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DEVELOPING INDUSTRIAL CITIZENSHIP: A CHALLENGE FOR CANADA'S SECOND CENTURY

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I. *The Concept of Industrial Citizenship.*

For the early years of Canada's first century, our industrial relations policy seemed to verify Maine's premise that progress is represented by the evolution from status to contract. By about 1900, a colony whose labour force included indentured servants and coolie labour, *habitants* and tenant farmers, had become almost entirely a nation of free workers and agricultural entrepreneurs. No longer bound to master or landlord by criminal sanctions or seigniorial obligations, the Canadian wage earner was free to sell his labour, or the fruits of his labour, on the open market. The price at which he would sell was, of course, subject to negotiation, but in law he was free to contract on almost any terms he wished.

Yet, almost unnoticed, we may have arrived at the beginning of our second century with precisely the opposite premise enshrined as national policy. Today the Canadian worker lives increasingly in a world of rights and duties created not by his individual contractual act, but by a process of public and private legislation. Members of the industrial community enjoy these rights and duties solely by virtue of their membership in that community. In effect there is emerging a new status—that of "industrial citizen"—whose juridical attributes may be analogized to those of citizenship generally. The purpose of this article is to trace the evolution of industrial citizenship and to speculate about its future: who are industrial citizens? to what extent do they enjoy freedoms and responsibilities in their relationships with government, with unions and management, with each other? what juridical institutions exist to protect the benefits of industrial citizenship and to enforce its burdens?

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Of course, the industrial community does not exist in a vacuum: it is a state within a state. Thus, there are areas where the attributes of industrial citizenship overlap with or parallel those of national citizenship, and areas where the two converge or diverge. Moreover, the worker, like the citizen-at-large, is not entirely the prisoner of the system. He obviously retains the right to accept or renounce his status and to participate, at least indirectly, in political processes which affect its quality, although he can seldom bargain on his own behalf for his individual vision of the good life. Finally, the retreat of Canadians from contractual freedom to the more secure advantages of status is by no means confined to the industrial worker: shippers of goods are the beneficiaries of regulated rates; purchasers of insurance are covered by statutory forms of policies; investors are protected against the most extreme perils of *caveat emptor* by legislation compelling truthful disclosure on the securities market; farmers sell their crops through government marketing boards; consumers are beginning to win the benefits of fair credit terms and guarantees against fraud. The worker, shipper, insured, investor, farmer or consumer gains certain advantages, not because he has contracted for them, but because of his status as a member of a group, or his role in a transaction. Conversely, he may not bargain away these advantages, unless at the same time he forsakes the group or relinquishes the transaction.

A critical threshold issue is to identify those who enjoy industrial citizenship. Because labour legislation typically confers rights upon "employees", it is the persons so described who are "industrial citizens". This definition, of course, immediately raises a theme which will occur throughout this article: is the industrial community to be permitted to create a distinctive system of jurisprudence, or must it faithfully reflect traditional legal concepts, doctrines, and procedures? In the particular context, the question is whether common law tests for the existence of an "employer-employee" or "master-servant" relationship are to prevail over distinctive industrial relations tests. Broadly speaking, the common law views employment as the product of contractual arrangements ("who has the right to control?"), while in industrial relations terms, employment is a status flowing from a relationship of economic dependence. The importance of this definitional exercise is that an employer might use his superior bargaining position to destroy "citizenship" rights, if employment were based on contract rather than status.

Without reviewing the extensive jurisprudence developed by Canadian courts and boards on this question,¹ it is clear that today we are well on the way to accepting the status test. For example, Ontario has adopted a "four-fold test" to define the coverage of the Labour Relations Act. Employee status is determined by inquiring whether the putative employee controls the performance of his work, owns his own tools, and has the chance of gain or risk of loss in the situation; an affirmative answer will identify the individual as an independent contractor, a negative answer as an employee.² Significantly, the labour board seeks its answer in the actual facts of the relationship, and has held that persons may enjoy the status of employees even though they have signed contracts in which they accept the designation of "independent contractor".³

Important developments in the law of industrial relations are based on the concept that employment is a status with distinctive rights and duties. A procedural example illustrates the significance of the eclipse of contract and of the rise of the "citizenship" concept.

For over a century, a distinctive characteristic of the employment contract was that it could not be specifically enforced, although damages might be sought in the event of breach.⁴ An employer could not force an employee to work, nor could he be forced to continue to employ him. *A fortiori*, a court would never compel either an employer or an employee to enter into such a contract. So far have we lost our inhibitions about legal intervention into this most personal of contracts that today labour relations boards, with express legislative authority,⁵ and arbitrators, with implied authority,⁶ do force employers to continue to employ persons who have been wrongfully discharged. More startling yet, employers have been required to hire employees to whom they have wrongfully denied employment.⁷ This rejection of traditional remedial techniques in employment has not been solely legislative, nor has it operated solely for the benefit of workers. In at least

¹ See, generally, Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power* (1965), 16 U.T.L.J. 89.

² *Canada Bread Co. Ltd.*, [1961] C.C.H. L.L.R. P.16,223 (O.L.R.B.)

³ *Cima Ltd.*, [1963] May Mthly. Rep. 100 (O.L.R.B.).

⁴ *Lumley v. Wagner* (1852), 42 E.R. 687; *Warner Bros. v. Nelson*, [1937] 1 K.B. 209.

⁵ See, e.g., Labour Relations Act, R.S.O., 1960, c. 202, s. 65.

⁶ See Levinson, *Discharge and Discipline in Ontario* (2nd ed., 1964); *R. v. Arthurs, ex. p. Port Arthur Shipbuilding*, [1967] 2 O.R. 49 (C.A.).

⁷ *Numilk Co. Ltd.* (1962), 62 C.L.L.C. P.16,237 (O.L.R.B.).

two provinces,⁸ courts have issued injunctions which require illegally striking employees to return to work, on the theory that they were thereby enforcing a "negative covenant" against strikes. As another court more frankly remarked in rejecting the traditional attitude of equity towards enforcement of personal service contracts, "the complexity of labour-management relations in a highly industrialized civilization were presumably not even thought of" a century ago when the rule against enforcement of affirmative promises to perform services first emerged.⁹

Undoubtedly, this procedural revolution reflects new substantive, legal values: what are being protected are not contractual rights but public policies. These policies would have been frustrated if new remedies had not been devised to protect workers against discrimination and employers against illegal strikes. Moreover the new remedies are made possible because the nature of the employment relationship itself has changed. Modern industrial workers are typically not bound by individual contracts of personal service; they are hired "at-will", and either worker or employer is free to terminate the relationship subject only to the restrictions imposed by public or private legislation. Finally, the changing nature of work helps to make the new remedies possible; jobs are more routine, workers are more nearly interchangeable, and "personal" contact between a large corporate employer and its employees is virtually non-existent. Thus, the traditional grounds for refusing to enforce the employment contract—the difficulty of supervising performance and the avoidance of personal animosity between worker and employer—have ceased to exist. Naturally, like any other unsuccessful litigant, a worker or employer affected by these new remedies may continue to be resentful, but the functional problems of securing his compliance with the order are considerably less formidable than they were.

With these changes in the dynamic of employment and in its legal implications, it would seem that through the use of the new remedies, courts, labour boards, and arbitrators are really creating,

⁸ *Re Dominion Bridge*, [1959] C.C.H. L.L.R. P.15,244 (B.C.S.C.), rev'd. (1960), 20 D.L.R. (2d) 621 (B.C.C.A.); *Gulf Island Navigation v. S.I.U.* (1959), 18 D.L.R. (2d) 216 (B.C.S.C.); *Inspiration Mining v. I.U.O.E., Local 115* (1962), 36 D.L.R. (2d) 363 (B.C.S.C.); *Antonsen v. United Fishermen* (1963), 64 C.L.L.C. P.15,497 (B.C.S.C.); *Kelly Douglas v. Bakery Workers, Local 468* (1965), 48 D.L.R. (2d) 520 (B.C.S.C.); *Winnipeg Builders Exchange v. Operative Plasterers* (1965), 48 D.L.R. (2d) 173 (Man. C.A.); *Winnipeg Builders Exchange v. I.B.E.W.* (1966), 57 D.L.R. (2d) 141 (Man. C.A.), aff'd. by S.C.C., Oct. 3rd, 1967, unreported.

⁹ *Winnipeg Builders Exchange v. I.B.E.W.*, *ibid.*, at p. 157.

restoring, and protecting a status relationship, rather than a contractual one.

Once this fact gradually emerges, the need to clearly articulate the basis of relief becomes more urgent. No doubt, the present fiction¹⁰ that the courts are merely enforcing "negative covenants" against striking will be abandoned, and either courts or some specialized tribunal will be given a broad legislative mandate to issue any remedial order necessary to effectuate statutory policy.¹¹ Similarly, the very definition of employment will be recast to more precisely reflect what it has already become—a legal conclusion flowing from economic facts. The present definition, the "four-fold" test referred to above, is not even found in a statute, but has been borrowed unceremoniously, and for no good reason, from another common law context. Any new definition probably should confer employee status, or industrial citizenship, on any person who is obliged to sell his services in a market in which he is economically dependent on a single purchaser. Under such a definition the advantages of industrial citizenship would be extended not only to those generally termed "employees", but also to many other economically vulnerable groups—self-employed truck-owners and taxi-cab operators, fisherman and service-station lessees, who might be described as "dependent contractors".¹² These groups could then be insulated both against superior bargaining power (through collective action) and against economic insecurity (through social welfare legislation designed to protect "employees").

The concept of the employee as an industrial citizen, however, did not proceed in orderly fashion from an articulated definition, to which rights and duties, in due course, were deliberately appended. Obviously, the concept is an attempt to rationalize and to draw together isolated developments which only in historical perspective can be seen to have produced "industrial citizenship". By exploring these developments, it is hoped, at least some relationship between them may be perceived, where formerly there was only "a wilderness of single instances". Perhaps, as well, some predominant currents can be charted so that the drift of

¹⁰ *E.g. Winnipeg Builders Exchange v. Operative Plasterers, supra*, footnote 8; *Arthurs, The Right to Strike in Ontario and the Common Law Provinces of Canada*, in 1966 Proceedings, U. of Ottawa 4th International Symposium on Comparative Law 187, at p. 199 *et seq.*

¹¹ *Cf. Labour Relations Act, R.S.O., 1960, c. 202, s. 65; Trade Union Act, R.S.S., 1965, c. 287, s. 5(e); Labour Relations Act, R.S.B.C., 1960, c. 205, s. 7(4).*

¹² *Arthurs, op. cit.*, footnote 1.

future decisions and statutes can be predicted and evaluated. Finally, the time may arrive for codification, for adoption of a charter of industrial citizenship.

II. *The Protection of Industrial Citizenship.*

1. *Protection Against State Action.*

Critical to the development of industrial citizenship was the removal of criminal restraints on individual and group action by workers. Until the 1870's, breach of an employment contract was a criminal offence;¹³ collective action such as a strike was similarly stigmatized as a criminal conspiracy;¹⁴ even peaceful picketing was of dubious legality until a proviso to the Criminal Code specifically authorized it.¹⁵ Until well into the twentieth century unions laboured under the stigma of the restraint of trade doctrine which operated as a form of outlawry to deny them access to the civil courts.¹⁶ The removal of these restraints in fact constituted an affirmative beginning to the concept of industrial citizenship, by establishing in the industrial context basic freedoms enjoyed elsewhere: freedom of contract, subject only to normal civil sanctions; freedom of association and group action for better working conditions; freedom of speech and assembly for labour objectives on the picket line, at least so long as violence and obstruction were avoided.

By 1900, then, the law no longer could be said to impose greater restraints on industrial workers than existed in the general community. However, the operation of general legal principles often seemed to have a peculiarly one-sided impact in the context of labour relations.

Rights of private property and contract, zealously guarded by the law, were of minor importance to those who had no such property, and whose contracts were thrust upon them by superior economic strength. Particularly through the development of tort

¹³ Master and Servant Act, C.S.U.C., 1859, c. 75; repealed by S.C., 1877, c. 35; see now Criminal Code, S.C., 1953-54, c. 51, s. 365.

¹⁴ For an account of the English criminal legislation relating to trade unions, its use in Canada following a printers' strike in 1871, and its subsequent amendment by the Trade Unions Act, S.C., 1872, c. 30, and the Criminal Law Amendment Act, S.C., 1872, c. 31, see Carrothers, *Collective Bargaining Law in Canada* (1965), c. 2. See now Criminal Code, *ibid.*, ss. 408-410.

¹⁵ The "peaceful picketing" proviso was added by S.C., 1876, c. 37, omitted in the 1892 consolidation of the Criminal Code, and restored by S.C., 1934, c. 47. See now Criminal Code, *ibid.*, s. 366(2).

¹⁶ See *Chase v. Starr*, [1923] 4 D.L.R. 103 (Man. C.A.), *aff'd.* [1924] S.C.R. 495.

doctrines, the courts began to inhibit the freedom of action which the repeal of criminal sanctions had permitted. Resentment against this judicial regulation of labour activity produced political pressures for change. English law,¹⁷ and to some extent Canadian law,¹⁸ reflected these pressures in legislation which conferred the right on those engaged in industrial warfare to commit what would otherwise be torts, in the special context of a "trade dispute". In retrospect, this approach was unfortunate insofar as it appeared to put unionists "above the law". As recent developments in both countries have shown, the courts are unsympathetic to any attempt by those who are bound by the general law to ignore it when they deem their interests to be adversely affected.¹⁹

The real problem was, of course, not whether industrial combatants should be privileged to break the law, but rather which of two opposed interests was to be preferred in a given situation. For example, was the economic interest of the employer in the uninterrupted operation of his business to be preferred over the economic interest of employees, striking to secure higher wages? Was the interest of potential customers in unimpeded access to struck premises greater than the interest of picketers in congregating at the focal point of a labour dispute? These, of course, are not easy problems, and even today Canadian law has barely begun to grapple with some of them. However, the earliest Canadian and English legislation did not speak directly to these policy choices. It merely excused tortfeasors so long as the occasion for wrongdoing was a trade dispute. Only with the development of a distinctive system of labour legislation did we begin to consciously establish any order of priorities amongst competing social values in labour relations.

The first step in the evolution of an affirmative Canadian labour policy was the 1907 Industrial Disputes Investigation Act.²⁰ Its purpose was to avoid the social waste of strikes by a mechanism of conciliation, thereby enshrining industrial peace as an important goal. However, implicit in the Act was recognition that industrial relations was an area of social conflict which could not be regulated by traditional legal techniques. Conciliation was required, rather than adjudication. Having accepted the basic premise

¹⁷ See Trade Disputes Act, 1906, 6 Edw. 7, c. 47.

¹⁸ Trade-Unions Act, S.B.C., 1902, c. 66, s. 3, repealed by S.B.C., 1959, c. 90.

¹⁹ See, *Rookes v. Barnard*, [1964] 1 All E.R. 367 (H.L.); *International Brotherhood of Teamsters, Local 213 v. Therien*, [1960] S.C.R. 265.

²⁰ R.S.C., 1907, c. 20.

that the industrial community possessed its own needs and norms, the next step was to articulate those norms and to fashion machinery for their enforcement.

Beginning in the mid-1930's, our provincial and federal legislators undertook this task.²¹ Labour relations acts proclaimed the freedom of industrial citizens to associate in unions and protected this freedom by both penal and administrative procedures.²² Reasonable freedom of economic action was ensured, including the right to strike, so that through collective bargaining employees could participate in the process of setting their wages and working conditions. The device of the certification vote ensured democratic majority rule on the issue of union representation, and displaced the former rule of power.²³ Free speech, in the context of the certification vote, was protected by legislation,²⁴ and in the context of picketing, by several libertarian judicial pronouncements.²⁵ The obvious thrust of these legal developments was to secure "the policy of collective bargaining as a road to industrial peace".²⁶

However, this road has proved to be rocky. Now we have entered a phase where the operation and extension of these freedoms have created conflicts within and beyond the industrial community. For example, freedom of association is seen to collide with freedom to abstain from association. Freedom of economic action in industrial warfare has produced casualties amongst non-combatants and neutrals. Yet, on balance, the labour relations acts remain a "bill of rights" which secure an ordered liberty in industry. Only in cases of serious threats to public health and safety, or community crises, have we invoked a "clear and present danger" test to justify compulsory mediation and arbitration, and to suspend freedom of action.²⁷

This is not to say that civil liberties in industrial relations are

²¹ See Carrothers, *op. cit.*, footnote 14, pp. 43-60.

²² The two most important legislative models were the Collective Bargaining Act, S.O., 1943, c. 4, and 1944 federal Wartime Labour Relations Regulations, P.C.1003.

²³ See *e.g.* Labour Relations Act, R.S.O., 1960, c. 202, ss. 5, 7; *Smith Bros. Construction v. Jones*, [1955] O.R. 362.

²⁴ See *e.g.* Labour Relations Act, *ibid.*, s. 48; and see Adell, *Employer "Free Speech" in the United States and Canada* (1966).

²⁵ *R. v. Baldassari*, [1931] O.R. 169; *Canada Dairies v. Seggie*, [1940] 4 D.L.R. 725 (Ont. H.C.); *Williams v. Aristocratic Restaurants*, [1951] S.C.R. 762.

²⁶ *Sask. L.R.B. v. John East Iron Works*, [1949] A.C. 134, at p. 150, per Lord Simonds.

²⁷ See *e.g.* Hospital Labour Disputes Arbitration Act, S.O., 1965, c. 48; Alberta Labour Act, R.S.A., 1955, c. 167; Maintenance of Railway Operations Act, S.C., 1966, c. 50.

always easy to define, or totally immune from attack by the state. Legislation has been passed dissolving a union freely selected by employees,²⁸ and depriving a union of bargaining rights because one of its officers is a Communist,²⁹ or a convicted criminal,³⁰ or because it is affiliated with a body in another jurisdiction.³¹ Statutes have forbidden political activity by a union regardless of the desires of a majority of its members,³² and have replaced the elected officers of a union with government-appointed trustees.³³ In each case, the legislation was attacked as an unwarranted interference with freedom of association, and defended on the basis that some higher community value was being served, or that individual employees were being protected against group oppression. For example, dissolution of a union on somewhat spurious grounds during the 1959 Newfoundland logging strike was obviously prompted by governmental fear that the entire economic structure of the province was threatened by the strike. Prohibitions against union political activity were said to be designed to protect the civil rights of individual members who did not support the party favoured by the majority. That those who were accused of infringing civil liberties felt obliged to justify their position by an appeal to high principle underscores the importance we attach to the rights of industrial citizenship; this fact is more important than the choice of values made in any particular case.

A final word must be added to this assessment of the place of libertarian values in the regulation of industrial conflict. Freedom of conscience, assembly, speech, and association are related, as philosophical and constitutional concepts, to public and governmental controversies. It can be argued, with some plausibility, that to describe the pursuit of economic self-interest by labour or management in the vocabulary of civil liberties is to confer upon one or the other unwarranted immunities. On this analysis, the legitimacy of any regulation of labour or management must be

²⁸ The Trade Union (Emergency Provisions) Act, S.Nfld., 1959, c. 2.

²⁹ Labour Relations Act, R.S.Q., 1941, c. 162A, as amended S.Q., 1953-54, c. 10; this section was omitted from the Labour Code, S.Q., 1964, c. 141.

³⁰ Labour Relations (Amendment) Act, S.Nfld., 1959, c. 1; amended by S.Nfld., 1960, c. 58; repealed by S.Nfld., 1963, c. 82.

³¹ Trade Union Act, P.E.I., 1948, c. 38, ss. 3, 5(2); see Forsey, *The Prince Edward Island Trade Union Act, 1948 (1949)*, 26 Can. Bar Rev. 1159.

³² Labour Relations Act, R.S.B.C., 1960, c. 205, s. 9(6), as amended by S.B.C., 1961, c. 31, s. 5. The constitutional validity of this statute was upheld in *O.C.A.W., Local 16-601 v. Imperial Oil*, [1963] S.C.R. 584; see comments, (1964), 3 O.H.L.J. 203; (1964), 22 U.T.Fac.L.Rev. 161.

³³ Maritime Transportation Unions Trustees Act, S.C., 1963, c. 17.

measured by some such yardstick as equality of bargaining power, calibrated and applied in the light of practical knowledge about the impact of the activity in question. In part, this argument turns on the degree to which labour-management relations are seen to involve simply a clash of private economic interests, rather than the resolution of public and political questions. If the workers' demand to earn more is put against management's desire for profit, to describe the strike as the exercise of "freedom" is unhelpful. If, on the other hand, the strike is the economic prelude to a long struggle for social and political power in our society, then "freedom" is a concept that might be relevant to deciding its propriety. However, even given this latter view, it is possible that we may wish to sacrifice "freedom" in favour of some other societal value of great importance.

Very likely, the immediate future of labour law in Canada will be in large measure concerned with limiting the rights, and emphasizing the responsibilities, of industrial citizenship. This is particularly true in respect of union treatment of individual employees—which, in a sense, involves better protection of citizenship rights—and in respect of economic conflicts which affect critical community interests. In both cases, the state will undoubtedly demand a price, hitherto unsought, for the security it has created for members of the industrial community.

2. Protection Against Employer Action.

As the state has moved from a posture of hostility to labour, through neutrality, to active protection of workers' rights, employer action which interferes with those rights has been progressively curtailed. Because the rights of industrial citizenship are premised upon the existence of an employment relationship, particular emphasis has naturally been placed on the creation or destruction of the status. Discharge and refusal to hire, because of race, colour, creed, sex,³⁴ age³⁵ or union activity or affiliation³⁶ are forbidden. So, too, is the conditioning of employment upon a promise not to exercise rights, or coercion or bribery designed to force their abandonment.³⁷

Nowhere is concern for the preservation of the employment relationship more dramatically demonstrated than in the case of strikers. At common law, an employee who absented himself

³⁴ Ontario Code of Human Rights, S.O., 1961-62, c. 93, s. 4.

³⁵ Age Discrimination Act, S.O., 1966, c. 3.

³⁶ Labour Relations Act, R.S.O., 1960, c. 202, s. 50(a)(c).

³⁷ *Ibid.*, s. 50(b)(c).

from work, whether for a strike or for other purposes, was liable to discharge. Implicit in his contract of employment was a promise to be present on the job; breach of this promise would in turn relieve the employer of further performance. But the employee's rights are no longer to be measured in contractual terms; today public policy, accepting strikes as part of the collective bargaining process, preserves the employment status of strikers and overrides the employer's common law rights.³⁸ As has been noted, a contrary rule would enable an employer to sweep aside valuable rights of long-service employees if they did go on strike, and to put their position at risk at the very moment when they most need their economic strength to support their bargaining demands.³⁹ A projection of this present policy would lead, first, to the "vesting" of rights which would otherwise be vulnerable to employer destruction—seniority and pensions, insurance and vacation pay. Since the right to a pension, for example, would be "owned" from the first day of employment, although its actual receipt is postponed, an employer would no longer be able to threaten cancellation of pension rights to bring a strike to an end.⁴⁰ Ultimately, however, we may actually come to protect a man's "ownership" of his job, and permit him to claim it against anyone, including a strike-breaker.

While protection of the right of employees to engage in collective bargaining is an important legal objective, it is not the only one which may be relevant in a given situation. Ancient proprietary rights, which emerge as modern value judgments in favour of free enterprise and managerial efficiency, are also respected and protected by law. An important concern of labour jurisprudence has thus been, and will continue to be, the balancing of the competing and legitimate claims of employers and employees. As a preliminary question, of course, there is the evidentiary difficulty of proving what interests are actually present in a given situation. For example, the only incontrovertible fact may be that an employee was discharged. Whether the employer was acting to frustrate the

³⁸ *C.P.R. (Royal York Hotel)*, [1961] Sept. Mthly. Rep. 214 (O.L.R.B.): acquitted on prosecution, *sub. nom. C.P.R. v. Zambri* (1961), 61 C.L.L.C. P.15,372 (Mag. Ct.), reversed [1962] O.R. 108, *aff'd.* [1962] O.R. 554 (C.A.), *aff'd* [1962] S.C.R. 609. See also *Dresser Electric Ltd.*, [1967] Feb. Mthly. Rep. 906 (O.L.R.B.).

³⁹ [1962] O.R., at p. 119, per McRuer C.J.H.C.

⁴⁰ *Cf.* Trade Union Act, R.S.S., 1965, c. 287, s. 9(1)(1); Industrial Relations and Disputes Investigation Act, R.S.C., 1952, c. 152, s. 4(3)(b); Alberta Labour Act, R.S.A., 1955, c. 167, s. 78; Labour Relations Act, R.S.N.B., 1952, c. 124, s. 3(2)(b); but see *contra, R. v. Fuller, ex p. Earles & McKee*, [1967] 1 O.R. 701.

employee's right to join a union, or to protect plant efficiency against the employee's poor work performance, may be difficult to prove. However, by a combination of presumption, suspicion and conventional proof, labour boards surmount this difficulty in reasonably acceptable fashion.⁴¹ The example chosen is an easy one, once the factual question is resolved. If the employer's motive is shown to be improper, and the concern for plant efficiency spurious, the employee should obviously be protected. On the other hand, employee rights may be frustrated by employer action which is based on unimpeachable legal doctrine or on *bona fide* business considerations. Here the difficulty is not merely evidentiary; it is essentially a matter of establishing priorities between competing groups, individuals, and social claims.

Cases involving the employer as a landowner illustrate this point. One of our most ancient legal rules involves the right of a landowner to determine who shall enter his land, and for what purpose. Can a landowner who is also an employer enlist his well-established proprietary rights in the cause of his campaign against his employees and their desire to unionize? For example, an employer may promulgate a rule forbidding any discussion of, or solicitation for, the union in the plant. In this way, he may force the union to resort to the laborious task of contacting each employee separately, at home, after work, instead of conveniently while they are gathered together. The labour board has struck a sensible balance in such cases. While an employer is entitled to insist on efficiency and discipline in the plant, he must show that the no-solicitation rule is actually designed for this purpose. If discussion of other topics is permitted, there is obviously no justification for interference with free employee discussion of unionism.⁴² In other words, bare-bones property rights are less important than the rights of industrial citizenship.

A similar policy is clearly evolving in situations where employees' living and recreation quarters are employer-owned, such as mining and logging camps, ships, and "company towns". Here there is an even greater need for restriction on the employer's property rights because employee discussion, assembly and association must take place on the employer's premises, or not at all.

⁴¹ See, e.g., *Metropolitan Meat Packers Ltd.*, [1962] C.C.H. L.L.R. P.16,230 (O.L.R.B.); for a contrary presumption see, Labour Code, R.S.Q., 1964, c. 141, s. 16.

⁴² See e.g. *Norfish Ltd.*, [1965] June Mthly. Rep. 227 (O.L.R.B.); *Delta Steel*, [1963] Oct. Mthly. Rep. 406 (O.L.R.B.); *Canadian Controllers Ltd.*, [1966] May Mthly. Rep. 130 (O.L.R.B.).

Unless his property rights are relegated to second place, the employer would enjoy complete freedom to obliterate industrial liberties, to say nothing of ordinary civil rights unconnected with industrial relations. This risk is accentuated if the employer can exclude non-employees from the premises, so as to quarantine employees against the dangerous virus of "foreign" ideas. Several Canadian jurisdictions have taken the simple view that the law of trespass governs the situation,⁴³ and one has recently gone to the other extreme of compelling the mine or woods operator to admit a union organizer to the camp and to provide him with food and lodging.⁴⁴ The Ontario Labour Relations Act, however, requires the board to strike a delicate balance between employee free speech and employer property rights, having regard to the facts of the particular situation.⁴⁵

The problem of picketing dramatically juxtaposes property interests and industrial "free speech". Until the celebrated decision in *Williams v. Aristocratic Restaurants*⁴⁶ in 1951, the most innocuous appeals to the public were stigmatized as interference with the enjoyment of the picketed premises, a legal "nuisance". Today, the legality of picketing is largely measured in terms of its legitimacy as a technique of industrial warfare: is it in support of a lawful or unlawful strike?⁴⁷ Is it violent or obstructive, so that it falls below the standards set by the Criminal Code?⁴⁸ Even the difficult question of picketing on shopping centre premises, which violates the real property rights of both landlord and tenants, has not been answered in terms which ignore labour relations realities.⁴⁹

Running through all of these situations is a recurring, if seldom articulated, theme. Industrial citizenship rights will be protected and advanced at the expense of mere traditional property rights, which are gratuitously exercised for no discernible business purpose. When, however, a genuine clash of policies occurs—as for example between in-plant employee discussion and orderly production, or between picketing and the right of access to premises

⁴³ Labour Relations Act, R.S.M., 1954, c. 132, s. 5A; *R. v. Labelle* (1965), 48 D.L.R. (2d) 37 (Ont. C.A.); *Anglo-Nfld. Development v. International Woodworkers* (1958), 59 C.L.L.C. P.15,428 (Nfld.S.C.).

⁴⁴ Labour Code, S.Q., 1964, c. 141, s. 8.

⁴⁵ Labour Relations Act, R.S.O., 1960, c. 202, s. 53. See *Milrod Metal Products Ltd.* (1964), 64 C.L.L.C. P.16,007 (O.L.R.B.).

⁴⁶ *Supra*, footnote 25.

⁴⁷ *Jacobsen Bros. v. Anderson* (1962), 35 D.L.R. (2d) 746 (N.S.C.A.); see *contra*, *General Dry Batteries v. Brigenshaw*, [1951] O.R. 522.

⁴⁸ *Williams v. Aristocratic Restaurants*, *supra*, footnote 25.

⁴⁹ See Arthurs, Comment, Picketing on Shopping Centres (1965), 43 Can. Bar Rev. 357.

—priority is seldom given to libertarian values. It is unlikely that the balance will shift in favour of employees, in order to permit them to pursue their economic interests at the cost of business enterprise or public order. As will be seen, the expansion of economic rights under legislative aegis has to some extent superseded total reliance on collective bargaining and other employee self-help activities.

3. Protection Against Union Action.

(a) *The union as a political entity*

Paralleling the development of employee status, and the effective protection of rights attached to that status, was the development of the union as the institutional vehicle for the advancement of employee interests.⁵⁰ At first, the courts viewed unions as combinations in restraint of trade. Obviously the law would not intervene in the affairs of these illegal organizations.⁵¹ Gradually, they gained the shadowy existence of clubs or voluntary associations, but legal regulation was still tentative. It was based on the theory that members of the union, by subscribing to its constitution, entered into a contract with each other. If the Supreme Court's 1957 decision in *Orchard v. Tunney*⁵² was the fullest flowering of this approach, it was soon to wither. By 1960, *Therien v. Teamsters*⁵³ had identified the union as a legal entity, responsible as such for its wrongs to third persons, and capable of suing to protect its institutional interests.⁵⁴

In terms of the protection of membership rights, the change from contractual to institutional existence was critical. Obviously, under the contract theory even union rules which were unfair were to be enforced because they were the product of consensus, unless they could be struck down on rather dubious grounds of "public

⁵⁰ See generally Palmer, *Union Security and the Individual Worker* (1963-4), 15 U.T.L.J. 336; *The Impact of Union Security in Canada* (1964), 13 Buff. L. Rev. 515.

⁵¹ See e.g. *Beaulieu v. Cochrane* (1898), 29 O.R. 151; *Parker v. Toronto Musical Protective Association* (1900), 32 O.R. 305; *Chase v. Starr*, *supra*, footnote 16.

⁵² [1957] S.C.R. 436; see Comment, (1958), 36 Can. Bar Rev. 83.

⁵³ *Supra*, footnote 19. See generally Sherbaniuk, *Actions By or Against Trade Unions in Contract or in Tort* (1958), 12 U.T.L.J. 151 for the development of the civil status of unions prior to *Therien*. The *Therien* case does not apply in Ontario, see *Nipissing Hotel v. Hotel Employees Union* (1963), 36 D.L.R. (2d) 81 (Ont. H.C.).

⁵⁴ In *Senkiw v. Utility Glove* (1967), 62 D.L.R. (2d) 48 (Man. C.A.), it was held that this new ability of a union to sue as a legal entity in its own name precludes suit by its officers acting in a representative capacity, which was the former practice.

policy",⁵⁵ or interpreted out of existence by a hostile court.⁵⁶ Moreover, the procedural rules of the constitution, as well as its substantive provisions, bound members. They were therefore obliged to exhaust internal remedies before turning to the courts for assistance,⁵⁷ a requirement that seriously impaired the effectiveness of such assistance. Finally, employees who were not union members were denied even the questionable protection of the union's constitution; they were strangers to the "contract".

By contrast, acceptance of the union's institutional character opened the door to the development of significant and appropriate techniques of protection. Recently, legislation has begun to ensure a minimum standard of union democracy. For example, unions are no longer entirely free to replace duly elected local officials with trustees appointed by a parent body,⁵⁸ copies of constitutions, financial statements and collective agreements are now made available to members, so that leaders may be held accountable through internal political pressures,⁵⁹ offensive discriminatory provisions in union constitutions are outlawed.⁶⁰ Obviously legislation is imminent for Canadian unions—as exists for corporations⁶¹ and for American unions⁶²—regulating the honesty of union financial affairs, and ensuring the right of members to participate fully in the union's government.

At the procedural level, three distinct developments are apparent. First, the court themselves have begun to relax the requirement that internal remedies be exhausted.⁶³ Second, adminis-

⁵⁵ See *e.g.* *S.I.U. v. Stern*, [1961] S.C.R. 682; *Burwash v. Ironworkers* (1964), 65 C.L.L.C. P.14,045 (B.C.S.C.); *Kennedy v. Gillis* (1961), 30 D.L.R. (2d) 82 (Ont. H.C.).

⁵⁶ *Bimson v. Johnston* (1958), 12 D.L.R. (2d) 379 (Ont. C.A.); *Carlin v. Galbraith* (1959), 20 D.L.R. (2d) 679 (N.B.C.A.).

⁵⁷ *Kuszych v. White*, [1951] 3 D.L.R. 641 (P.C.); *Jurak v. Cunningham* (1959), 21 D.L.R. (2d) 58 (B.C.S.C.); *Anderson v. Amalgamated Clothing Workers* (1967), 67 C.L.L.C. P.14,015 (Man. Q.B.); but see *Hornak v. Patterson* (1966), 58 D.L.R. (2d) 175 B.C.C.A.).

⁵⁸ See, *e.g.*, Labour Relations Act, R.S.O., 1960, c. 202, s. 60.

⁵⁹ See Labour Relations Act, R.S.B.C., 1960, c. 205, s. 66A; Alberta Labour Act, R.S.A., 1955, c. 1967, s. 107a; Labour Relations Act, R.S.O., 1960, c. 202, ss. 61-3; Industrial Relations Act, S.P.E.I., 1962, c. 18, s. 47; Trade Union Act, S.Nfld., 1960, c. 59, ss. 8-10.

⁶⁰ See *e.g.*, Labour Relations Act, R.S.O., 1960, c. 202, s. 10; Ontario Code of Human Rights, S.O., 1961-62, c. 93, s. 4; Employment Discrimination Act, R.S.Q., 1964, c. 142, s. 3; Fair Employment Practices Act, R.S.M., 1954, c. 81, s. 4(3); Canada Fair Employment Practices Act, S.C., 1952-3, c. 19, s. 4(3)(4).

⁶¹ See *e.g.*, Corporations Act, R.S.O., 1960, c. 71; Companies Act, R.S.C., 1952, c. 53; Securities Act, R.S.O., 1960, c. 363.

⁶² Labor-Management Reporting & Disclosure (Landrum-Griffin) Act (1959), 73 Stat. 519; 29 U.S.C. ss. 401-531.

⁶³ *Hornak v. Patterson*, *supra*, footnote 57.

trative remedies exist, at least in seminal form, which afford the employee speedy, cheap and sophisticated relief against certain kinds of union impropriety.⁶⁴ Third, and most dramatic, union-created tribunals, such as the UAW Public Review Board,⁶⁵ represent a more promising forum for genuine employee protection than administrative tribunals or the regular courts.

(b) *The union as a bargaining agency*

While internal union political processes are important, the more critical developments involve the union's role as the exclusive bargaining agent of all employees in an enterprise. A cardinal principle of collective bargaining legislation is that when a majority of a group of employees, who constitute an appropriate bargaining unit, select a union as bargaining agent, it represents all employees in the unit. Union members will continue to relate to the union on the basis of loyalty and emotional commitment, but their economic gains do not come to them in their capacity as union members. Rather all employees, regardless of union affiliation, are entitled to receive the fruits of collective bargaining simply because they are employees. It is therefore important to perceive the union's relationship with employees as quite distinct from the union's relationship with its members, although the two groups will always overlap and may sometimes be identical.

Since by force of law the union represents all employees in the bargaining unit, whether union members or not, it has been repeatedly argued that the union is under a duty to treat all fairly and without hostile discrimination. At least in *obiter dicta*, both boards⁶⁶ and courts⁶⁷ have now recognized this duty, although remedies have seldom been made available to employees harmed by its breach. By the same token, since the union is obliged to represent all employees, the argument has been made that all should be made to bear a share of the costs of creating and administering the contractual regime. The famous Rand formula⁶⁸

⁶⁴ *Canadian Dredge & Dock Co. Ltd.* (1965), 66 C.L.L.C. P.16,071 (O.L.R.B.); *Plumbers Local 67*, [1966] Oct. Mthly. Rep. 513 (O.L.R.B.).

⁶⁵ Note, *Public Review Boards: A Check on Union Disciplinary Power* (1958), 11 *Stan. L. Rev.* 497; Oberer, *Voluntary Impartial Review of Labor Unions: Some Reflections* (1959), 58 *Mich. L. Rev.* 55; Stieber, Oberer, & Harrington, *Democracy and Public Review* (1960).

⁶⁶ *E.g. Wallace Barnes Co. Ltd.*, [1961] C.C.H. L.L.R. P.16,198 (O.L.R.B.).

⁶⁷ *O.C.A.W. Local 16-601 v. Imperial Oil*, *supra*, footnote 32, at p. 593, per Martland J.

⁶⁸ *U.A.W. & Ford Motor Co.* (1946), 46 *Lab. Gaz.* 123; see also Dudra, *Union Security in Canada* (1961), 12 *Lab. L.J.* 585.

requires that non-unionists, as a condition of employment, pay a service fee to the union equal to the dues paid by members. In effect, a tax is levied on all employees to defray the costs of governing the employment relationship. While obviously fair, even this formula leaves unresolved problems. First, as a matter of conscientious or religious conviction, some individuals may decline to make any contribution to the union. An eminently fair Saskatchewan statute⁶⁹ enables such individuals to seek exclusion from the bargaining unit, and removes any financial incentive to false claims of conscientious objection by providing for a charitable contribution in lieu of union dues or service fee. Second, not all union funds are expended in contract negotiation or administration. Some are spent in the promotion of the union's institutional interests in organizing workers in other firms, or in political or legislative activities. Of course, these activities may enhance the union's power, stabilize the labour market, or culminate in a protective statute. Nonetheless, non-unionists may be forced to support activities from which they derive no immediate benefit, and to which they may be expressly opposed. In British Columbia, this problem has been partly solved by the rather drastic expedient of forbidding the expenditure of any union funds on political activity.⁷⁰ A more sophisticated solution which has been suggested,⁷¹ is to "tax" the non-unionists at a reduced rate, discounting that proportion of the dues dollar devoted to non-collective bargaining activities of the union. Finally, the Rand formula does not affect situations in which the union is, in reality, a monopolist selling labour through its hiring hall. The formula is designed to protect workers who are already employed, or who may from time to time be hired. However, when union membership is a prerequisite to employment, the right to refrain from membership becomes the certainty of abstaining from work. Here the solution lies in removing exclusive union control over the hiring hall. A viable scheme might well involve a joint labour-management-government employment agency, serving all who seek work, but giving preference to union members when workers are sought by an employer who has agreed to a union security provision.⁷²

⁶⁹ Trade Union Act, R.S.S., 1965, c. 287, s. 5(1) as amended by S.S., 1966, c. 83, s. 3.

⁷⁰ Labour Relations Act, R.S.B.C., 1960, c. 205, as amended by S.B.C., 1961, c. 31.

⁷¹ Dudra, *The Swiss System of Union Security* (1959), 10 *Lab. L.J.* 165.

⁷² Cf. Report of Industrial Inquiry Commission on the Disruption of Shipping (Norris Report) (1963), p. 307.

The basic issue of the right to abstain from unionism altogether has been resolved on a pragmatic, rather than a principled, basis. In theory, freedom *from* association is as much a libertarian objective as freedom *of* association. However, the greatest support for "right-to-work" laws comes from employers who see the non-union employee as a divisive and debilitating factor in the united ranks of labour. To the extent that a union's monopoly of the labour supply is imperfect its bargaining strength is inhibited. Thus, the right of the individual to abstain from union membership has been largely sacrificed in order to maintain a power balance between union and management. Few restrictions have been placed on the union's right to force workers into membership through the compulsion of union security provisions in collective agreements, although cruder forms of coercion are naturally forbidden. A major effort, however, is made to ensure that the union does in fact enjoy majority support amongst employees before it is entitled to demand that membership be made a condition of employment. Certification following a secret ballot, or representation over a substantial period of time, is viewed as *prima facie* evidence that the majority of workers freely favour the union; once this fact is established, the majority are in effect entitled to conscript the minority into membership.⁷³

While majority rule and the union's exclusive right of representation are each entirely justifiable on pragmatic grounds, in combination they may produce undesirable and unnecessary hardship. Perhaps the clearest example of this is the plight of the non-union employee who seeks an impartial interpretation of the union security clause, upon which his continued employment may depend. Present legislation contemplates, and agreements inevitably provide, that only the union may pursue pre-arbitration procedures, and establish the board of arbitration. Thus, if a union seeks an arbitration award to compel an employer to enforce a union security clause against a non-union employee, there is no clear statutory or contractual basis upon which he can claim the right to participate in the hearing in order to argue for a contrary interpretation of the clause. True, the employer may wish to dispute the union's interpretation, and thereby indirectly shield the non-union employee, but this still leaves him to the charity of an uncommonly high-minded employer. More often, the employer will simply concede the point to the union, and the employee will be left without protection. Essentially similar is the plight of the

⁷³ Labour Relations Act, R.S.O., 1960, c. 202, s. 35.

employee who is in disfavour with the union, although a member of it. If he is expelled or suspended from the union, he may be discharged under the union security clause.⁷⁴ Even without recourse to that clause, he may be discharged for some spurious reason as the result of connivance between the union and a co-operative employer.⁷⁵ In all of these cases, arbitration is foreclosed because the union will obviously not carry forward the case of an individual seeking relief against the union itself.

Predictably, labour boards and courts have begun to grope towards a solution by giving the employee a remedy against the union based upon the breach of a fiduciary duty⁷⁶ violation of the union's constitution,⁷⁷ or perhaps illegality under the labour relations legislation.⁷⁸ Save in the last category of cases, which is confined to union dealings with the employer, there appears to be no way of securing reinstatement in employment for the discharged employee, because no determination is made of the employee's rights *vis-à-vis* the employer. A common law action for wrongful dismissal against the employer would, of course, supply this missing element, but is open to the criticism that arbitral administration of the collective agreement is confused by the occasional and unfamiliar intervention of a court.⁷⁹ Another possibility, adumbrated by a recent decision of the Ontario Court of Appeal,⁸⁰ and apparently adopted by the Supreme Court of Canada,⁸¹ is to permit the employee to intervene in arbitration proceedings in which the union is seeking a result which specifically, directly and adversely affects his interests. This ingenious extrapolation of the "right to be heard" principle, however, is open to many practical objections. First, the union may simply win its point in discussions with the employer, without even constituting a board of arbitration; no question of a hearing need ever arise. Second, if a hearing did occur, the number of interveners is potentially large, and their presence

⁷⁴ See e.g. *Jurak v. Cunningham*, *supra*, footnote 57; *Brady v. Heinekey* (1960), 24 D.L.R. (2d) 737 (B.C.C.A.); *McAnally Freightways Ltd.*, [1964] C.C.H. L.L.R. P.16,011 (O.L.R.B.).

⁷⁵ See dictum in *Pitt St. Hotel* (1963), 63 C.L.L.C. P.16,275 (O.L.R.B.).

⁷⁶ See e.g. *Hornak v. Patterson*, *supra*, footnote 57; cf. *Murphy v. Robertson*, [1941] 3 D.L.R. 30 (Man. C.A.).

⁷⁷ See e.g. *S.I.U. v. Stern*, *supra*, footnote 55; *Orchard v. Tunney*, *supra*, footnote 52.

⁷⁸ *Canadian Dredge & Dock Co. Ltd.*, *supra*, footnote 64; *Plumbers Union, Local 67*, *supra*, footnote 64.

⁷⁹ See e.g. *Miramichi Hospital v. Woods* (1967), 59 D.L.R. (2d) 290 (N.B.C.A.).

⁸⁰ *R. v. Ottawa, ex parte Bradley*, [1967] 2 O.R. 311 (C.A.).

⁸¹ *Re Hoogendoorn & Greening Metal Products*, [1967] 1 O.R. 712 (C.A.), rev'd by S.C.C. Nov., 1967, unreported.

at the hearing would be disruptive. Third, the union's ability to function as a broker between divergent employee interests, and its authority to speak on behalf of the group, are both undermined.

More promising would be a legislative requirement that an individual employee, dismissed in circumstances where he is in conflict with the union, be given the opportunity to constitute a board of arbitration at his own expense.⁸² The board would hear representations from the employee, the employer and the union, and would be entitled to give relief against the latter in appropriate cases; in addition, the board would be able to order reinstatement of the employee because the employer would be a party to the proceedings.

This proposal is but a single instance of the evident need to treat the union and the employees as distinct, if not opposed, in interest.⁸³ While this view may stem from an accurate judgment that the union is not totally responsive to employee desires, its full legislative implications are by no means obvious.

One approach to protection against union oppression of employees involves disestablishment of the union as a dominant force on the labour market. By guaranteeing individual employees the right to remain aloof from the union in setting the terms of employment, or in administering the collective agreement made by the union, the freedom of individual employees would in theory be enhanced. However, experience demonstrates that the undermining of the system of collective bargaining would in fact reduce employee liberty by substituting less benevolent employer power for union power. Quite opposite in conception, but equally questionable, is the attempt to totally democratize the union, to make it completely responsive to the workers it represents. For three reasons, however, the costs of such an approach fall ultimately on the public and on management, rather than on the employees. First, political pressures from below may cause insecure union officers to adopt bargaining positions which are unrealistic, or to champion grievances which are without merit, thus exacerbating union-management relations. Second, the technical knowledge and efficiency of professional union officers may produce policies which in the long run benefit workers more than the unsophisti-

⁸² See Laskin, *Collective Bargaining and Individual Rights* (1963), 6 Can. Bar Jo. 278.

⁸³ *Ibid.*: "It is possible in today's climate of opinion to be a proponent of individual employee rights without being hostile to collective bargaining." Cf. Wilson J. in *Contractors Equipment & Supply v. Building Material Drivers* (1965), 65 C.L.L.C. P.14,090, at p. 275: ". . . the 'Union' . . . is nothing more than the aggregation of the employees"

cated majority decisions which are likely to result from participatory democracy. Third, as a practical matter, if union officers were obliged to seek a new mandate for each new situation, they could not cope with the fast moving events of the bargaining relationship. In effect, the union would become an economic dinosaur whose intelligence and nervous system would be inadequate to the demands of a large and uncoordinated body attempting to survive in a hostile environment.

Between these polar positions of total disestablishment and total democracy lies a third approach, the public utility analogy.⁸⁴ A public utility enjoys, by statute, a monopoly in the supply of a particular service. In exchange for, and because of, its monopoly position, it becomes a fiduciary which owes to its customers efficient and non-discriminatory service, at reasonable cost. The customers enforce these obligations not through direct political or economic action, by voting on proposed rate changes or by seeking an alternative supplier of the service, but rather through the supervisory power of a public regulatory agency. In somewhat the same way, the union has an exclusive, state-sanctioned, monopoly within the bargaining unit: it alone can negotiate regarding the terms of employment of its "customers", the employees. It can be persuasively argued that the union should be made to use its monopoly position on their behalf in a non-discriminatory fashion, and be held accountable through the enforcement of statutory standards of fair representation by the labour relations board. However, it should not be thought that union decision-making would thereby be confined except within the broadest limits. For example, a union decision to allow management unrestricted freedom to innovate may cost workers with low skills and low seniority their jobs, although the ultimate result of the decision is to ensure better wages for the remaining employees in a more profitable enterprise. To impugn such a decision, the displaced workers would have to show not merely that they were harmed by the union's concession, but that the union made no serious attempt to protect them by negotiating for alternate employment or severance pay. Similarly, a union which provided employees with sub-standard service in the prosecution of grievances would only be called to account if it could be shown that its failure was due to neglect or discrimination, rather than lack of financial resources to employ staff or to pay arbitration costs. The doctrine of "fair

⁸⁴ See Ross, *Labor Organizations and the Labor Movement in Advanced Industrial Society* (1964), 50 Va. L. Rev. 1359, at p. 1366 *et seq.*

return on investment" which is used to gauge public utility rates could be translated in the labour context as "reasonable service" in relation to the economic and human resources available to the union. Of course, union officers would continue to be held accountable to the membership, as they presently are, through periodic elections, referenda, and convention votes. The "public utility" analogy is intended to measure the union's legal responsibility, rather than limit its institutional vitality.

This bifurcated approach to the union—as a political institution and as a bargaining agent—will no doubt characterize legal developments over the coming years. The most promising from a libertarian viewpoint is probably the latter. By focussing on the union's discharge of its obligations to all employees, a coherent and complete code of conduct will gradually be developed which makes their position as industrial citizens economically more secure. But the law inevitably will become involved in union political processes as well. As union organization spreads, the group of non-union workers will diminish in importance. As is already the case in some highly organized industries, the union's two roles will become indistinguishable, so that political processes will determine bargaining decisions and the "public utility" approach to bargaining will affect internal political decisions.

Apart from this congruency of members and employees, internal political processes will increasingly demand legal regulation and protection because of the changing focus of union activity. Instead of being total preoccupied with collective bargaining, unions are becoming important social institutions. Already they endorse candidates for public office, participate in a labour-affiliated party, and make representations to governments on a broad spectrum of subjects ranging from foreign policy to fiscal policy, from accident prevention to consumer protection. In recent years, unions have established housing cooperatives, medical clinics, recreation centres and educational institutions. As these activities become increasingly important features of union membership, the union will have to develop governmental structures to administer them. It can be predicted, then, that there will be a shift in emphasis in union "public law", similar to that which has occurred with the emergence of the welfare state. Instead of an obsessive concern with protection of the individual against official action, greater attention will be given to his right to participate in the positive benefits of programmes designed to ensure his economic wellbeing in a complex industrial society. An obvious prerequisite of this

participation must be the right to be admitted to union membership, especially where membership is the key to employment and its benefits.⁸⁵

4. *Protection Against Economic Insecurity.*

Social security legislation which protects everyone against the economic burdens of illness and old age, has a special significance for employees. As members of a large lower-income group, they obviously stand to benefit from health insurance and pension plans—less than those who are unemployed or on fixed incomes, but more than self-employed, professional and business groups. However, employees benefit from such universal plans as members of the general community, rather than as industrial citizens. By contrast, such schemes as workmen's compensation and unemployment insurance are designed to relieve against special risks incurred by workers, and not by other groups. Consequently, entitlement to benefits under these schemes turns on a past or present job nexus.⁸⁶

Historically, however, neither universal nor employment-related legislation developed early in North America to satisfy the needs and expectations of employees. In default of public action, labour and management with considerable ingenuity, constructed a private regime of social security within industry.

In the early years, pension plans, sickness and welfare benefits, and burial expenses were provided by paternalistic employers or union-sponsored self-help organizations. These schemes often involved innuendoes of charity, were almost always restricted to small groups identified with a particular employer or union, and were, of course, liable to be modified or terminated by the unilateral act of their initiator. The effort to provide economic "rights" for employees, as opposed to mere charity, therefore led unions to press for the inclusion of provisions in collective agreements which established these welfare plans on a bilateral basis.

Union-management agreements to provide "fringe benefits" created for the employee at least an aura of entitlement. As will be seen, the ability of an employee to enforce the provisions of a collective agreement is a matter of considerable controversy. Shortly put, the employee is not a party to the collective agree-

⁸⁵ See generally Rideout, *The Right to Membership of a Trade Union* (1962); Hickling, *The Right to Membership of a Trade Union*, [1967] U.B.C.L. Rev. 243.

⁸⁶ See *c.g.* Unemployment Insurance Act, S.C., 1955, c. 50 (as amended), s. 25; Workmen's Compensation Act, R.S.O., 1960, c. 437, s. 3.

ment, and may not be able to enforce it except by means of legal proceedings initiated by the union. Strictly speaking, then, his legal rights under a bilateral social security regime are no greater than under a unilateral regime. However, as a practical matter the employee's position was much enhanced by this development. When a union and an employer negotiate a collective agreement, concessions won by the union in the area of welfare are traded off against union concessions to management which are of monetary value, including wages. The employee feels, quite accurately, that he has sacrificed present income for future protection. Welfare benefits, thus viewed as deferred payment for past services, are at least arguably "vested" once the service has been performed.⁸⁷

Perhaps most important, as a practical matter, is the likelihood that the union's legal and economic power will be used to secure and protect welfare benefits for employees. No longer is the employee dependent upon his employer's largesse; it is unlikely that he will for long continue to depend upon the willingness of the union to advance his interests. As part of the general movement towards enforcement of the union's fiduciary obligations to those it represents, the law will surely first insist upon protection by the union of these "vested" rights.

Finally, the very arrangements by which welfare plans are administered generate internal safeguards for employee rights. Where administration is entrusted to a nonpartisan professional administrator, such as an insurance company, its institutional integrity is likely to produce fair disposition of deserving claims. Where administration is placed in the hands of a joint committee, the confrontation of labour and management members is likely to reduce the incidence of capricious and discriminatory treatment.

Within this framework of private, consensual, labour-management "legislation" have emerged a wide variety of important "rights": pensions; sickness, accident, medical, hospital and life insurance; seniority and "just cause for discharge" provisions which are of special importance to older workers facing layoff or compelled retirement; work rules and "featherbedding" provisions which cushion the impact of technological change; vacations; overtime, shift and holiday premium pay which helps to "civilize" and

⁸⁷ See e.g. *Falconbridge Nickel Mines Ltd.* (1955), 6 L.A.C. 56 (Prof. Laskin); *Caland Ore Co. Ltd.* (1963, unreported award, Reville C.C.J.); *Filkington Bros. (Canada) Ltd.* (1966), 17 L.A.C. 146 (Prof. Arthurs); but see *contra*, *R. v. Fuller, ex parte Earles*, *supra*, footnote 40; *Close v. Globe & Mail*, [1967] 1 O.R. 235 (C.A.).

regularize work routines. In many cases—pensions and vacations are a striking example—private legislation has provided a model for public lawmaking.

However, there are limits to the security system which can be created by private union-management arrangements. First, the very fact that such schemes are consensual and private is an inherent weakness. If the welfare benefits are rooted in the provisions of a collective agreement, termination of the agreement topples the entire structure. To be sure, if a new agreement is signed which revives and renews the scheme, no harm is done. If, however, a long unresolved strike occurs, or if either the union or the company ceases to exist, the contractual regime may be permanently shattered.⁸⁸ Moreover, the “reserved rights” school of arbitral jurisprudence may permit the employer to circumvent or subvert the whole scheme. For example, in the celebrated case of *Canadian Car Foundry v. Dinham*,⁸⁹ an employer was permitted unilaterally to establish a pension plan, and to fix an age for compulsory retirement, despite a contractual promise that employees would be discharged only for cause. Because the agreement made no explicit mention of their pensions or retirement, the employer was permitted to terminate the service of the older workers, although their seniority and ability ought to have guaranteed continued employment for them. Finally, as indicated, the employee may not himself be able to enforce rights under the collective agreement and is thus to some extent a pawn in the power relationship between union and employer.

Second, it must be remembered that a union is responsive to internal political pressures. Given the willingness of an employer to make a total wage settlement of a fixed amount, one of the functions of a union is to ensure that this amount is distributed within the industrial community in a way which is acceptable, if not “just”. For example, a decision may have to be taken as to whether all employees should receive the same hourly increase, or whether skilled employees should be rewarded by a proportionately larger increase. Similarly, a choice may have to be made between improvements in the present hourly pay of workers, or creation of a system of social welfare. While wages are received by all workers, “fringe benefits” may only help a relatively small group of older workers, or those who are victims of illness or

⁸⁸ *R. v. Fuller, ex parte Earles, ibid.*; *U.M.W. v. McKinnon*, [1958] S.C.R. 202.

⁸⁹ [1960] S.C.R. 3; see also *Re Sandwich Windsor and Amherstburg Railway* (1961), 26 D.L.R. (2d) 704 (Ont. C.A.).

dislocation, circumstances which are conjectural or in the distant future. "More now" or "more later" is a difficult political decision. A preponderance of younger workers may influence the union to choose the former, and thus inhibit the growth of adequate pension or insurance schemes.

Third, the dimensions of the social problem may be broader than those of the bargaining relationship. For example, technological change may make a group of unskilled workers redundant. However, if large numbers are displaced and if no alternative jobs can be found within the enterprise, what then? One solution would simply be to turn these employees loose into the labour market, where unemployment insurance will help to tide them over until they find new work. This solution is being viewed with increasing disfavour on both policy and pragmatic grounds. As to the former, most modern governments appear anxious to avoid the loss of purchasing power and of self-esteem which are the twin penalties of unemployment. As to the latter, efficient utilization of human resources dictates that unemployment should be minimized, as does the unproductive outlay of unemployment benefits. Thus, two important approaches are developing, a short-run policy of avoiding unemployment, and a long-run policy of labour market management.

A number of devices have been employed to protect the jobs of those threatened with layoff or discharge. Make-work rules have been written into collective agreements; severance pay or redundancy pay has been advocated to compel the employer to "buy out" job rights; employers have been required to consult or bargain with unions over changes, or the effects of changes, in production techniques, where job security is imperilled.⁹⁰ These techniques, largely contract-based, are all designed to protect workers, but have the unfortunate effect of inhibiting technological change by enhancing its cost to the innovating employer. More promising are devices which enhance worker mobility, either making equivalent alternative employment available or upgrading the workers' skills. Sometimes this can be done by the private action of a single firm and union. For example, intrafirm transfers and retraining have been attempted, and made more palatable by relocation al-

⁹⁰ See Cowan, *Proposed Measures to Facilitate Manpower Adjustment to Technological and Other Change: Twelve Selected Case Studies* (1967, Economic Council of Canada); Keys & Wright, *Manpower Planning in Industry: A Case Study* (1966, Economic Council of Canada, Staff Study No. 18).

lowances and other financial inducements.⁹¹ Sometimes government collaboration or initiative is required. For example, industries may be given incentives to move to labour surplus areas, and unemployed low-skilled workers may be sent for training to special schools and given living allowances while learning a new trade.⁹² Of course, general governmental measures designed to stimulate the economy, and sound basic educational policies, in the long run are the most important techniques available for avoidance of worker dislocation.

This web of private and public measures, while loosely woven, is gradually capturing an elusive notion: the right to economic security. Technology, sociology and probably psychiatry will determine the means by which this right will be vindicated. Whether we can produce more while working less, whether increased leisure time is to be channelled into education or recreation or into secondary employment, whether work is a psychological necessity, are all questions beyond the scope of this article. But it does seem likely that citizens of the industrial community will gradually come to enjoy protection against the erratic action of a particular employer or the economy as a whole, in much the same way as citizens of the general community gradually came to enjoy protection against arbitrary governmental action.⁹³

Yet, with rights come responsibilities. In exchange for protection against the extreme fluctuations of an enterprise economy, the worker is increasingly required to surrender his own freedom to create crises for the community. As noted earlier, strikes which disrupt essential services, such as transportation and communications, are viewed with increasing antipathy.⁹⁴ More significant, in the long run, is the growing recognition that regulation of the labour sector is an intrinsic part of the overall task of producing

⁹¹ See Cardin, *A Study of Ways and Means of Improving the Contribution of Labour Relations in Canada to More Effective Manpower Adjustment to Change* (1967, Economic Council of Canada); Economic Council of Canada, *Declaration on Manpower Adjustments to Technological and Other Change* (1967).

⁹² See *e.g.* Technical and Vocational Training Assistance Act, S.C., 1960-61, c. 6, as amended; Agricultural Rehabilitation and Development Act, S.C., 1960-61, c. 30; Older Worker Employment and Training Incentive Program Regulations, SOR/63-439; amended by SOR/64-104(1964); Manpower Mobility Regulations, SOR/67-163(1967).

⁹³ *Cf.* Trudeau, *Economic Rights* (1962), 8 McGill L.J. 121.

⁹⁴ See Woods, *Canadian Policy Experiments with Public-Interest Disputes* (1963), 14 Lab. L.J. 739, and see *e.g.* Hospital Labour Disputes Arbitration Act, S.O., 1965, c. 48; Maintenance of Railway Operation Act, S.C., 1966, c. 50; Essential Services Emergency Act, S.S., 1966, c. 2; Right of Education & Schooling Collective Agreement Plan Act, S.Q., 1967, Bill 25.

a well-modulated economy. Labour costs do affect our domestic growth rate and our international trading position, so that it seems inevitable that governmental policies designed to secure important national objectives will increasingly have to take priority over the short-run objectives of individual workers and unions. No doubt this will be accomplished largely by consultation and collaboration between labour, management, and government; sometimes coercion may be necessary. Paradoxically, then, the desire to protect the industrial citizen against economic insecurity may diminish other valued freedoms he now enjoys.

Larger questions of political philosophy and economic theory remain to be answered before definitive value judgments can be made about this trend. The thrust of these observations, however, is merely to identify the cumulative effect of the enormous and diffuse mass of legislative and contractual rules which have been thrown up by the developing right to economic security.

III. *The Development of an Industrial Jurisprudence.*

Just as a special set of rights and duties, indigenous to the industrial relations community has largely developed outside the general law, so too has the enforcement of these rights and duties become the primary concern of specialized tribunals rather than the regular courts. Labour relations boards administer labour relations Acts, while arbitration boards enforce the collective agreement, the private "legislation" created by the parties.

The shift from courts to boards has not been accomplished without difficulty, nor is it by any means an established fact, even after a quarter-century of modern labour legislation. Juridical tradition is strongly opposed to the notion that labour-management relations exist in an industrial Alsatia, into which the royal writ does not run. In earlier times, the King's courts waged a vigorous contest to win jurisdiction from local and parochial bodies. In this century, many judges have undertaken the task of protecting citizens from the "new despotism" of administrative tribunals.

Yet the courts have proved to be their own worst enemy in the contest for exclusive or even primary jurisdiction in labour matters. The Workmen's Compensation Act⁹⁵ was the direct product of the courts' refusal or inability to safeguard the physical interests of employees.⁹⁶ The doctrinal vagueness, procedural awk-

⁹⁵ R.S.O., 1960, c. 437.

⁹⁶ Report of Royal Commission on Laws Relating to the Liability of Employers, Sir W. R. Meredith, Commissioner (1913, Ontario).

wardness, and alleged bias of the courts in regulating picketing led to their virtual ouster from this activity in England in 1906,⁹⁷ and in the United States in 1932,⁹⁸ and to violent demands for similar action in Canada today.⁹⁹ The early refusal of the courts to enforce collective agreements, coupled with the light-hearted judicial observation that the remedy for breach is "not an action . . . but the calling of a strike",¹⁰⁰ consigned the protection of contractual rights to arbitration. The experience of the Ontario Labour Court in 1943-1944 in administering the first collective bargaining statute¹⁰¹ was apparently not satisfactory enough to warrant its resumption in the post-war era.¹⁰² The inappropriateness of criminal sanctions in labour relations has led the parties to virtually ignore the criminal courts as a forum for regulating wrongful conduct.¹⁰³ The uninhibited judicial penchant for prerogative writ review of the decisions of labour relations boards has spawned several generations of privative clauses, each more sophisticated than its predecessors, each equally ineffective against the onslaught of jurisdiction-jealous jurists.¹⁰⁴ All of these seemingly diverse developments are bound together by a common theme: the courts often seemed determined to handle labour litigation in a way which might have been consistent with general jurisprudential concepts, but which did not recognize the special needs and traditions of the industrial community. As a result, the parties and the legislators came to depend less and less on the courts as the protectors of private rights or public policy.

Nor is the proliferation of boards solely a negative reaction to the regular courts. It reflects, as well, a desire to bring to industrial adjudication new procedures, evidentiary rules, and remedies. To

⁹⁷ Trade Disputes Act, 1906, 6 Edw. VII, c. 47.

⁹⁸ Norris-LaGuardia Act (1932), 47 Stat. 70.

⁹⁹ See e.g. *Re Tilco Plastics v. Skurjat, A.G. Ont. v. Clark* (1966), 57 D.L.R. (2d) 596 (Ont. H.C.), aff'd and leave to appeal to S.C.C. denied. (1967), 61 D.L.R. (2d) 664 (Ont. C.A.); *R. ex rel Nissho (Canada) v. I.L.W.U.* (1965), 66 C.L.L.C. P.14,113 (B.C.S.C.); *R. v. Neale* (1966), 67 C.L.L.C. P.14,016 (B.C.C.A.).

¹⁰⁰ *Young v. C.N.R.*, [1931] A.C. 83, at p. 89.

¹⁰¹ Collective Bargaining Act, S.O., 1943, c. 4.

¹⁰² See Laskin, *Labour Law: 1923-47* (1948), 25 Can. Bar Rev. 286; Finkelman, quoted in Bromke, *The Labour Relations Board in Ontario* (1961), p. 24.

¹⁰³ See Bromke, *ibid.*, pp. 60-61.

¹⁰⁴ See Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Bar Rev. 986; Cutler, *The Trade Union Case Against Prerogative Writs* (1957), 4 McGill L.J. 35; Strayer, *The Concept of Jurisdiction in Review of Labour Relations Board Decisions* (1963), 28 Sask. Bar Rev. 157; Weatherill, *Labour Relations Boards and the Courts*, [1965] Nov. Mthly. Rep. 563 (O.L.R.B.).

some extent these aims have been accomplished. But the major rationale of the boards is more basic yet: they are to decide cases not on common law principles, but in accordance with industrial jurisprudence—the statutes, customs and contracts which operate exclusively in the world of labour relations.¹⁰⁵

This uniqueness of both procedural and substantive rules in turn complicates the relationship between courts and boards. When board decisions are reviewed, they are frequently measured with a common law yardstick rather than evaluated in their own context. Boards may therefore be tempted to become increasingly court-like in order to avoid judicial censure.¹⁰⁶ When board decisions are quashed, the courts may interject unsuitable and incongruous doctrines into well-integrated administrative policies or procedures. Thus the boards' ability to handle the problems assigned to them may be seriously impaired. Finally, when courts encounter labour problems in the context of conventional litigation, they tend to deal with them in a conventional way, rather than remit them to specialized labour tribunals. Litigants are therefore given a choice of forums and a choice of substantive rules, with the result that inconsistent decisions may co-exist in related matters. This, again, dilutes the distinctiveness and effectiveness of industrial adjudication.

Against this historical and practical background, several specific examples of the uniqueness of the forms, processes and doctrines of industrial decision-making deserve examination in detail.

1. *The Role of Industrial Tribunals.*

(a) *The decision-makers*

Both judges and members of industrial tribunals should ideally have certain qualities—intellectual honesty, patience, and wordly wisdom. What distinguishes one group from the other is the specialized talent which each brings to his role. The judge is above all a skilled lawyer; a lifetime lived in the law has inculcated in him its premises, its analytical techniques, its principles. Presumably judges are selected from amongst those who are most knowledgeable about the law, precisely so they can bring this knowledge to bear in the making of decisions. Industrial adjudicators—arbitrators and board members—are selected, on the other hand,

¹⁰⁵ This is not to say that "industrial jurisprudence" is a fully-developed system. See Carrothers, *Labour Arbitration in Canada* (1961), p. 18: "A new jurisprudence may be aborning; but it is scarcely cracking its shell".

¹⁰⁶ For an extensive discussion of this phenomenon, see Finkelman, *The Ontario Labour Relations Board and Natural Justice* (1964).

because they have a particular knowledge of labour relations. Whether this knowledge is the product of prior academic or practical training, or whether it is acquired on the job as they discharge their limited and specialized functions, their salient characteristic is that they understand and respond to the values of the industrial community.

To underline the primacy of labour relations expertise over legal skill, there is no requirement that members of industrial tribunals even be lawyers.¹⁰⁷ By tradition, of course, some tribunals (such as labour relations boards) are often presided over by law-trained chairmen. By default, lawyers and judges have gained a near-monopoly in others (such as arbitration boards).¹⁰⁸ But the pre-eminence of lawyers cannot be taken as *prima facie* evidence of the relevance of legal skills. First, to some extent their presence is to be explained by political pressures: some labour and management officials exhibit a real fear that new-fangled industrial relations concepts will govern their relationships, instead of the old and familiar value judgments which are embodied in the common law. Thus, they wish their disputes to be decided by those who personify the older tradition rather than the newer one. Second, to some extent court criticism of decisions which are labour relations-based rather than law-based, has led industrial decision-makers who possess both types of skills to act like lawyers rather than industrial relations experts.¹⁰⁹ Third, in some critical areas, such as job evaluation, even the most ardent advocates of law-based adjudication acknowledge its inadequacies; here the best and most popular arbitrators are engineers rather than lawyers. Nonetheless, acknowledging the *de facto* control by lawyers and law principles of much of the business of industrial tribunals, it remains possible for non-lawyers to decide cases. That this possibility exists is strong evidence that their industrial expertise is legitimate and relevant in the process of adjudication.

No more dramatic contrast exists between judges and their counterparts in the world of industry than in the tripartite board.

¹⁰⁷ See *e.g.* Labour Relations Act, R.S.O., 1960, c. 202, s. 75.

¹⁰⁸ A survey covering the years 1960-61 showed that approximately 84% of all labour arbitrations in Ontario were heard by county and district court judges, and other judicial personnel. Report of the Attorney General's Committee on the Process of Arbitration in Ontario (E. H. Silk, Q.C. chmn.) (1962).

¹⁰⁹ But *cf.* Carrothers, *op. cit.*, footnote 105, p. 13: "Whatever theories an arbitrator may harbour as to the nature and purpose of his office, a common denominator of his function must be the test, 'Is it faithful to basic legal principles?' Anything short of that mark is wasted effort."

The judge, of course, must be impartial; any extracurial connection with the parties or the controversy disqualifies him. By definition, the opposite is true of members of a tripartite board. Apart from the chairman, the members of the board of labour arbitration, for example, are nominated precisely because they are known to be sympathetic (if not totally loyal) to the position of their nominator. While some courts have attempted to force the members of tripartite tribunals to be impartial,¹¹⁰ and others have tolerated their notorious partisanship,¹¹¹ the parties continue to expect, and to receive, the almost automatic support of their respective nominees in the deliberations and decisions of arbitration boards. Why, then appoint partisans if their response is so predictable? Why not leave the impartial chairman free to reach by himself the decision which, in a tripartite board, carries the day by a majority vote? The answer must lie in the expectation of the parties that the nominee will influence the decision of the chairman. Since he is often law-trained while the nominees are not, it is reasonable to assume that their function is to bring industrial norms to his attention, and thus to produce a result which is meaningful in context, whether or not it is right in law. Even where both chairman and nominees are lawyers, it is most unlikely that the latter are nominated to the board in the hope of enhancing the legal quality of its decision. Rather, their role is to deflect a law-based decision if it is inimical to the interest of their nominator, and to fight vigorously for such a decision if it is favourable. This is hardly an attractive picture of the tripartite board, but it is an accurate one: the parties do not expect or want industrial adjudicators to act like judges.

Finally, the typical board of labour arbitration is created *ad hoc*, to hear and dispose of a single controversy. Since security of tenure is viewed as the bedrock of judicial independence, there is good reason to believe that the parties do not wish to insulate the arbitrator from certain pressures which are thought to distort truly impartial adjudication. More precisely, the parties want the arbitrator to be aware that he draws his mandate from them, and that he should be responsive to their interests. Since he must hold an even hand as between labour and management, it seems likely that they wish to emphasize his fidelity to their private system of law rather than to the general legal system. If he displeases either

¹¹⁰ See Arthurs, *The Three Faces of Justice—Bias in the Tripartite Tribunal* (1963), 28 Sask. Bar Rev. 147 and cases cited therein.

¹¹¹ *Re Gainers Ltd.* (1964), 47 W.W.R. 544 (Alta. S.C.); *C.A.L.P.A. v. C.P.A.* (1966), 57 D.L.R. (2d) 417 (B.C.C.A.).

party, by producing a decision which does violence to industrial norms (as they are perceived by that party), he will not be invited to arbitrate again. By contrast, a government is unable to remove a judge from office simply because he has "violated" general legal norms in reaching a particular decision.

In summary, then, adjudication of industrial disputes is often assigned to persons whose relevant expertise is their knowledge of labour relations rather than law, and whose decisions are forced by institutional pressures into an industrial mould rather than a legal one.

(b) *The process of decision-making*

As might be expected, the techniques by which industrial tribunals make decisions are not identical to those employed by the courts. In a broad sense, of course, arbitrators and labour boards are engaged primarily in adjudication, and the adversary process characterizes most of their hearings. However, there are distinctive features of industrial adjudication.

The fact-finding process, for example, is much more flexible. Conventional evidentiary rules are inapplicable,¹¹² so that hearsay is admissible, if seldom compelling. More importantly, industrial tribunals are free to exercise initiative in seeking out facts through inspection by tribunal members or their subordinates¹¹³ and through conferences with the parties¹¹⁴ or with other persons having relevant views.¹¹⁵ "Official notice" of facts notorious to those engaged in labour relations is frequently relied upon to lay the foundation for, or to evaluate, facts adduced by the parties.¹¹⁶ Within the confines of the rules of natural justice, a broad mandate has been given labour boards to develop appropriate fact-finding mechanisms.¹¹⁷

¹¹² See e.g. Labour Relations Act, R.S.O., 1960, c. 202, ss. 34(7)(c), 77(2)(c); R.S.B.C., 1960, c. 205, s. 62(7), but see *Langley Fruit Workers v. U.P.H.W.* (1967), 61 D.L.R. (2d) 31 (P.E.I.S.C.)

¹¹³ See e.g. Labour Relations Act, R.S.O., 1960, c. 202, ss. 34(7)(d)(e), 75(2)(e)(g); Industrial Relations and Disputes Investigation Act, R.S.C., 1952, c. 152.

¹¹⁴ See e.g. Procedure of Examiner's Inquiry into Duties and Responsibilities, O.L.R.B. Practice Note #4. (Dec. 10th, 1962, as amended July 28th, 1965, Sept. 26th, 1966) (Examiner appointed by Labour Relations Board to investigate eligibility of employees for inclusion in bargaining unit meets with parties informally).

¹¹⁵ See e.g. *Fraser-Brace Engineering*, [1964] Mar. Mthly. Rep. 660 (O.L.R.B.); *W. F. Flynn*, [1964] June Mthly Rep. 112 (O.L.R.B.) (Board holds hearing of all interested persons—including non-litigants—to determine suitability of proposed geographic bargaining unit).

¹¹⁶ See Finkelman, *op. cit.*, footnote 106, p. 40, *et seq.*

¹¹⁷ See e.g. *Payfair Stores v. L.R.B.* (1965), 51 W.W.R. 472 (Man. Q.B.).

Law-finding equally offers arbitrators and labour boards considerable scope for creativity. The absence of any appellate arbitral tribunal precludes the application of a rule of *stare decisis*. Thus, conflicting decisions, advanced by different arbitrators, vie with each other for acceptance in the "market place of ideas". Consumer judgments there, expressed in terms of the arbitrator's acceptability to labour and management, tend to mould decisions, over a period of time, to the needs and expectations of the parties. Equally, the willingness of arbitrators to be persuaded by the awards of their colleagues is some measure of the soundness of those awards. Both of these influences, it should be noted, are indigenous to the world of industry rather than to the world of law. The labour board, likewise unencumbered by any appellate structure, is free to experiment and to learn the lessons of experience.

This is not to say that the opportunities for creativity have always been seized boldly, or that consumer judgments have necessarily been open-minded. For example, few arbitrators have made any imaginative response to the difficult problem of the employer's right to "contract out" work,¹¹⁸ in time the possibility of dealing with the problem through arbitration vanished.¹¹⁹ Likewise, the labour board's evolving doctrines have sometimes seemed merely expedient to its critics,¹²⁰ and even by its own admission board policy has sometimes seemed ephemeral.¹²¹

To some extent the courts have reinforced the ability of tribunals to engage in free-form adjudication. For example, so long as an arbitrator has dealt with the "very question" submitted to him, his award is immune from review.¹²² This rule, to the extent that it is honoured by the courts,¹²³ leaves an arbitrator free to provide answers which are "wrong" in law, but "right" in industrial relations terms. In a more affirmative way, the courts have reprimanded

¹¹⁸ See Young, *The Contracting Out of Work—Canadian and U.S.A. Industrial Relations Experience* (1964).

¹¹⁹ See *Russelsteel* (1966), 17 L.A.C. 253 (Prof. Arthurs).

¹²⁰ See e.g. *Associated Medical Services*, [1961] C.C.H. L.L.R. P.16,218 (O.L.R.B.) per Young C.C. dissenting; quashed on *cert.*, *sub. nom. A.M.S. v. Ontario L.R.B.*, [1962] O.R. 1093 (C.A.), *aff'd* [1964] S.C.R. 497.

¹²¹ See Finkelman, *Office Bargaining Units in Ontario* (speech to Labour Relations Subsection, Ontario Section, Canadian Bar Association, 1964) reproduced in Arthurs (ed.), *Labour Relations Law Casebook* (1966), p. 6.2.2.

¹²² See e.g. *Re Canadian Westinghouse & U.E.W. Local 504* (1961), 30 D.L.R. (2d) 676 (Ont. H.C.); *R. v. Bigelow, ex parte Sefton* (1965), 50 D.L.R. (2d) 38 (Ont. H.C.); *R. v. Fuller, ex parte Earles, supra*, footnote 40.

¹²³ See e.g. *R. v. Bigelow, ex parte International Nickel Co.* (1959), 19 D.L.R. (2d) 380 (Ont. C.A.) ("The board not only exceeded its powers but it omitted to clearly determine the real issue before it."); *Re Canadian*

mandated administrative tribunals for over-rigid adherence to their own doctrines and have urged them to decide each successive case on its own merits.¹²⁴

Caught between the temptations of freedom and its dilemmas, industrial tribunals have yet accomplished some significant feats of creativity by responding to labour policy rather than conventional legal doctrine. For example, an arbitrator has ruled that an employee's seniority, though rooted in the collective agreement, survives its expiry.¹²⁵ The labour board has conditioned the granting of bargaining rights upon the abandonment of a recognition strike, thus reinforcing, without express statutory authority, its own peace-keeping powers.¹²⁶ However, most creative decisions of industrial tribunals are of a more modest sort, involving such techniques as the implication of a condition of good faith,¹²⁷ and a power to award damages where none was expressed,¹²⁸ or the use of past practice to lend meaning to ambiguous contractual language.¹²⁹ Perhaps most frequent, yet virtually beyond demonstration, is the selection by a labour board or arbitrator of a nuance of fact from a jumble of evidence, or one particular meaning of an agreement or statute from amongst several tenable meanings.¹³⁰ This process lies at the very heart of the act of decision-making, yet it is partly intuitive rather than purely rational. Above all, this informed intuition of industrial adjudicators sets their decisions apart from those of the regular courts; their decisions are vividly coloured by the

Westinghouse & Draftsmen's Association, Local 164 (1961), 30 D.L.R. (2d) 673 (Ont. C.A.) ("The Court has . . . to decide whether or not the interpretation applied by the arbitrator is one which . . . the language of the agreement reasonably will bear.")

¹²⁴ See e.g. *R. v. O.L.R.B., ex parte Trenton Construction Workers*, [1963] 2 O.R. 376; *R. v. Arthurs, ex parte Port Arthur Shipbuilding*, *supra* footnote 6, at p. 71.

¹²⁵ *Tung Sol of Canada Ltd.* (1964), 15 L.A.C. 161 (Reville C.C.J.).

¹²⁶ See e.g. *Radio Lunch*, [1950] C.C.H. L.L.R.P. 17,012 (O.L.R.B.); *Robert McAlpine Ltd.*, [1961] Aug. Mthly. Rep. 178 (O.L.R.B.).

¹²⁷ See e.g. *Falconbridge Nickel Mines* (1958), 8 L.A.C. 276 (Prof. Laskin); *National Cash Register* (1966), 17 L.A.C. 67 (Reville C.C.J.).

¹²⁸ *Polymer Corp.* (1958), 10 L.A.C. 31.51 (Prof. Laskin), *cert. denied sub. nom. Imbleau v. Laskin, ex parte Polymer Corp.* (1961), 26 D.L.R. (2d) 609 (Ont. H.C.); *aff'd.* (1961), 28 D.L.R. (2d) 81 (Ont. C.A.); *aff'd.* [1962] S.C.R. 338.

¹²⁹ See e.g. *Wellesley Hospital* (1963), 14 L.A.C. 81 (Reville C.C.J.); *Emco Ltd.* (1964), 15 L.A.C. 116 (Lang C.C.J.).

¹³⁰ See e.g. *Jarvis v. A.M.S.*, [1964] S.C.R. 497, per Abbott J., dissenting, at p. 506: "A board such as the Labour Relations Board, experienced in the field of labour management relations, representing both 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." *Cf. Bakery Workers v. White Lunch*, [1966] S.C.R. 282, per Hall J., at p. 292-293.

facts, values, practices, policies and purposes of the industrial community.

Finally, it should be noted that compromise is a distinctive characteristic of labour relations decision-making in two senses; it is both an adjunct of pure adjudication, and a central feature of it. The collateral function of compromise is easily illustrated. Before seeking arbitration under a collective agreement, an employee is required to substantially exhaust the possibilities of settlement by resort to the grievance procedure;¹³¹ before a formal hearing is convened on a complaint of illegal discrimination, whether because of union affiliation or because of race or religion, attempts are made to secure amicable settlement through the intervention of an officer of the labour board,¹³² or the Human Rights Commission¹³³ Even where breaches of legislation may give rise to quasi-criminal proceedings, the consent of the labour board (or some administrative officer) is interposed as a condition precedent to prosecution.¹³⁴ The board's decision to give or withhold consent to prosecute is determined by its assessment of whether or not the statutory policy of industrial peace will be advanced; prosecution is not viewed as "a manifestation of retributive justice".¹³⁵ Moreover, the consent application itself has been used as a means of educating the parties in their rights and duties so that they will be able to resolve their differences without recourse to law.¹³⁶ In a similar way, the labour board may make declarations of illegal strikes or lockouts which have no binding force, but which tend to produce voluntary compliance by the transgressor.¹³⁷ The relative rarity of prosecution testifies eloquently to the success of this policy of encouraging compromise.

As a value to be observed in the process of adjudication itself, compromise is more difficult to identify and its proper limits are

¹³¹ See *e.g.* Labour Relations Act, R.S.O., 1960, c. 202, s. 34(2), which stipulates a model arbitration clause for collective agreements which do not contain one. The statutory clause provides for the submission of disputes to arbitration "after exhausting any grievance procedure" provided by the agreement; see generally *Toronto Parking Authority* (1967), 17 L.A.C. 37 (Prof. Arthurs).

¹³² See *e.g.* Labour Relations Act, R.S.O., 1960, c. 202, s. 65(2); R.S.B.C., 1960, c. 205, s. 7(2).

¹³³ Ontario Human Rights Code, S.O., 1961-2, c. 93, ss. 12, 13.

¹³⁴ See *e.g.* Labour Relations Act, R.S.O., 1960, c. 202, s. 74; R.S.B.C., 1960, c. 202, s. 85; Industrial Relations and Disputes Investigation Act, R.S.C., 1952, c. 152, s. 46; Ontario Human Rights Code, S.O., 1961-2, c. 93, s. 15; Labour Code, R.S.Q., 1964, c. 141, s. 131.

¹³⁵ See *e.g.* *Savage Shoes Ltd.* (1953), 53 C.L.L.C. P.17,060 (O.L.R.B.).

¹³⁶ See the remarks of the former chairman of the Ontario Labour Relations Board, J. Finkelman, quoted in Bromke, *op. cit.*, footnote 102, p. 93.

¹³⁷ See Arthurs, *op. cit.* footnote 10, at pp. 204-205, and cases cited.

more difficult to define.¹³⁸ Where an arbitrator, for example, is charged with the duty of deciding upon alleged breaches of a collective agreement, he cannot ignore the agreement and foist upon the parties an award premised solely upon considerations of fairness or good labour relations. Of course an award must be rooted in the agreement. Yet within the limits of the contractual language, the arbitrator may decide a case in a way which either contributes to labour-management harmony, or detracts from it. Sometimes the arbitrator's choice of language may be influenced by this consideration; he may temper his criticism of rash management action to minimize a debilitating "loss of face" for a foreman, or accept management's interpretation of the agreement while warning against potential abuses if that interpretation is carried to its logical limits. Sometimes the arbitrator may apply a standard such as "just cause for discharge" in a way which will vindicate an important employer interest while avoiding excessive punishment for an employee; in such a case, a discharge might be reduced to a suspension. Sometimes an arbitrator may choose one of two possible interpretations of an agreement because it seems most consonant with the balance of power which the agreement embodies. In all of these situations, compromise is an important makeweight.

The rationale of compromise as an adjudicative consideration is found in the ongoing nature of the relationship between labour and management. When the "litigation" is over, they must still live together at least for the unexpired term of the collective agreement, and likely for many years beyond it. A decision which ignores this fact may do untold harm to the tranquility of this industrial community. Moreover, compromise is a function which the parties themselves may intend the arbitrator to perform, within limits; the crisis atmosphere of collective bargaining, the unforeseeability of events which may arise during a two or three year agreement, the minutiae of working conditions for hundreds or thousands of workers—all of these facts create temptations for the parties to "paper over" their differences, and to rely upon the arbitrator when and if controversy should arise.¹³⁹ Indeed, this function of arbitration may be implicit in the typical statutory commandment that the parties must provide in their collective agreement for "settlement"

¹³⁸ Cf. Carrothers, *op. cit.*, footnote 105, p. 13: "It may, however, be noted that whereas compromise is often the essence of settlement of negotiation disputes, legal principles lie at the root of grievance disputes. Whatever an arbitrator does, his actions must not exceed the bounds of legal validity."

¹³⁹ See *e.g.* *Leather Cartage Ltd.* (1965), 15 L.A.C. 291 (Prof Arthurs).

of their differences by arbitration.¹⁴⁰

Only the obvious remains to be stated: the regular courts do not, and probably cannot, have regard to the effect of their decisions on the future relationship of litigants with each other, even in the rare cases where parties to a contract are likely to be committed to a course of future dealing. Therefore, considerations of compromise are not likely to affect a court's judgment in an ordinary contract case.

2. *The Role of the Common Law Courts.*

The common law courts made their greatest contribution to the development of an industrial jurisprudence by their refusal to grapple with the problems of labour relations. As has been noted, this refusal sometimes took the form of the application of inappropriate doctrines, but in at least one important area—enforcement of the collective agreement—the courts simply declined to accept jurisdiction at all. Ironically, *Young v. C.N.R.*¹⁴¹ was a suit by an employee on his personal employment contract (into which, he alleged, the terms of the collective agreement were incorporated) so that the court need not have taken any position on the enforceability of collective obligations. However, dicta in the case did continue, for over thirty years, to deny judicial blessing to the labour-management contract. Predictably, with the advent of legislation which encouraged the creation of these contracts, an extra-curial, private system of enforcement was developed. Over the years this private system, arbitration, began to emerge as an efficient and sophisticated process whose presence made court intervention virtually superfluous.

Then, by another and greater irony, the courts which had refused to enforce collective agreements when no other technique of enforcement was available, began to entertain actions based upon these agreements at the time when their assistance was least required. The origins of this development, its probable future course, and its implications for industrial jurisprudence, must now be explored.

A line of cases, primarily in British Columbia, developed the notion that the labour relations acts, in recognizing the existence of collective agreements and in providing for their enforcement, had impliedly rendered obsolete the former judicial antipathy to-

¹⁴⁰ See *e.g.* Labour Relations Act, R.S.O., 1960, c. 202, s. 34(1); R.S.-B.C., 1960, c. 205, s. 22(1)(b); Industrial Relations and Disputes Investigation Act, R.S.C., 1952, c. 152, s. 19(1).

¹⁴¹ *Supra*, footnote 100.

wards them.¹⁴² These cases conferred upon the parties to the agreement a right to seek either a declaration or an injunction—but not damages—in the event of breach. Subsequently, in Manitoba, legislation¹⁴³ was enacted to clearly establish the right of the courts to award damages for breach of the agreement to either party or to any person bound by the agreement or to anyone injured by, or suffering damage as the result of, the breach. However, neither the cases referred to, nor the statute, expressly advert to two critical problems: first, is an aggrieved party entirely free to seek redress through the courts rather than through arbitration? and, second, if so, from what source is the court to derive the law which it applies in deciding whether the agreement has been violated?

The former question, in a sense, was impliedly answered by the statute referred to; presumably if resort to arbitration was to be compelled, there would have been no point in creating a new cause of action enforceable in the courts. Contrariwise, legislation in Ontario and Saskatchewan¹⁴⁴ appears to preclude any inference that statutory “recognition” of the collective agreement invites its judicial enforcement. Apart from these statutes, however, the likelihood is that the regular courts will increasingly entertain actions seeking relief for breaches of collective agreements, despite the fact that arbitration boards can give equally effective remedies.

What effect does the availability of the common law action have upon the rights of the industrial citizen? In one sense, the individual employee's situation is affected not at all; he is not a party to the union-management contract, and therefore has no status to sue on it.¹⁴⁵ In another sense, however, the repercussions are substantial. The court's decision may profoundly affect his wages and working conditions by laying down the rules of the shop; a decision that the union is answerable in damages for a breach may sap its resources and undermine its ability to advance the employees' interests. But these results, however dramatic, strike the employee only on the ricochet. The critical question is whether

¹⁴² See Southin, *The Collective Agreement as the Subject of a Civil Action* (1958), 2 U.B.C. Leg. Not. 571; Sherbaniuk, *op. cit.*, footnote 53; Adell, *The Legal Status of Collective Agreements in England, the United States and Canada*, (unpublished Ph.D. thesis, Oxford, 1966).

¹⁴³ Labour Relations Act, R.S.M., 1952, c. 132, as amended by S.M., 1962, c. 35, s. 46A(2); see also Trade-Unions Act, R.S.B.C., 1960, c. 384, s. 4.

¹⁴⁴ Rights of Labour Act, R.S.O., 1960, c. 354, s. 3; Trade Union Act, R.S.S., 1965, c. 287, s. 27.

¹⁴⁵ At common law, the ordinary citizen was likewise unable to enforce community norms expressed in legislation and municipal by-laws, see *Orpen v. Roberts*, [1925] S.C.R. 364, a doctrine now partially displaced by the Municipal Act, R.S.O., 1960, c. 249, s. 486.

he may sue and be sued in a common law court in respect of rights and duties arising under a collective agreement. Recent cases indicate an affirmative answer.

The measure of the employee's common law rights is, of course, his contract of employment. At least since 1959, it has been clear that an employee's contract of employment cannot be inconsistent with the provisions of the collective agreement.¹⁴⁶ From this conclusion, the courts moved easily to the view that the terms of the individual employment contract incorporated the provisions of the collective agreement, so that the employee could sue¹⁴⁷ or be sued¹⁴⁸ in the regular courts without regard to the problem of whether the collective agreement was to be enforced exclusively through arbitration. This movement outflanked three serious obstacles to suit, one of them factual and two legal. The factual obstacle is the non-existence of the employment contract in modern industry. By inferring a personal contract, and by borrowing its terms from the collective agreement, awkward problems of proving the invisible are avoided. The legal obstacles are the employee's status as a third-party beneficiary of the collective agreement, and the decision in *Young v. C.N.R.* The former consideration becomes irrelevant because the action is brought on the personal contract; as to the latter, the *Young* case is simply written off as a victim of the onward march of legal technology. Finally, in deference to the special legislation in Ontario and Saskatchewan, the action is not brought "on a collective agreement", but rather on an employment contract.

Yet nagging questions persist. If the employee has unsuccessfully attempted to pursue his remedies before the industrial tribunal, is it fair that he should be allowed to relitigate his case in the regular courts? If the substantive provisions of the collective agreement are incorporated into the contract of employment, why not the procedural provisions as well? If the "common law" of industry is to develop from a series of decisions by arbitrators, how can continuity of growth be ensured, and the possible incongruity of a decision by an external court be avoided? All of these questions might have been answered simultaneously by forcing the employee to seek redress exclusively before industrial tribunals. However, the courts have chosen instead to work out a rather

¹⁴⁶ *Le Syndicat Catholique v. Cie. Paquet*, [1959] S.C.R. 206.

¹⁴⁷ *Grottoli v. Lock*, [1963] 2 O.R. 254, aff'd in C.A. (unreported).

¹⁴⁸ *Nelson Laundries v. Manning* (1965), 51 D.L.R. (2d) 537 (B.S.S.C.).

complex accommodation between their jurisdiction and that of their counterparts in industry.

Expressed in policy terms, the courts' basic premise is that union control of access to arbitration¹⁴⁹ will place the rights of individual employees in jeopardy.¹⁵⁰ Assuming that this fear is well-founded and that no other adequate safeguard exists,¹⁵¹ the courts have really never come to grips with the problems created by permitting litigants a choice of forums.

In one case, the court observed that the employee "although he was not bound to do so" had elected to go to arbitration, and that he was therefore precluded from attacking an unfavourable award by means of an action in the regular courts alleging breach of his employment contract.¹⁵² In another case, the court suggested that had the employee elected to pursue arbitration, he could not have brought an action at common law for wrongful dismissal.¹⁵³ But apart from the easy cases where an employee seeking to relitigate his case can be forestalled by a plea of estoppel or election,¹⁵⁴ there is little discussion of the hard cases where an employee is driven to the common law court because he cannot obtain relief in any other way. For example, in one case a grievance was time-barred, and arbitration was impossible; suit was permitted without comment on this point.¹⁵⁵ In another case, the union agreed that the grievance was without merit and abandoned it prior to arbitration; the court gave relief, but "reserved" for future determination the question of whether "mere invocation" of the grievance procedure constitutes an election of remedies.¹⁵⁶ Only in a passing comment in a Quebec case did a court suggest that an employee's ability to invoke the aid of a common law court might depend on whether his union was prosecuting his claim "in good faith".¹⁵⁷

¹⁴⁹ See *Hoogendoorn v. Greening Metal Products*, *supra*, footnote 81 and *R. v. Ottawa, ex parte Bradley*, *supra*, footnote 80; see also Laskin, *op. cit.*, footnote 82.

¹⁵⁰ See *e.g. Grottoli v. Lock*, *supra*, footnote 147, at pp. 255-256, per McRuer, C.J.H.C.; *Miramichi Hospital v. Woods*, *supra*, footnote 80, at pp. 295-296, per Bridges C.J.N.B.

¹⁵¹ See *supra*, Section II 3(b), *The Union as a Bargaining Agency*.

¹⁵² *Canadian Car & Foundry v. Dinham*, *supra*, footnote 89.

¹⁵³ *Miramichi Hospital v. Woods*, *supra*, footnote 79.

¹⁵⁴ See *e.g. Caven v. C.P.R.*, [1925] 3 D.L.R. 841 (P.C.); *Layne v. Pullman*, [1955] O.W.N. 219; *Canadian Car & Foundry v. Dinham*, *supra*, footnote 89.

¹⁵⁵ *Grottoli v. Lock*, *supra*, footnote 147.

¹⁵⁶ *Crossman v. Peterborough* (1966), 58 D.L.R. (2d) 218 (Ont. C.A.).

¹⁵⁷ *Bisson v. Bro. Railway Carmen* (1962), 63 C.L.L.C. P.15,469 (Que. Sup. Ct.).

Apart from cases involving the election of remedies, the courts have shown no consistent inclination to avoid suits by individual employees seeking protection against alleged employer violations. In several cases, it is true, the courts declined to issue temporary injunctions which would preserve existing working conditions until the legality of a proposed change was tested by an arbitrator.¹⁵⁸ Here the courts seemed to be responding to the traditional doctrine that temporary injunctions should be sparingly given, rather than (or in addition to) any considerations of jurisdictional propriety. In only one case has a court forthrightly declined jurisdiction in favour of an arbitration board, holding that it was "precluded . . . by the terms of the Labour Relations Act" from embarking upon an interpretation of the collective agreement.¹⁵⁹ The Supreme Court of Canada, too, has indicated that interpretation of the collective agreement lies within the exclusive power of industrial decision-makers, although the courts may award damages where no question of interpretation arises.¹⁶⁰ As seen by a later court¹⁶¹ this decision makes an interpretative award a "condition precedent" to suit.¹⁶²

This distinction between issues of interpretation (which the courts will avoid) and issues of enforcement (which the courts will entertain) may not be entirely clear-cut. For example, the issue of whether an employee has been discharged "for cause", as specified by the agreement, only tangentially involves interpretation, yet it is much more than mere enforcement. Clearly this should remain within the exclusive control of industrial adjudicators,¹⁶³ yet the courts have several times heard actions for wrongful dismissal on the merits.¹⁶⁴ Similarly, the question of a union's liability for an admitted violation of a no-strike clause might seem to be solely a problem of remedy but it penetrates to the heart of the union-

¹⁵⁸ *Cummings v. H.E.P.C.*, [1966] 1 O.R. 605; *Shank v. K.V.P.*, [1966] 2 O.R. 847; *Canada Steamships v. S.I.U.* (1966), 66 C.L.L.C. P.14,155 (Que. C.A.); *Caveney v. deHavilland Aircraft* (1963), 64 C.L.L.C. P.15,494 (Ont. C.A.).

¹⁵⁹ *Close v. Globe & Mail*, *supra*, footnote 87.

¹⁶⁰ *Hamilton Street Railway v. Northcott*, [1967] S.C.R. 3.

¹⁶¹ *R. v. Fuller, ex parte Earles*, *supra*, footnote 40.

¹⁶² To the same effect see *Cité de Jacques Cartier v. Tanquay* (1965), 66 C.L.L.C. P.14,121 (Que. C.A.); and see *contra I.C.W.U. v. Consumers' Gas* (1963), 41 D.L.R. (2d) 119 (Ont. H.C.), where a union sought an injunction to enforce an arbitration award, which was refused on the ground that the Labour Relations Act provided a statutory scheme of enforcement.

¹⁶³ See *R. v. Arthurs, ex parte Port Arthur Shipbuilding*, *supra*, footnote 6.

¹⁶⁴ See e.g. *Miramichi Hospital v. Woods*, *supra*, footnote 79; *Crossman v. Peterborough*, *supra*, footnote 156.

management relationship and dramatizes the arbitrator's essential functions.¹⁶⁵

Given the courts' obvious reluctance to yield jurisdiction entirely, the interpretation-remedy distinction does open the door to fruitful speculation on a question posed earlier: from what source should the court derive the law which it will apply when industrial litigation comes before it? The question may arise in a variety of situations. The court may be asked to review the decision of a labour board or arbitrator in *certiorari* proceedings; an application for an injunction may be premised on the illegality of conduct allegedly proscribed by the labour relations Act; as indicated earlier, an action based upon an individual's contract of employment may well involve analysis of the terms of a collective agreement. In all of these situations, the court may, if it wishes, defer to the system of jurisprudence developed within the industrial community and apply the "law" of that system rather than the conventional legal doctrines administered by the courts. Such an approach can be justified on the basis of both precedent and policy.

In terms of precedent, we should not forget that modern commercial law owes its origins to the "law merchant" developed by the private arbitral courts of the trading community. As with industrial jurisprudence, the law merchant developed as a reaction to the failure of the common law to provide substantive, evidentiary, and procedural rules suitable for litigation between the parties to various commercial transactions. Only with Lord Mansfield's attempts to integrate the law merchant into the common law could it be said that the regular courts were the appropriate forum for such litigation. A distinguished American observer, recognizing the inevitability of judicial involvement in industrial litigation, has speculated that,

. . . perhaps some modern Mansfield might turn this industrial jurisprudence into a body of law governing judicial interpretation and enforcements of collective-bargaining agreements.¹⁶⁶

Perhaps equally compelling, and more contemporary, is the familiar practice of our courts in dealing with contracts made in another jurisdiction. Once it is determined that the "proper law of the contract" is foreign law, the substantive rules of the forum no longer apply. Subject of course to the adequacy of proof, our courts have

¹⁶⁵ See *Imbleau v. Laskin, ex parte Polymer, supra*, footnote 128; Palmer, Remedial Authority of Labour Arbitrators (1960), 1 *Curr. Law & Soc. Prob.* 125; Arthurs, *op. cit.*, footnote 10.

¹⁶⁶ Cox, Reflections Upon Labor Arbitration (1959), 72 *Harv. L. Rev.* 1482, at p. 1483.

little hesitation in deciding the case on the basis of the doctrines of another legal system. Once the industrial community and its legal system is recognized as a "foreign" jurisdiction, the courts should likewise apply industrial law rather than common law in deciding controversies involving labour and management.¹⁶⁷

In policy terms, the arguments for the application by the courts of principles of industrial law seem overwhelming, when set against the contrary consideration of uniformity for its own sake. In large part, these arguments have already been canvassed. The distinctive characteristics of industrial decision-makers and of their decisions have developed in the context of, and in response to, statutes, agreements, policies and practices, which represent an accommodation between labour and management and community interests. This accommodation is an evolutionary one, and seems to be developing in the direction of an authentic and integrated code of industrial citizenship. This growth should therefore not be inhibited by the introduction of extraneous and inappropriate doctrines, nor should its administration be confused by holding out to litigants the prospect of obtaining a different result in the regular courts than they might obtain by staying within the industrial system.¹⁶⁸ A final consideration, perhaps the most important one, is the present reputation of the regular courts within the community of labour and management. In the eyes of labour, the judges are enemies and the law is a weapon of oppression; in management's view, the courts are a last line of defence against labour's irresponsibility. However distorted these images may be, the courts must be rescued from the partisan role to which they have been assigned. By educating themselves in the living tradition of the industrial community, and by accepting the legitimacy of its values, the courts can perhaps retrieve the lost opportunities of the period during which industrial jurisprudence was coming of age.

IV. Conclusion.

The characteristics of "industrial citizenship" seem to be emerging, almost accidentally, as the result of legislation, customs, administrative decisions and consensual arrangements which form the

¹⁶⁷ See *e.g. Re Gainers, supra*, footnote 111, and *R. v. Arthurs, ex parte Port Arthur Shipbuilding, supra*, footnote 6, per Wells J.A., at p. 60, per Laskin J.A., at pp. 69-70.

¹⁶⁸ See Adell, Note, *Labour Law—Collective Agreement—Right of Individual Employee to Sue Employer* (1967), 45 Can. Bar Rev. 354; Molot, *The Collective Labour Agreement and its Enforcement* (1967), 5 Alta L. Rev. 274.

pattern of rights and duties within which the Canadian worker exists. This pattern is kaleidoscopic: it is composed of a jumble of diffuse and jagged parts, and its symmetry is a thing of the moment.

As social and industrial problems increasingly engage the attention of Canadian lawyers, and labour relations specialists, they will no doubt continue to develop solutions to them on an *ad hoc* basis. But the challenge of industrial citizenship is that it invites a coherent and integrated approach to these problems. This approach will require imagination and energy as those within the world of industry begin to forge a code of citizenship. It will also require restraint on the part of judges and lawmakers who must maintain an atmosphere in which responsible industrial self-government can develop.
