Labour Relations Law in Canadian Law Schools -- Does Our Reach Exceed Our Grasp, or What's a Law School For?

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Every law school in Canada, with the temporary exception of the University of Alberta, now offers a course in the law of labour relations. There can be no doubt, however, that the arrival of this postwar academic baby in the law school household poses a real challenge in rearranging well-ordered concepts of what ought to be taught to law students. If, with Prof. Cox — a labour law teacher made good — we hold that Labour Law ... is a course which should lead to an appreciation of the interplay between law and life ... the obvious question is: how? In pursuit of an answer, a questionnaire to my fellow teachers of labour relations and this note.

I. Who is teaching what to whom?

In 11 of our 16 law schools, labour law is taught by a full-time member of the faculty. In the remaining five schools, the instructor is almost inevitably an experienced practitioner of the art, and indeed, at Sherbrooke, is the provincial Minister of Labour. The full-time teachers themselves, at almost all schools, are active to some degree as arbitrators, conciliators, or as members of a governmental agency engaged in labour relations. In fact, U.B.C. and Toronto boast, respectively, of six and four faculty members who are blooded in industrial combat. The Deans of Saskatchewan, Manitoba and Dalhousie all hold positions on the labour relations boards of their respective provinces. It can thus fairly be claimed that most teachers of labour law, be they full-time or part-time, can speak of "life" from personal experience. Their audience is composed of over 500 undergraduates (typically in their final year). four or five graduate students, and a few "special students". Instruction can be said, then, to be almost wholly at the basic level, but sufficiently widespread that some knowledge of the field is now probably commonplace among younger

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*Assistant Professor, Osgoode Hall Law School. The raw material for this survey represents the response to a questionnaire distributed by the author and completed with the kind co-operation of teachers of labour relations law across the country. Because the questionnaire was somewhat vague, and because no response was received from two law schools (University of Manitoba, Université de Montréal), the analysis lays no claim to statistical accuracy.

1. Alberta has offered the course in the past, although apparently will not do so in 1963-64.
2. Sometime Professor of Law at Harvard Law School; now Solicitor-General of the United States.
3. Cox, Cases on Labour Law, (4th ed. 1958) at p. 3. In response to the question "Do you feel it desirable to introduce discussion of policy on 'non-legal' considerations into your course?" the unanimous answers of all who responded ranged from "yes" to "essential".
4. McGill, Université de Montréal, the two Ottawa schools and Université de Sherbrooke.
members of the profession. Advanced work and research are virtually non-existent. The teachers of labour law reported a grand total of seven published works during 1962-3.5 There are no “advanced” courses, apart from the “problems” course offered graduate students at Toronto; a five-hour course on labour relations in the public service at Ottawa (Civil Law); and a 30-hour paper-requirement seminar on institutional problems of unionism at Osgoode.6 If any formal intensive work is being done in labour relations law, it is not being done by Canadian law students or teachers. Nor, except at Dalhousie and U.B.C., do law faculties participate in research or instruction with non-student or non-legal groups, except on an informal basis. Basic undergraduate courses in labour law are thus the stuff of which our institutional contribution to labour peace consists (as opposed to the invaluable, but personal contributions, made by individual law teachers). Almost unanimously,7 surprisingly, labour law teachers felt that their subject merited no more emphasis than this.

The length of labour law courses varies widely:

16 hours — Ottawa (Civil Law)
30 hours — Alberta, Dalhousie, Saskatchewan, Manitoba, Sherbrooke.
45-50 hours — Osgoode, Ottawa (Common Law), Queen’s, U.B.C.
60 hours — McGill, Toronto, Western, U.N.B.
70 hours — Laval.
Unknown — Montreal.

So far as can be gathered, the same general topics are usually covered, but hour allotments reflect little common judgment on their relative importance. Certainly, historical introduction ranks low almost everywhere, with only Toronto allowing it as much as five hours. On the other hand, labour relations legislation is often accorded prime importance. At Queen’s and Osgoode it occupies about 25 hours, 50% or more of the total, while at U.B.C., Western and Toronto it receives almost the same hour allotment, and represents only a little lower proportion of the whole. By contrast, however, Alberta and Ottawa (Common Law) devote only twelve hours to this topic (out of 30 and 46, respectively), while Saskatchewan assigns seven hours out of 30. Labour torts are covered in six hours at Alberta, ten to twelve at Western and Osgoode, but 20 at Toronto and U.B.C. Collective agreements and arbitration are dealt with in four hours at Alberta, while Western devotes fifteen hours — fully 25% of the total — to this topic. The internal affairs of unions are not dealt with at all at McGill and Queen’s, barely touched upon at Osgoode and Saskatchewan, but are scrutinized in some detail for twelve hours at Ottawa (Common Law). A definite split exists between common law and civil law schools on the topic of social welfare legislation. While it is virtually ignored by all of the former, except for a cursory glance at Saskatchewan and Ottawa, it is dealt with by all of the latter.

There are, of course, explanations for this great diversity of ap-

5. Only five of the sixteen published anything in the field of labour relations.
6. This seminar is not being offered in 1963-64.
7. The exceptions were Ottawa (Civil Law), Queen’s and Osgoode.
proach. For example, Ontario, British Columbia and, recently, Quebec, are provinces where union organization and collective bargaining within the statutory framework have been the basic concern of the labour law practitioner. An emphasis on labour relations legislation in those provinces is to be expected. The professionalism of the common law schools has resulted in the curricular sacrifice of social welfare legislation, which is poor man’s law and unlikely to be encountered in practice. But diversity of approach seems primarily to reflect personal judgments on the pedagogical impact of each topic and on its doctrinal difficulty.

Diversity in curricular approach, of course, means diversity in classroom materials. Merit makes Bora Laskin’s annotated syllabus the basis of the assigned materials at Alberta and of the mimeographed materials at Western and Queen’s. It is one of the bases of my casebook, which has been used at Western and is being used at Saskatchewan; Queen’s and U.N.B. also see Laskin via references to my casebook. Carrothers’ U.B.C. casebook is used as a reference work at Saskatchewan. Hendry has a typed text at Ottawa (Common Law) while Nicholls at Dalhousie firmly states that “Casebooks . . . are avoided like the plague.” Certainly, no “national” casebook such as Laskin’s on Constitutional Law or Wright’s on Torts has emerged, nor — given the small market and the highly individualized courses — is it likely to. On this topic, response to the questionnaire was (for the most part) silence. However, Carrothers stated that such a casebook would be “a big help” although he was “skeptical” that it could ever be produced. At the other end of the country, Nicholls at Dalhousie emphasized the flexibility and fluidity of labour law which make it particularly desirable that the student be encouraged to use his own initiative in solving problems. Casebooks, he suggests, are a form of “spoon feeding” and leave the student “with an impression of undue rigidity, undue formality”. While this may represent a general mistrust of casebooks per se, it certainly points up the very great difficulty of compiling a labour law casebook in particular, of which more below.

II. On teaching law and life

As might be expected, virtually all teachers of labour law opt for the use of seminar discussion, case and problem methods, with lectures being given rather infrequently. Certainly, the subject-matter does not easily yield to formal exposition, and lectures are used primarily to convey factual information. The great challenge, however, is to recreate in the classroom the peculiar tensions of picketline and bargaining table — those subtle invisible forces which generate grievances or prompt workers to join unions. The challenge is met in many ways: a capsule course in labour economics, references to non-legal source materials, visits to labour relations tribunals, films, interviews with labour and management officials, mock bargaining sessions or conciliation hearings, and of course, recounting of personal experiences and observations in the context of class discussion. In no other subject on the law school curriculum is the effort made so consistently and conscientiously to place legal problems in a “life” context.

To what avail?

No questionnaire can provide the answer: no statistics can capture
atmosphere. Let me briefly offer my own experiences, as the confessions of a spent youth, in the hope that they will strike a responsive chord in the hearts of my more experienced and life-weary colleagues.

As an apprentice in the art, I resolved to feed my own class from a rich intellectual smorgasbord of statutes, caselaw, economics texts, sociological studies, and first-and-second-hand observations of labour and management at work and play. Alas, the life of the law teacher, like that of the law itself, is not logic but experience. A casebook which I was preparing during my first year had, in its early chapters, contained non-legal extracts; by midpassage these had shrunk to mere references, and by year-end they had disappeared altogether. A projected regular programme of labour and management visitors had, by the second year, dwindled to three speakers — a professional conciliator, a union organizer, and a lawyer who represents employers. Sic transit scientia mundi. There is barely enough time in 30 or 45 or 60 hours to teach law itself, let alone life.

Let me suggest that the normal Parkinsonian tendency of work to expand to fill the amount of time available for its performance does not fully explain our plight. I think that at least part of our problem lies in the doctrinal structure of the law. Contrast the ease with which the process of certification can be explained with the intellectual gymnastics required to answer the simple question: is recognition picketing unlawful? Certification, indeed all of the statutory procedures, have been fully canvassed in their life-context by the labour relations boards. The statutes which give birth to these procedures almost inevitably talk in terms of activities and practices in the world of labour relations: strikes, bargaining, participating in union activities. By contrast, the common law, which dominates the law of strikes and picketing, and of internal union affairs, has neither been organized nor analyzed in these terms. Scratch a tort judgment and you will find a glib generality at best, or festering bias at worst; look beneath a labour board decision and you will find a sober evaluation of industrial fact. It is for this reason that I prefer to teach so much of my course through the labour board decisions.

To teach labour law meaningfully, we may have to discard our traditional approach of doctrinal analysis. As George Nicholls noted, the term “labour relations law” (with the emphasis on “relations”) may be significantly different from “labour law”. To organize materials on picketing in terms of primary peaceful picketing, recognition picketing, secondary picketing, ambulatory and common situs picketing, may make no sense at all doctrinally; it makes excellent sense in terms of labour relations issues. It is only when the legal materials are so organized that the non-legal environment becomes both meaningful and important for the student. In the result, he may be hazy on the more esoteric aspects of conspiracy, nuisance or inducing breach of contract, but he will have a firmer grasp on the permissible limits of economic pressure than does many a judge. To the charge that this is a “how-to-do-it” approach, I plead guilty. In mitigation of sentence, I can only suggest that “it” — the more effective ordering

of labour relations — is an important social task in which many lawyers are engaged, with good or evil consequences for their clients and the public. A more serious indictment of my proposal is that it ignores the realities of judicial performance. Recent developments in the statutes and case law affecting picketing do indicate an increasing willingness to discard the Emperor's suit of common law doctrine and to acknowledge the intellectual nudity of our approach to labour litigation. Nonetheless, for the foreseeable future lawyers will have to argue doctrine. I am not sure of the answer to this problem and willy-nilly I am driven to a brief canvass of the basic formulae of conspiracy, nuisance and inducing breach.

To teach in terms of social issues rather than legal doctrine requires an edifice of materials which law teachers should be uniquely equipped to construct. If it is too large a task for us to undertake individually, our American colleagues have proven that it can be done co-operatively. They have demonstrated that despite individualized courses, it is possible to create a "national" casebook which goes a long way towards teaching labour law in the context of labour relations.

11. Wollett & Aaron eds., Labor Relations and the Law (2d. ed., 1960). This excellent casebook represents the collective efforts of no less than 26 co-operating editors. An account of the genesis of the book is found in the Foreword to the first edition. As a casebook it is almost unique in the catholicity of its coverage, the depth of the text notes, and the elaborate realism of the problems provided for student analysis.