.L.R. (2d) 587; [1965] S.C.R. 222, aff'd (1964), 44 D.L.R. (2d) 575, was mentioned but its significance not really canvassed, though it had been relied on in the arbitration cases.
\textsuperscript{163} Among these cases were Columbus McKinnon, 17 L.A.C. 213 (Lang), Timken Roller Bearing, 17 L.A.C. 157 (Reville), Hydro-Electric Power Commission of Ontario, 17 L.A.C. 244 (Thomas) and Hamilton Spectator, 17 L.A.C. 323 (Little), where integration was permitted and Tecumseh Products, 17 L.A.C. 144 (Lang) and Township of Etobicoke, 17 L.A.C. 199 (Lane), where it was forbidden. If a Court is going to intervene directly in a problem of interpretation it should feel obliged to canvass the relevant arbitration authorities in order to obtain some sense of the complexity of the issues.
In *Hoar Transport*, the question was whether, under the Agreement, the nominee of the union was the “agent” or “representative” of the grievor. The arbitration board held that he was not, relying on both the language and the negotiation history of the clause. The Court overruled this “interpretation” because it disagreed with it (though it gave no reasons) and ignored the distinction expressed in *Hudson Bay Mining*. Even the dissent in *Hoar Transport* proceeds on the basis that the question in judicial review is whether the conclusion of the Board about the meaning of the language was the right one rather than a proper one.

The author of both the *Union Carbide* and *Hoar Transport* opinions was Mr. Justice Judson, and the sum effect of his work was to squelch a promising effort to interpret and administer time limits in collective agreements in a reasonable manner, giving effect to the substantive protection they envisaged but not allowing them to be used as mere technical obstructions to the enforcement of employment claims. It is especially ironic then that the same Mr. Justice Judson held in *Hamilton Street Railway v. Northcott* that the existence of such stringent time limits in utilizing the arbitration process was a good reason for allowing suit in the common law courts for rights created by the collective agreement.

Before dealing with the *Northcott* case in detail, I might mention *Hoogendoorn* again, because it is of more than peripheral relevance to this issue. In that case, the majority of the Court went out of its way to include the individual employee in the grievance and arbitration procedure once the latter was constituted. In so doing it approved the application of the rules of natural justice to the arbitration process in order to find that Company representation of individual employee interests was not sufficient. The significance of *Hoogendoorn*, though, is that it held that the technical character of a policy grievance would not prevent the Court perceiving the substance of the individual problem posed by the case. In *Union Carbide* and *Hoar Transport*, on the other hand, where the individual employee would be deprived of any review of his grievance at all (whereas he was at least represented by the Company in *Bradley* and *Hoogendoorn*), the Court was unwilling to look at the substantive significance of a technical error, late in the grievance procedure, by a Union official, or even an appointed member of the Board. It is only fair to add that Judson J., who wrote the majority opinions in *Union Carbide* and *Hoar Transport*, was consistent in his dissent in *Hoogendoorn*. This brings us then to the significance of *Northcott*, a decision which Judson J. did write for the Court.

The *Northcott* case dealt with a situation where the Union brought a policy grievance about the right to guaranteed hours of work, after the time limit for individual grievances expired. When the agreement was interpreted in its favour by the arbitration board’s declaratory judgment, and the employer failed to pay the individual’s lost wages, the latter sued in Court. The Supreme Court held that they could succeed as long as no issue of interpreta-

tion of the Agreement was involved, because the latter was within the exclusive jurisdiction of the board. Here, of course, there already was an authoritative judgment of the board, but the decision was not confined to this situation. Instead the Court went out of its way to approve of *Grottoli v. Lock*, a case where an employee sued directly in court for vacation pay as provided by the agreement, and without first going to arbitration.

What does this decision mean? Of course the phrase "interpretation of the agreement" is an elusive chameleon, as is shown by its use in reviewability decisions. Decisions about the fact of an offence giving rise to a discharge or discipline would be amenable to suit as would the quantum of damages in an unlawful strike. Cases of so-called application of a provision whose meaning is clear (as in *Grottoli v. Lock*) would allow easy avoidance of time limits which ordinarily affect only the right to get to arbitration. Presumably the employee discharged in *Hoar Transport* can still sue for unlawful dismissal in Court. This decision is inconsistent with *Young v. C.N.R.*, with the policy, if not the strict wording, of the Rights of Labour Act with the intention of the parties, with the compulsory legislative provision of a private dispute-settling process for collective agreements in negotiating a collective agreement, and with the ability of the Union to function effectively as a bargaining representative in the administration of the agreement, as well as in its negotiation. A whole host of American cases and literature devoted to these complex issues is unmentioned by the *Northcott* case, when the latter casually laid down a very wide and very unnecessary legal rule, by approving *Grottoli v. Lock*. Again, the only reason given in favour is the fact of time limits, and it is probably unnecessary to ask why the Court did not see fit to ameliorate the effect of such provisions, directly, as it had the opportunity to do shortly thereafter.

There is no doubt that the *Young* decision had been rendered outmoded by subsequent legislative statements of the binding legal effect of collective agreements. This posed severe problems as to the direction in which the Court should move within the doctrinal notion of the individual contract of employment. The individual contract is a fiction as far as social reality is concerned, and the legislatures have intended to make collective agreements legally enforceable through the medium of labour arbitration. Clearly, if the Court is to incorporate the substantive provisions of the collective agreement in the individual contract, it should also incorporate the procedures for adjudication and enforcement of these provisions. This will implement the objectives of the legislature in selecting labour arbitration as the primary route for dispute-settlement under the agreement, while leaving the courts ultimate control through judicial review of arbitration decisions.

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167 A good recent review is Lewis, *Fair Representation in Grievance Administration* 1967 Supreme Court Review 81.
168 And as Adell explicitly pointed out in the Canadian Bar Review note, supra note 164, which preceded *Hoar Transport* and *Union Carbide* in the Supreme Court.
169 The logic of this argument is radically extended in *Re Prince Rupert Fishermen's Co-operative Asscn.* (1967), 68 C.L.L.C. 14,079 (B.C.S.C.).
This still leaves the problem explicitly adverted to in Grottoli (and, perhaps tacitly relied on by Northcott) — union control of access to arbitration and its concomitant power over individual rights. The effect of Northcott's approval of Grottoli is to splinter the law of the collective agreement by providing two forums for adjudication of disputes and to fragment the union's exclusive bargaining authority created by legislation and approved in Paquet and O.C.A. (neither of which was cited in Northcott). The doctrinal technique adopted in Northcott is quite unrealistic, because the reasons for arbitration apply equally as much to fact-finding or fact-evaluation as to "interpretation". The Court should have started with the duty of fair representation hinted at in O.C.A.W. and used this to review union control over access to arbitration, while still requiring the latter as the primary route for all adjudication under the agreement (by analogy to Hoogendoorn). Of course, this kind of imaginative law-making requires quite a different style of judicial reasoning, and the inability of our courts to develop it is one of the main reasons why they should be reluctant to deal with the problems they see in the interstices of our legislation.170

There are few areas of Canadian law where the Supreme Court has done a poorer job than in its efforts in the area of the collective agreement and labour arbitration. There is some hint in the literature of the area that the collective agreement is a very peculiar and esoteric instrument for judicial administration and that labour arbitration is such a distinctive function that it is outside the competence of the ordinary courts.171. I would strongly disagree with either of these suggestions. The collective agreement is a sophisticated and complex document, and its interpretation requires great sensitivity to its special features and an understanding of its social background. These characteristics it shares with almost all statutory or contractual interpretation. Labour arbitration requires judgment and experience, but it is and should be a form of adjudication, and any kind of judgment requires professional craft and skill. The tragedy of the experience I have recounted in this area is not that the Supreme Court involved itself in an area which was peculiarly unsuited to law and courts, but rather that this sequence of cases epitomizes all that is deficient in the conception of law and judging which appears to be shared on our Supreme Court.

There are ten cases in the area. The opinions are invariably short, sparsely-reasoned, and devoid of reference to authorities, even to those cases just decided by the Court in the same area. Perhaps the Court does not exercise bad judgment in its concrete decision of some of these cases, but the opinions it writes, and the general policies it enunciates are almost always disastrous. There seems to be no sense of the complexity of the issues, and how the concrete cases are fitted into an on-going legislative, administrative, and privately-negotiated framework. The Court uses no opportunity to build on its earlier work, to state general principles and policies and then to rework


them in terms of later experience, and to try to create some coherent and orderly pattern of law in the area.

Unfortunately, despite its failure to do the kind of intellectual and legal work which sophisticated judicial policy-making requires, the Court has not been at all reluctant to express its casual opinions about some of the general questions raised in the concrete cases. Too often, it has gone beyond what is necessary for the specific decision to state a more general rule of law, and almost invariably the resulting rule is very dubious. However, labour arbitration boards find it very difficult to dismiss the authoritative language in a Supreme Court opinion, however off-handed it may be. Hence, we have the worst of all possible worlds — a Court which does not see that it is making radical changes in the law in this area and that this requires a certain reasoned attention to the problems, but also a Court which is actively intruding by way of the worst kind of "absentee management".

I think that the Courts did have to intervene and that Young v. C.P.R. became outmoded after the radical legislative changes in our labour policy. However, the Courts can only do more harm than good by their intrusion if they are unaware of the implications of what they are doing for the whole context of the problem raised by their case. Such an awareness of the ongoing process requires that the Supreme Court make itself informed about what is going on in the arbitration reports themselves. Even if such direct acquaintance could not reasonably have been expected of a Court in the Sixties, it can still not avoid responsibility for the ill-considered steps it was taking. There were several massive efforts in the area by Mr. Justice Laskin, who was eminently qualified to begin the task of building a coherent law of labour arbitration in Canada, a law which was attuned to the essential elements and needs of the arbitration process, and with a proper but limited role for the Court in preventing or remedying its excesses. Three of these efforts were reversed without reasons, and the fourth was sustained without comment. One can only hope, now that Laskin J. is a member of the Court, that the very sparseness of the reasoning in the opinions will enable him to confine them quite easily to their concrete facts, and then to begin anew the task of creating the rational body of industrial jurisprudence we so badly need.

GENERAL CONCLUSIONS

A complete and systematic review of the work of the Court in the whole area of labour law furnishes the kind of concrete experience which is necessary in order to put flesh on the earlier, and very general, analysis of "institutional policy". The specific content and impact of the Supreme Court's performance may furnish some evidence with which my earlier proposal of judicial restraint and neutrality can be evaluated. As can be seen, there are four distinctive divisions in the field of labour law in which the appropriate role of the Court had to be worked out — collective bargaining legislation, administration of the collective agreement, industrial conflict, and the internal relationship of the union to its members.

The last three of these problem-areas had each developed a similar response from the common law — a "hands-off" attitude on the part of both
the law and the courts. Privy Council decisions in Young and Kuzych, respectively, had held that collective agreements were legally unenforceable in the courts and drastically limited an effective remedy for the individual employee against his union in the courts. The House of Lords in Crofter Veitch had adopted much the same stance by refusing to allow the courts to review the legitimacy of peaceful use of economic coercion by unions for their own selfish objectives. Young and Kuzych were Canadian cases in origin and presumably were binding law in Canada while the Crofter Veitch approach was ratified by the first Supreme Court cases of this area — Aristocratic and Newell. Labour relations was to be treated as a war between fairly evenly-matched "countervailing powers" and the Courts were not willing to impose legal constraints even to remedy immediate injustices which they believed they might perceive in the process.

Canadian legislatures changed the thrust of our law by the enactment of collective bargaining legislation which aided but also regulated unions in their attempt to achieve a secure bargaining stance. In order to flesh out the skeletal framework of this law, the legislatures uniformly created administrative agencies to whom it also gave primary control over the remedies and sanctions specifically created for the statutory provisions. Unfortunately, not only did the legislatures, of necessity, fail to create an exhaustively defined body of collective bargaining law, but they also, and without the same justification, failed to direct their attention to much of the related areas of common law mentioned earlier. This was particularly a problem because the direction of social change sponsored by the legislation was quite inconsistent with the policy of non-involvement in the common law. Collective agreements were made legally binding and strikes were legally proscribed at times when the legislatures had provided alternative and more rational procedures for dispute-settlement. Though picketing and the relationship of employee to the union were not usually dealt with in the statutes, the close relationship of picketing to the coercion of a strike, and the new union status and power over employment opportunities, made the old doctrines and rationales of "information picketing" or "voluntary association" rather outdated.

Hence one could predict a real surge on the part of the Canadian courts to revise the old attitudes of legal neutrality and bring them into what they would believe was a more rational relationship to the statutory attitude toward unions and collective bargaining. Moreover, there remained in the common law a sufficient residue of traditional doctrine — much of it anti-union in inspiration — which could easily furnish an adventurous court with legal justification for the advances it might want to make. On the other hand, there still is a real difference between the conclusion that legal neutrality is no longer appropriate and the decision to discard the position of judicial restraint. All of the arguments I have sketched earlier remained as valid reasons why the courts were not the right institution to engage in the legal innovation required in this area. Moreover, much of the letter and all of the spirit of the statutes showed that the legislatures agreed with the courts about their inability to make a real contribution to the development of labour relations law. Not only was primary jurisdiction given to administrative agencies, arbitration boards, etc., but the draftsmen exercised all their legal ingenuity to preserve their decisions from even limited judicial review.
With this background, what pattern of involvement emerged in the work of the Supreme Court in the next twenty years? The first thrust occurred in the quartet of labour board decisions in 1953 and was not promising. The Court clearly asserted its power to ignore the existence of privative clauses and, with few exceptions, the judges exhibited little or no readiness to defer to or learn from the judgment of the specialized agencies. Each of the decisions focused on the concrete problems in the immediate dispute and there was no effort to create a general doctrinal rationale for judicial involvement. This same attitude was displayed in the next few labour board decisions which made their way up to the Supreme Court.

The first common law problem to next reach the Court was concerned with protecting the individual employee-member against union officials. Orchard was rather hesitant in formulating any general principle favouring judicial protection and in treating the Union as a suable entity. It did go some way beyond Kuczyn, though, and effectively gave the individual plaintiff almost all the relief he wanted. Full-scale judicial intervention followed shortly, though, in favour of the individual in Stern and against the Union as an entity in Therien. The latter decision, together with Gagon, reversed the policy direction of Aristocratic and Newell, and consolidated the position of the courts in fleshing out the gaps in no-strike legislation and in making available their own distinctive remedy of the labour injunction.

Judicial participation in decision-making under a collective agreement, together with arbitration boards, was equally hesitant in the early cases, notwithstanding that the latter did not reach the Court until the 1960s, and at the same time as Stern and Therien. The individual employee was held to be bound by the decision in Dinham, no review at all was allowed in Howe Sound, and the important arbitration advance in Polymer was accepted without comment. However, the same pattern emerged in this area also by the end of the decade. Full-scale review of all issues of law and interpretation is afforded by the “Osgoode Hall trilogy”, an independent jurisdiction for the courts is staked out in Northcott, and the continuing effort to protect the individual employee against union power is extended to this area in Hoogen-door. Meanwhile the Court’s attitude to labour board decisions was rather fitful, as it was very lenient in most cases, including claims of procedural natural justice. However, the Court did reassert its control in Barbara Jarvis and Metropolitan Life, when it reversed extensively-reasoned innovations by the Ontario Labour Relations Board. Effectively, the law of judicial review which the Court has developed allows for reversal of any serious error of law which the judiciary believes it sees in a labour board opinion.

Hence, within this one dimension — judicial restraint or judicial activism — with which I have been assessing the work of the Court, the major thrust of the Court’s endeavours is unmistakable. Beginning slowly, but with increasing intensity, the Supreme Court has carved out a major role for the Canadian judiciary in establishing and administering our labour law policies. Hence, we have a substantial body of experience which can be used to test my hypothesis that such a role for our courts is institutionally undesirable. Both the legal doctrines formulated by the Supreme Court, and those created by lower courts in the area of judicial innovation legitimized by the major Supreme Court decisions, are relevant for this purpose.
The first argument I made against judicial creativity in labour law is that a body whose primary function is the adjudication of concrete disputes will not likely formulate general, substantive doctrines with the kind of rational quality we would prefer. Careful reading of all the Supreme Court cases in this area has left me with the inescapable impression that this Court is very much oriented towards the equities of the instant case and concerned to give a remedy to an individual who seems to have suffered an injustice. The behavioural indices I analyzed earlier suggest that this tendency is increasing. Gradually the pursuit of the objective of equity in the concrete dispute led the Court to adopt, almost unconsciously, a high degree of overt control over the whole labour relations process.

It appears to me that in most cases, the Court's intuitive sense of the realities of the individual case is usually defensible. Even some of the decisions which I personally find debatable, involve value choices which are reasonable in the circumstances. Moreover, the Court's relative lack of concern for legal doctrine means that it is usually not blinded by abstract concepts in the older law. It is quite ready to penetrate legal form to get at the substance of an issue and remould old doctrine to make sense of new social facts. The problem of picketing in support of illegal strikes, the suability of unions, changing corporate and union entities, agency shop clauses, specific performance of the contract of employment, the remedial power of arbitrators, and the discretion allowed in certification, all testify to this fact, albeit with certain notable fumbles. Moreover, as I have noted several times, the Court has been fairly moderate in evaluating both Union and administrative agency claims in engaging in this innovation.

This is not to say that the Court's interventionist stance has not had costs. It has legitimized the exercise of much worse behaviour and judgment in the lower courts, especially in the area of strikes and labour arbitration (and, to a lesser extent, in the review of labour boards). The evils in a purely intuitive exercise of good judgment are that the Court has not stated in general, systematic, doctrinal terms its own views about the collective bargaining process and the role of law and the courts. It thus has not been able to build on what it has done before in clarifying and refining its own views, nor has it been able to indicate to the lower courts the priority of values on which it has decided and which it wants followed. The essential moderation and good sense of the Supreme Court has thus not been duplicated in the lower provincial courts where the bulk of labour relations justice is meted out.

The undue influence of the equities of the concrete dispute is exacerbated by several other features of Supreme Court adjudication in this area. In the first place, the Court, of necessity, must rely on the efforts of counsel to present the case for each side and counsel in the adversary process are concerned to win the instant case for their client and only secondarily for the kind of general legal doctrine which may emerge for the future. Moreover, the relative infrequency of judicial involvement in the area makes it difficult for the Court to learn a great deal from its earlier efforts and to see the wider context into which it is inserting its new legal rule. Finally, the Court deprives itself of the assets which might help overcome these difficulties

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172 Globe Printing appears to be a very good example of this.
because it does not utilize lower court decisions, Board decisions, foreign (especially American) precedents, law review articles, etc., which could help it appreciate the practical significance of the doctrines it is attempting to formulate.

There are at least three typical kinds of deficiencies which result in the Court's performance. It may give the right concrete decision but base it on erroneous doctrinal theory;\textsuperscript{178} it may make the right concrete decision but clutter up its opinion with dangerous and influential dicta;\textsuperscript{174} it may make the right decision but do so without formulating any intelligent or integrated theory at all, especially one which attracts a Court majority.\textsuperscript{175} Each of these defects may be much worse than decisions which are dubious on the merits but are confined within a narrow compass\textsuperscript{170} and can be specifically remedied if the legislature so wishes.\textsuperscript{177}

The process of decision-making in this area is sadly lacking in even the desire to create an integrated pattern of rules which would allow the Court to see the implications of what it is doing in the whole body of developing law, to incorporate the efforts, where relevant, of U.S. courts or academic writers, and to build on the cumulative insights which can be transferred from every part of this area to every other part. What we have, instead of a clear statement of the values which are operative in the actual process, is a set of opinions which manipulate very abstract legal doctrines (derived largely from irrelevant English cases) to reach what is usually a sensible concrete conclusion. The trouble is that out of the multitude of such concrete disputes which arise in Canada — whether settled privately, or adjudicated by boards or lower courts — only a very few can ever reach the Supreme Court (only fifty-one in the last twenty years). The Court can no longer afford to be simply a group of nine “wise men” dispensing industrial equity to individual claimants. However, the fact that this is what it has done, and is very likely to continue to do, makes me extremely dubious of the desirability of any extensive role for Canadian courts in formulating our Canadian labour law.

The second relevant criterion in assessing the propriety of a judicial role in this area concerns the legitimacy of its doctrinal products. This raises the delicate question of whether a tenured and unrepresentative body such as the Court can impartially weigh the competing interests of unions and management and then adopt the correct rule. Behavioural analysis of the votes of the judges and the decisions of the Court did not indicate any undue bias in judicial attitude. However, it is no secret that Canadian unions have vociferously opposed every extension of judicial power in this area and the

\textsuperscript{172} See, e.g., Orchard and Gagnon.
\textsuperscript{174} See, e.g., Dinh; Hudson Bay Mining & Smelting; Stern; Northcott in approving Grottoli; Hoogendoorn in approving Bradley.
\textsuperscript{170} See, e.g. Aristocratic and Newell; Canada Safeway and Smith & Rhuland; Stern.
\textsuperscript{177} One can compare legislative reversal of the specific conclusions of \textit{Metropolitan Life} with its failure to revise \textit{Barbara Jarvis}. However, general doctrines, especially of reviewability, as formulated in \textit{Metropolitan Life} or \textit{Port Arthur Shipbuilding} are almost impossible to correct legislatively.
A view of management is very much in contrast. A clue to this apparent inconsistency can be located in the trend in the general doctrines which have resulted from these decisions. In the long run, the doctrines tend to have a much larger impact on the balance of power than do decisions in a few concrete disputes.

In the formulation of new legal rules, unions have fared badly in situations where their interests conflict with those of the individual employee-member. Perhaps Orchard and O.C.A.W. did not require a large step forward by the Court, but the same cannot be said for Stern, Northcott, and Hoogendoorn. Whatever may be said about the desirability on the merits of these new legal rules, there can be no doubt that the Court has itself imposed restrictions on union power which, to some extent, splinter its authority and cohesion for the economic struggle with management. The same is true of Therien, Gagnon and Winnipeg Builder's Exchange which involve a direct conflict between the two major interest groups. The Court gave management the extremely effective and almost draconian remedy of the labour injunction to enforce, without limitation, the legislative policy against untimely industrial conflict. Again, I am not concerned at this time with the merits of such a step but simply to record the fact that extensive revision of authoritative legal doctrine was necessary to implement this new policy and the Court was quite prepared to undertake it.

In the direct administration of the legislation, the Labour Board is required to perform the major task of innovation in the first instance and problems reach the Courts only at the later stage of review. The primary doctrinal advances made by the Court in this area involved the strained reading of statutory privative clauses to retain judicial control over legal developments. Theoretically such control can be used at the behest of either side which may be affected by an adverse administrative decision. As a practical matter, on most occasions when the Court has decided for the union in this area, it has done so by ratifying a Labour Board innovation. The major reversals of Board decisions have occurred when management has succeeded in persuading the Court to apply the narrow letter of statutory language to what the Board perceived as necessary and permissible policy demands. Occasionally, though, a Labour Board does adopt a new approach adverse to the interests of a union, and the latter asks the courts to review and reverse it. Three such cases reached the Supreme Court with mixed results.

While the doctrinal product of the Court in the administrative law of collective bargaining has been fairly balanced, the same cannot be said for the law of the collective agreement and labour arbitration. I have already mentioned the creative efforts in Hoogendoorn and Northcott to limit union power over individual employee interests. In the three important “Osgoode Hall” decisions, the arbitration boards had attempted to rework older doctrines of master and servant law and contract interpretation. The Court unambiguously squelched these efforts in favour of a very restrictive view of labour arbitration and the collective agreement. Again, what is important at this stage are not the merits of these decisions, but rather the fact that there were adequate doctrinal grounds to support the innovations, that equally creative advances adverse to unions had been made or ratified by the Court.
in other contexts, and yet the Court rejected these three doctrines without any reasoning at all. In this area, as in labour law as a whole, the doctrinal impact of the intervention of the Supreme Court has been quite unfavourable to unions. There are many indications that the Canadian judiciary is not held in high regard in the labour movement today and this must be due, in some part, to the judicial work I have been discussing.

Up to now, my general review has been intended to show why the Supreme Court should not have involved itself so heavily in developing our Canadian labour law. Of whatever value such an analysis might be, though, a recommendation of judicial restraint will not undo the damage which has been done. It is only fair to ask of the critical bystander that he add to his own assessment of the Court's previous work some positive suggestions which will be helpful to their future performance.

As I have said, in most areas the Court has been able to look at the specific practical realities of a situation free of legal doctrine or dogma. The trouble is that it has never articulated for itself the general character of a "type-situation" which can be used in developing a systematic policy which is implemented through coherent legal guidelines. For example, there is no consistent attitude towards strikes, or towards peaceful but coercive picketing, which animates the cases from *Aristocratic* to *Gagnon* and indicates clearly when they should or should not be legal. The Court does not explicitly perceive the union constitution as a contract of adhesion, with important implications for job opportunities, and thus warranting certain kinds of judicial control. The Court has never adverted to the kind of document which a collective agreement is, the kinds of human relationships it is designed to regulate, and the reasons why private arbitration has been designated as the primary avenue for adjudication under it. As a result, it has been simply destructive in its effect on the capacity of labour arbitration to make a contribution to the elaboration of a law of the collective agreement. Finally, the Court has rarely adverted to the reality of expert specialized tribunals (whether a Labour Board, arbitration boards, union appeal procedures) in order to devise an acceptable compromise between the need for external control and the dangers of "absentee management". Hence the first obligation of a Supreme Court which takes seriously its role as the final authority in the adjudicative elaboration of our law of labour relations is that it lay bare the tacit value assumptions which influence the directions in which it is developing our legal doctrines. Only then can other responsible bodies participate intelligently in this task and critically assess the implications of the view that a Court takes — about the nature of a collective agreement, or of "peaceful" picketing, or of union membership, etc.

A second prescription for a Supreme Court is that it is vital that the Court see the whole industrial and legal context which is relevant to the assumptions that it makes, so that the enlightenment gained in one problem area will illuminate the issues posed by another. For example, it is the obligation of the Court, within established legal doctrines, to work out a coherent and consistent view of labour arbitration boards and the administrative agency. Are there differences in the make-up of these tribunals, or in the interpretation of labour relations statutes and collective agreements, which warrant greater judicial intervention in one area or the other? What
has the legislature indicated about the relative ambit of judicial control appropriate to each? Similarly, the perception that the Court has about the need for, and the danger of, union powers, should be brought to bear on the vital question of individual rights in the administration of the collective agreement. What are the implications of *Paquet* for union control of access to arbitration and is *Hoogendoorn* a viable response to this issue? If the Court is dissatisfied with what it can do through *Hoogendoorn*, is *Northcott* a defensible alternative approach? Did the doctrine of *Orchard* as to the contractual bases of union membership under a constitution constitute the real reason for *Metropolitan Life*? If it did, shouldn't the insight into the real nature of union membership, garnered from that case, have led to a re-working of *Orchard* rather than an attempt (unsuccessful after the statutory amendment) to force the Labour Board into the same outmoded mould?

The certification cases must be viewed as a “package”, both in defining the ambit of control by the Court and, more important, in developing a theory of statutory interpretation which does justice to the needs of legislative and adjudicative collaboration in the elaboration of our law. Finally, we have had enough cases in the strikes and picketing area which, taken together, would justify a distinction between the judicial policy of restrained deference to the legislative judgment about when union tactics are to be permitted and a judicial policy of activist innovation in supplementing legislative remedies. Only a Court which continually looks back over all its work will see this as a thread which does make sense of the pattern, decide whether this is the right thread, and then make explicit the assumptions which it wants adhered to in further implementing these doctrines. In reviewing all the cases decided by the Court in this period, I was surprised by all the work that has been done. I am even more disappointed by the almost total failure to realize the opportunities this creates for a Court which makes law in the context of individual cases but which should do so on the basis of articulated rational principles.

Are these suggestions as to judicial method consistent with my additional thesis that judicial innovation in this area should be careful and restrained? Usually those writers who call for a realistic and purposive use of legal doctrines have in mind the contribution the courts can make to the renovation of earlier rules in the light of changing social conditions. However, I believe that examination in depth of this area shows quite clearly that intelligent restraint on the exercise of legal power can also be ensured only by doctrines which are continually subjected to re-examination in the light of the reasons which purportedly justify them. The easiest, and also the most dangerous, forms of judicial activism are those which are disguised as the mere application of abstract doctrinal formulae. Especially in the case of a Supreme Court whose opinions are themselves never authoritatively reviewed, great advances can be hidden in the apparently neutral characterization of the facts of the case. Only if the Court explicitly discusses why a doctrine is applicable in a case, in the light of a realistic assessment of the implications of what it is doing, can it formulate doctrines which limit its interventions and prevent its concern for the peculiar equities of an individual case from distorting the law in the whole area because of the particular language used in its opinion.
All of Canadian labour law is filled with doctrines which have no intelligible content to shape and control later decisions. A very good example is the general law of judicial review of administrative decisions. The Supreme Court cases do not tell us if all legal errors (in the opinion of the Court) are reviewable and, if not, which errors are reviewable (jurisdictional?) and which are not. There is no law which meaningfully prevents a Court from characterizing a decision as reviewable simply because it disagrees with the equities of the particular Board conclusion. In the area of picketing, the situation is not much different as regards the very vague and general doctrines of civil conspiracy, inducing breach of contract, and perhaps even nuisance. Especially because lower courts decide most of these cases on difficult-to-review “interim injunction” applications, there is ample room for judicial implementation of judicial values, rather than legislative or socially-accepted policies (and Hammer and Hershes are clear examples of this tendency in the appellate courts). The doctrine of the incorporation of the collective agreement into the individual contract of employment or the use of the union constitution as an enforceable contract with the members are both legal fictions which are quite unrelated to the reality of the human relationships in question. While legal fictions are not necessarily bad, and any legal rule must be at some degree of abstraction from concrete reality, there is always the danger that unreflective use of the fiction will disguise from the Court the nature of the step it is taking and prevent it from reasoning in explicit terms about the arguments which can be made for and against this step. When this occurs the Supreme Court has deprived itself of the opportunity of channelling lower court behaviour along the lines of its own basic judgments and eliciting the collaboration of these lower court judges in refining the doctrines in the light of the experience they obtain in administering it. In these two areas, as in all of labour relations law, there is no dialogue being conducted by the Supreme Court with the lower courts and administrative agencies (as well as academic writers) about the kinds of legal rules our Canadian society ought to have and the role the courts should play in fashioning them.

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One wonders, finally, how meaningful it is to offer this form of advice to a court which has the kind of perception of its role as is apparent in the cases I have been reviewing. The Supreme Court of Canada views its primary function as heavily-oriented toward the adjudication of concrete disputes. It views each such case as raising specific issues which are discrete and unrelated to those posed by other cases before it. It does not utilize the form of legal materials — statutory, judicial, academic, royal commission, etc. — which would illuminate the general implications of the doctrines that it is creating by using them to solve the concrete dispute. As long as this general attitude is pervasive in the work of the Court as a whole, one cannot realistically hope for substantial improvements in its contribution to Canadian labour law.