THE POLICIES UNDERLYING INTEREST DISPUTE SETTLEMENT IN BRITISH COLUMBIA AND NEW ZEALAND

by

PHILIP AUSTIN JOSEPH

LL.B. (Hons), University of Canterbury, 1973

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAW

in
THE FACULTY OF GRADUATE STUDIES
(Faculty of Law)

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

May, 1983

© PHILIP AUSTIN JOSEPH, 1983
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Law

The University of British Columbia
1956 Main Mall
Vancouver, Canada
V6T 1Y3

Date 21 October 1983
ABSTRACT

All the western industrial economies have had to devote their attention this century to ways of minimising the disruption that often accompanies contract negotiations in disputes of interest. This thesis examines the markedly differing means of achieving this objective in British Columbia and New Zealand.

Chapters II and VII present the first point of difference: the administrative versus judicial solution to labour disputes. Chapter II portrays the intent of the British Columbia Legislative Assembly when it enacted the Labour Code of British Columbia in 1973, examines the language the Code employed in seeking to foreclose the court's intervention in labour matters, and observes those instances where the judiciary has disavowed the legislature's instruction to the courts. It is argued that for the judiciary to intervene further in the Province's labour relations would be both unwelcome and an unconstitutional denial of the rule enjoining judicial obedience to statute.

Chapter VII presents the judicial solution to interest disputes for which New Zealand's Industrial Conciliation and Arbitration legislation is renowned. Whereas British Columbia's objective has been to avoid the repercussions of judicial intervention in sensitive labour disputes, New Zealand's industrial legislation promotes the
judicial solution on two levels: through the Arbitration Court upholding the Act's jurisdictional requirement in arbitration proceedings and through preserving the concurrent jurisdiction of the ordinary courts to entertain civil proceedings resulting from industrial action.

Chapter IIA is a postscript to Chapter II. This appends the recent decision of the Supreme Court of Canada, delivered subsequent to the time of writing of Chapter II, determining for the first time that to insulate a provincially-constituted statutory tribunal from review of decisions on questions of jurisdiction is in violation of section 96 of the British North America Act, 1867. This renders henceforth the detailed examination of the Code's jurisdictional provisions of significance principally for jurisdictions where the "section 96" problem does not arise - where the sole issue is the appropriate drafting of an effective privative clause.

Chapter III portrays in light of traditional Canadian labour policy the first innovation of the British Columbia labour statute: the replacement of all facility for normative intervention in interest disputes with procedures providing solely for accommodative intervention. It is explained why this is a significant development for Canadian labour policy.

But probably the most significant development is the British Columbia Labour Relations Board's rejection of the American jurisprudence and the per se rules attaching to the categories of bargaining subjects in the United States. This is examined in Chapter IV. Whilst the prospect of some residual limitation on the substantive scope of bargaining under the British Columbia statute is not discounted entirely, the Board's policy has been to remove all legal issues from the bargaining table. Chapter VII,
examining the jurisdictional requisite of "dispute" under the Industrial Relations Act 1973 (N.Z.), provides the contrast. Under the New Zealand statute the question must first be asked whether the proposed subject for bargaining satisfies the legal description of permissible bargaining topics. It is submitted that no longer is this a defensible question in view of the vast industrial changes of the present century.

Chapter VIII, entitled "The Legality of Industrial Action in New Zealand", provides the third point of contrast between the two systems. Whereas the legitimacy of the economic sanction is fundamental to the Labour Code's policy of free collective bargaining, New Zealand's legislative aversion to strikes, dating from the first Industrial Conciliation and Arbitration statute of 1894, is equally manifest under today's Industrial Relations Act 1973.

Chapter V, entitled "Industrial Conciliation and Arbitration", provides the necessary background on the procedures and institutions of the New Zealand system, and shows the extent to which successive New Zealand governments have relied upon the Industrial Conciliation and Arbitration system as a broader instrument of wages-control.

The primary question raised on this examination concerns the New Zealand system, whether it could not learn from the British Columbia reforms of 1973-74.
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSTRACT</td>
<td>(iii)</td>
</tr>
<tr>
<td>TABLE OF STATUTES</td>
<td>(xii)</td>
</tr>
<tr>
<td>TABLE OF DELEGATED LEGISLATION</td>
<td>(xx)</td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td>(xxi)</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENT</td>
<td>(xxxiii)</td>
</tr>
</tbody>
</table>

I. INTRODUCTION

PART I

II. PERFECTING THE ADMINISTRATIVE SOLUTION

A. INTRODUCTION

B. THE JURISDICTIONAL PROVISIONS
   (a) Section 34(1)
      i) The drafting defect
      ii) An avenue for review
   (b) Section 31
   (c) Other sections
   (d) Section 33

C. THE BACKGROUND TO SECTION 33


D. APPROACHES TO SECTION 33
(a) The legislative interaction

(b) Possible arguments
   i) The section 33 determination
   ii) Natural justice
   iii) Jurisdiction "under this Act"
   iv) External law

E. THE BOARD'S RETREAT
(a) Re Pruden
(b) Statutes incorporating the Code

F. THE JUDICIAL INCURSION
(a) 'External law' and section 33
(b) 'External law' and competing policy regimes
(c) 'External law' and the labour statute

G. CONCLUSION

IIA. PERFECTING THE ADMINISTRATIVE SOLUTION - POSTSCRIPT
A. THE DECISION IN CREVIER
B. LASKIN C.J.C.'S VOLTE-FACE?
C. AFTER CREVIER
D. GENERAL

III. THE EVOLUTION OF CANADIAN LABOUR POLICY AND THE BRITISH COLUMBIA REFORMS
A. INTRODUCTION
B. THE STATUTORY BASIS OF AMERICAN POLICY
C. THE EARLY EXPERIMENTS IN COLLECTIVE BARGAINING
D. THE IMPETUS FOR A NATIONAL POLICY
E. POST-WAR POLICY AND THE AMBIVALENCE TO BARGAINING

F. THE CULMINATION OF CANADIAN POLICY: THE FIRST INNOVATION OF THE BRITISH COLUMBIA CODE

G. SUMMARY

IV. THE DUTY TO BARGAIN COLLECTIVELY IN BRITISH COLUMBIA: THE AMERICAN JURISPRUDENCE REJECTED

A. THE AMERICAN JURISPRUDENCE

   (a) The early board decisions and the Taft-Hartley amendment

   (b) N.L.R.B. v Borg-Warner Corporation

      i) The decision
      ii) Comment
      iii) The "Borg-Warner straight-jacket"

B. THE JURISPRUDENCE REJECTED

   (a) The former deference to Borg-Warner

   (b) Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union

   (c) "Legitimate" bargaining subjects and the "employee" concept

   (d) "[T]he fundamental policy of the Code - the fostering of free collective bargaining"

   (e) The unworkable standard of forbidden insistence and the potential for litigation

   (f) The labour board and the consequence of legal regulation

   (g) The ramifications of substituting the bargaining result

      i) The parties' commitment
      ii) Contra Borg-Warner

   (h) The evolution of bargaining subjects
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.</td>
<td>THE POSSIBILITY OF SUBSTANTIVE LIMITATIONS</td>
<td>143</td>
</tr>
<tr>
<td>(a)</td>
<td>Unlawful subjects</td>
<td>143</td>
</tr>
<tr>
<td>(b)</td>
<td>&quot;A legitimate subject for bargaining&quot;</td>
<td>146</td>
</tr>
<tr>
<td>(c)</td>
<td>Certification and the &quot;employee&quot; concept</td>
<td>157</td>
</tr>
<tr>
<td>(d)</td>
<td>&quot;Unusual terms&quot;</td>
<td>159</td>
</tr>
<tr>
<td>(e)</td>
<td>Summary</td>
<td>162</td>
</tr>
<tr>
<td>D.</td>
<td>SECTION 70 &quot;FIRST-CONTRACT&quot; ARBITRATION: THE EXCEPTION PROVING THE RULE</td>
<td>163</td>
</tr>
<tr>
<td></td>
<td><strong>PART II</strong></td>
<td>170</td>
</tr>
<tr>
<td>V.</td>
<td>INDUSTRIAL CONCILIATION AND ARBITRATION</td>
<td>171</td>
</tr>
<tr>
<td>A.</td>
<td>INTRODUCTION</td>
<td>171</td>
</tr>
<tr>
<td>B.</td>
<td>THE INSTITUTIONS OF CONCILIATION AND ARBITRATION</td>
<td>174</td>
</tr>
<tr>
<td>(a)</td>
<td>The Arbitration Court</td>
<td>174</td>
</tr>
<tr>
<td>(b)</td>
<td>Conciliation Councils</td>
<td>178</td>
</tr>
<tr>
<td>C.</td>
<td>THE PRE-EMINENCE OF ARBITRATION</td>
<td>186</td>
</tr>
<tr>
<td>D.</td>
<td>THE OMNIPRESENT STATE</td>
<td>198</td>
</tr>
<tr>
<td>(a)</td>
<td>A &quot;strategy of domination&quot;?</td>
<td>198</td>
</tr>
<tr>
<td>(b)</td>
<td>Farewell to free wage-bargaining?</td>
<td>202</td>
</tr>
<tr>
<td>(c)</td>
<td>Conclusion</td>
<td>214</td>
</tr>
<tr>
<td>VI.</td>
<td>THE JURISDICTIONAL CONCEPT OF &quot;DISPUTE&quot;</td>
<td>218</td>
</tr>
<tr>
<td>A.</td>
<td>INTRODUCTION</td>
<td>218</td>
</tr>
<tr>
<td>B.</td>
<td>THE SIGNIFICANCE OF &quot;DISPUTE&quot; IN RELATION TO &quot;INDUSTRIAL MATTERS&quot;</td>
<td>221</td>
</tr>
<tr>
<td>C.</td>
<td>THE JUDICIAL PERSPECTIVE</td>
<td>227</td>
</tr>
<tr>
<td>(a)</td>
<td>Introduction</td>
<td>227</td>
</tr>
<tr>
<td>(b)</td>
<td>The ANZ Bank case</td>
<td>229</td>
</tr>
</tbody>
</table>
(c) Clancy v Butchers Shop Employees' Union
(d) After Clancy
   i) The liberal approach
   ii) The return to Clancy

D. THE MELBOURNE AND METROPOLITAN TRAMWAYS CASES

E. THE CLASSICAL ECONOMICS AND THE COMMON LAW
   (a) The common law background
   (b) The market conception
   (c) The market v state regulation
   (d) The transformation of modern industry
      i) General
      ii) New Zealand - evidencing the trend

F. TECHNOLOGY AND "INDUSTRIAL MATTERS"
   (a) New Zealand Federated Clerical and Office Staff
       Employees' I.A.W. v Wellington Law Practitioners'
       I.U.W.
   (b) General
   (c) Quaere the statutory justification?

VII. JUDICIAL CONTROL OF INTEREST DisPUTES

A. INTRODUCTION

B. THE NATURE OF ARBITRATION

C. JURISDICTIONAL ERROR

D. THE CONCURRENT JURISDICTION OF CIVIL COURTS
## VIII. THE LEGALITY OF INDUSTRIAL ACTION IN NEW ZEALAND

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. GENERAL</td>
<td>294</td>
</tr>
<tr>
<td>B. THE PRE-1973 POSITION</td>
<td>303</td>
</tr>
<tr>
<td>C. THE 1973 RECONSTRUCTION</td>
<td>307</td>
</tr>
<tr>
<td>(a) Re Disputes of Right</td>
<td>308</td>
</tr>
<tr>
<td>(b) Re Disputes of Interest</td>
<td>309</td>
</tr>
<tr>
<td>D. THE 1976 AMENDMENTS</td>
<td>311</td>
</tr>
<tr>
<td>(a) Industrial Relations Amendment Acts</td>
<td>311</td>
</tr>
<tr>
<td>(b) Commerce Amendment Act 1976</td>
<td>312</td>
</tr>
<tr>
<td>E. THE 1981 AMENDMENTS</td>
<td>322</td>
</tr>
</tbody>
</table>

## IX. CONCLUSION

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>BIBLIOGRAPHY</td>
<td>327</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. BOOKS</td>
<td>332</td>
</tr>
<tr>
<td>B. MONOGRAPHY</td>
<td>333</td>
</tr>
<tr>
<td>C. ARTICLES</td>
<td>334</td>
</tr>
<tr>
<td>Table of Statutes</td>
<td></td>
</tr>
<tr>
<td>-------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Canada</strong></td>
<td></td>
</tr>
<tr>
<td>Anti-Inflation Act, S.C. 1974-75-76</td>
<td>. . 55, 134, 145, 198</td>
</tr>
<tr>
<td>Assessment Authority of British Columbia Act, S.B.C. 1974</td>
<td></td>
</tr>
<tr>
<td>s. 20</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 20(1)(a)</td>
<td>. . . .</td>
</tr>
<tr>
<td>British Columbia Hydro and Power Authority Act, S.B.C. 1964</td>
<td></td>
</tr>
<tr>
<td>s. 4</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 53(1)</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 53(6)</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 55</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 55(1)</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 55A</td>
<td>. . . .</td>
</tr>
<tr>
<td>British Columbia Industrial Conciliation and Arbitration Act, S.B.C. 1937</td>
<td></td>
</tr>
<tr>
<td>. . . .</td>
<td>.</td>
</tr>
<tr>
<td>Canada Labour Code, R.S.C. 1970</td>
<td></td>
</tr>
<tr>
<td>s. 31(1)</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 122</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 163</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 164(1)</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 168(1)</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 170(b)</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 171.1(1)</td>
<td>. . . .</td>
</tr>
<tr>
<td>Collective Bargaining Continuation Act S.B.C. 1975</td>
<td></td>
</tr>
<tr>
<td>s. 7</td>
<td>. . . .</td>
</tr>
<tr>
<td>Essential Services Disputes Act, S.B.C. 1977</td>
<td></td>
</tr>
<tr>
<td>s. 1</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 2(2)</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 6</td>
<td>. . . .</td>
</tr>
<tr>
<td>s. 6(1)</td>
<td>. . . .</td>
</tr>
<tr>
<td>Act</td>
<td>Sections</td>
</tr>
<tr>
<td>-------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Industrial Disputes Investigation Act</td>
<td></td>
</tr>
<tr>
<td>S.C. 1907</td>
<td></td>
</tr>
<tr>
<td>s. 56</td>
<td></td>
</tr>
<tr>
<td>Industrial Relations and Disputes Investigation Act, R.S.C. 1952</td>
<td></td>
</tr>
<tr>
<td>s. 16</td>
<td></td>
</tr>
<tr>
<td>s. 17</td>
<td></td>
</tr>
<tr>
<td>s. 21</td>
<td></td>
</tr>
<tr>
<td>s. 32</td>
<td></td>
</tr>
<tr>
<td>Interpretation Act, R.S.B.C. 1976</td>
<td></td>
</tr>
<tr>
<td>s. 7(1)</td>
<td></td>
</tr>
<tr>
<td>s. 8</td>
<td></td>
</tr>
<tr>
<td>s. 35</td>
<td></td>
</tr>
<tr>
<td>s. 39A</td>
<td></td>
</tr>
<tr>
<td>s. 1</td>
<td></td>
</tr>
<tr>
<td>s. 1(1)</td>
<td></td>
</tr>
<tr>
<td>s. 5</td>
<td></td>
</tr>
<tr>
<td>s. 6</td>
<td></td>
</tr>
<tr>
<td>s. 21</td>
<td></td>
</tr>
<tr>
<td>s. 28</td>
<td></td>
</tr>
<tr>
<td>s. 31</td>
<td></td>
</tr>
<tr>
<td>s. 31(a)</td>
<td></td>
</tr>
<tr>
<td>s. 31(b)</td>
<td></td>
</tr>
<tr>
<td>s. 32</td>
<td></td>
</tr>
<tr>
<td>s. 32(1)</td>
<td></td>
</tr>
<tr>
<td>s. 32(2)</td>
<td></td>
</tr>
<tr>
<td>s. 32(3)</td>
<td></td>
</tr>
<tr>
<td>s. 33</td>
<td></td>
</tr>
<tr>
<td>s. 34</td>
<td></td>
</tr>
<tr>
<td>s. 34(1)</td>
<td></td>
</tr>
<tr>
<td>s. 34(2)</td>
<td></td>
</tr>
<tr>
<td>s. 45</td>
<td></td>
</tr>
<tr>
<td>s. 46</td>
<td></td>
</tr>
<tr>
<td>s. 53</td>
<td></td>
</tr>
<tr>
<td>s. 63</td>
<td></td>
</tr>
<tr>
<td>s. 64(4)</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>Legislation</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>s. 65</td>
<td>Labour Relations: Act, R.S.B.C. 1960</td>
</tr>
<tr>
<td>s. 65(1)</td>
<td></td>
</tr>
<tr>
<td>s. 69</td>
<td>Manitoba Labour Relations Act, S.M. 1972</td>
</tr>
<tr>
<td>s. 69(3)</td>
<td>Mediation Commission Act, S.B.C. 1968</td>
</tr>
<tr>
<td>s. 70</td>
<td>Mediation Services Act, S.B.C. 1972</td>
</tr>
<tr>
<td>s. 70(2)</td>
<td>Ontario Collective Bargaining Act, S.O. 1943</td>
</tr>
<tr>
<td>s. 71</td>
<td>Ontario Labour Relations Act, R.S.O. 1970</td>
</tr>
<tr>
<td>s. 72</td>
<td>Public Services Labour Relations Act, S.B.C. 1973</td>
</tr>
<tr>
<td>s. 79</td>
<td></td>
</tr>
<tr>
<td>s. 80</td>
<td></td>
</tr>
<tr>
<td>s. 81</td>
<td></td>
</tr>
<tr>
<td>s. 87</td>
<td></td>
</tr>
<tr>
<td>s. 89</td>
<td></td>
</tr>
<tr>
<td>s. 93</td>
<td></td>
</tr>
<tr>
<td>s. 113</td>
<td></td>
</tr>
<tr>
<td>s. 114</td>
<td></td>
</tr>
<tr>
<td>s. 151(b)</td>
<td></td>
</tr>
<tr>
<td>s. 49</td>
<td></td>
</tr>
</tbody>
</table>

Note: Pages listed are for reference only and do not indicate the pages on which the sections are located in the original document.
Quebec Professional Code, R.S.Q. 1977

s. 162 ........................................ 64
s. 169 ........................................ 65
s. 175 ........................................ 75
s. 194 ........................................ 65

Trade Union Act, R.S.S. 1953 ........................................ 86

NEW ZEALAND

Declaratory Judgments Act 1908 ........................................ 283


s. 3 ........................................ 203
s. 11 ........................................ 204
s. 11(1) ........................................ 204
s. 11(2)-(4) ........................................ 204

Commerce Act 1975 ........................................ 311, 323, 325

s. 119A ........................................ 225, 314
s. 119B ........................................ 225, 313, 314, 315, 316, 317, 320, 321
s. 119B(1) ........................................ 314, 317, 318
s. 119B(2) ........................................ 315
s. 119B(3) ........................................ 202, 315
s. 119C ........................................ 313, 318, 319, 322, 323, 325
s. 119C(1)(a)(b)(c) ........................................ 319, 325
s. 119C(5) ........................................ 319
s. 119C(8) ........................................ 320, 321

Commerce Amendment Act 1976 202, 226, 312, 313, 318, 321, 328

s. 36 ........................................ 313, 314

General Wage Orders Act 1969 ........................................ 207

General Wage Orders Act 1977 ........................................ 207, 208

s. 3 ........................................ 208
s. 6(1) ........................................ 208
s. 6(2) ........................................ 208
s. 7 ........................................ 208

### Industrial Conciliation and Arbitration Amendment Act 1898

- s. 3 .......................... 303

### Industrial Conciliation and Arbitration Amendment Act 1937

- ........................................ 182

### Industrial Conciliation and Arbitration Act 1954

<table>
<thead>
<tr>
<th>Section</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td>ss. 103-108</td>
<td>189</td>
</tr>
<tr>
<td>s. 105</td>
<td>189</td>
</tr>
<tr>
<td>s. 130</td>
<td>189</td>
</tr>
<tr>
<td>s. 191</td>
<td>305</td>
</tr>
<tr>
<td>s. 192(1)(2)</td>
<td>305</td>
</tr>
<tr>
<td>s. 193(1)(3)(4)</td>
<td>305</td>
</tr>
<tr>
<td>s. 194</td>
<td>306</td>
</tr>
<tr>
<td>s. 195(1)</td>
<td>305, 306, 307</td>
</tr>
<tr>
<td>s. 195(2)</td>
<td>306</td>
</tr>
</tbody>
</table>

### Industrial Conciliation and Arbitration Amendment Act 1970

- 223, 224, 307

### Industrial Relations Act 1973

<table>
<thead>
<tr>
<th>Section</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td>s. 2</td>
<td>1, 10, 173, 205, 216, 225, 230, 239</td>
</tr>
<tr>
<td></td>
<td>280, 289, 304, 307, 309, 311, 314, 318</td>
</tr>
<tr>
<td>s. 2(2)</td>
<td>182</td>
</tr>
<tr>
<td>s. 7</td>
<td>179</td>
</tr>
<tr>
<td>s. 32</td>
<td>174</td>
</tr>
<tr>
<td>s. 32(1)</td>
<td>7, 280</td>
</tr>
<tr>
<td>s. 33</td>
<td>175</td>
</tr>
<tr>
<td>s. 37</td>
<td>175</td>
</tr>
<tr>
<td>s. 37(2)</td>
<td>175</td>
</tr>
<tr>
<td>s. 37(5)</td>
<td>175</td>
</tr>
<tr>
<td>s. 40</td>
<td>175</td>
</tr>
<tr>
<td>s. 41</td>
<td>175</td>
</tr>
<tr>
<td>s. 42</td>
<td>175</td>
</tr>
<tr>
<td>s. 48</td>
<td>284</td>
</tr>
<tr>
<td>s. 48(6)</td>
<td>285</td>
</tr>
<tr>
<td>s. 48(7)</td>
<td>285</td>
</tr>
<tr>
<td>s. 48(1)(d)</td>
<td>174</td>
</tr>
<tr>
<td>s. 48(5)(b)</td>
<td>7</td>
</tr>
<tr>
<td>s. 51</td>
<td>7</td>
</tr>
<tr>
<td>s. 52A</td>
<td>177</td>
</tr>
<tr>
<td>s. 53(1)</td>
<td>177</td>
</tr>
<tr>
<td>s. 53(2)</td>
<td>177</td>
</tr>
<tr>
<td>s. 54(4)</td>
<td>175</td>
</tr>
<tr>
<td>s. 57(1)</td>
<td>176</td>
</tr>
<tr>
<td>s. 57(2)</td>
<td>176</td>
</tr>
<tr>
<td>s. 62A</td>
<td>7</td>
</tr>
<tr>
<td>s. 64</td>
<td>216</td>
</tr>
<tr>
<td>s. 65</td>
<td>189, 195, 216</td>
</tr>
<tr>
<td>s. 65(8)</td>
<td>195</td>
</tr>
<tr>
<td>s. 67</td>
<td>177</td>
</tr>
</tbody>
</table>
Industrial Relations Act 1973 (Continued)

<table>
<thead>
<tr>
<th>Section</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>ss. 67-74</td>
<td>196</td>
</tr>
<tr>
<td>ss. 67-83</td>
<td>13</td>
</tr>
<tr>
<td>s. 68</td>
<td>178, 180, 183, 185, 197, 310</td>
</tr>
<tr>
<td>s. 68(1)</td>
<td>179, 182, 238</td>
</tr>
<tr>
<td>s. 68(5)</td>
<td>182</td>
</tr>
<tr>
<td>s. 70</td>
<td>184, 185</td>
</tr>
<tr>
<td>s. 72</td>
<td>185</td>
</tr>
<tr>
<td>s. 72(4)</td>
<td>184</td>
</tr>
<tr>
<td>s. 75</td>
<td>196</td>
</tr>
<tr>
<td>s. 76</td>
<td>197</td>
</tr>
<tr>
<td>s. 77</td>
<td>177, 184</td>
</tr>
<tr>
<td>s. 77(3)</td>
<td>186</td>
</tr>
<tr>
<td>s. 77(10)</td>
<td>186</td>
</tr>
<tr>
<td>s. 81</td>
<td>196, 197, 290, 310, 311</td>
</tr>
<tr>
<td>s. 82</td>
<td>181, 182, 185, 223</td>
</tr>
<tr>
<td>s. 82(4)</td>
<td>181</td>
</tr>
<tr>
<td>s. 82(9)</td>
<td>185, 193</td>
</tr>
<tr>
<td>s. 83</td>
<td>181, 193, 223</td>
</tr>
<tr>
<td>s. 84(1)</td>
<td>186, 286</td>
</tr>
<tr>
<td>s. 84(2)</td>
<td>186</td>
</tr>
<tr>
<td>s. 84(3)</td>
<td>186</td>
</tr>
<tr>
<td>s. 89</td>
<td>181</td>
</tr>
<tr>
<td>s. 89(2)</td>
<td>181, 185</td>
</tr>
<tr>
<td>s. 98</td>
<td>239</td>
</tr>
<tr>
<td>s. 98A</td>
<td>239</td>
</tr>
<tr>
<td>ss. 98-104</td>
<td>202</td>
</tr>
<tr>
<td>s. 115</td>
<td>224, 308</td>
</tr>
<tr>
<td>s. 116</td>
<td>224, 308</td>
</tr>
<tr>
<td>s. 117</td>
<td>277</td>
</tr>
<tr>
<td>s. 120</td>
<td>323</td>
</tr>
<tr>
<td>s. 123</td>
<td>289, 299, 302, 309</td>
</tr>
<tr>
<td>s. 123(1)</td>
<td>303, 318</td>
</tr>
<tr>
<td>s. 123(1)(a)</td>
<td>302</td>
</tr>
<tr>
<td>s. 123(1)(b)</td>
<td>301, 302</td>
</tr>
<tr>
<td>s. 123(1)(e)</td>
<td>300, 311</td>
</tr>
<tr>
<td>s. 124</td>
<td>299</td>
</tr>
<tr>
<td>s. 124A</td>
<td>309, 312</td>
</tr>
<tr>
<td>s. 124A(3)</td>
<td>309</td>
</tr>
<tr>
<td>s. 125</td>
<td>290, 310, 312</td>
</tr>
<tr>
<td>s. 125A</td>
<td>312</td>
</tr>
<tr>
<td>s. 125B</td>
<td>321, 322, 323, 324</td>
</tr>
<tr>
<td>s. 125C</td>
<td>321, 322, 323, 324</td>
</tr>
<tr>
<td>s. 125D</td>
<td>321, 322, 323, 324</td>
</tr>
<tr>
<td>s. 125E</td>
<td>321, 322, 323</td>
</tr>
<tr>
<td>s. 145</td>
<td>174</td>
</tr>
<tr>
<td>s. 146</td>
<td>174</td>
</tr>
<tr>
<td>s. 148</td>
<td>309</td>
</tr>
</tbody>
</table>
Industrial Relations Act 1973 (Continued)

s. 162 . . . . . . 179, 182, 238
s. 163(1) . . . . . . 179, 180, 238
s. 170 . . . . . . 180
s. 171 . . . . . . 180
s. 173 . . . . . . 180
s. 192 . . . . . . 180
s. 224(1)(2) . . . . . . 176
First Schedule . . . . . . 290, 310, 321, 325

Industrial Relations Amendment Act 1975

s. 2(1) . . . . . . 195

Industrial Relations Amendment Act 1976 . . . . 311, 318

s. 2 . . . . . . 299, 311

Industrial Relations Amendment Act (No.2) 1976 202, 311, 312, 313

s. 10(2) . . . . . . 193
s. 20 . . . . . . 309, 312
s. 21 . . . . . . 312

Industrial Relations Amendment Act 1977 . . . . 229

s. 2(1)(2) . . . . . . 205

Industrial Relations Amendment Act 1981 . . . . 321

s. 9 . . . . . . 322
s. 16 . . . . . . 321

Judicature Act 1908

s. 7 . . . . . . 175
s. 8 . . . . . . 175

Public Safety Conservation Act 1932

s. 2(1) . . . . . . 201

Remuneration Act 1979 206, 209, 211, 212, 213

s. 4(2)(c) . . . . . . 209, 210
s. 5 . . . . . . 206
s. 6 . . . . . . 210
s. 9(1) . . . . . . 208

Shop Trading Hours Act 1977 . . . . . . 231

Stabilisation of Remuneration Act 1971 . . . . 203, 204

s. 1(4) . . . . . . 203
UNITED KINGDOM

British North America Act, 1867

s. 96                  9, 65, 66, 67, 69, 70, 71

Conspiracy and Protection of Property Act 1875                  253

Trade Unions and Labour Relations Act 1974

s. 13                                  287
s. 14                                  287

UNITED STATES OF AMERICA

Labor Management Relations Act, 1947  75, 101, 103, 104, 129, 131

s. 8(a)(5)                   84, 105, 106
s. 8(d)                        102, 103, 105, 108, 123, 126, 129
s. 158                       125
s. 201(a)(b)                  83, 94
s. 203                 84
s. 204(a)(1)                  84, 87
s. 206                  84

National Industrial Recovery Act, 1933  75, 100

National Labor Relations Act, 1935  3, 13, 72, 73, 74, 75, 77, 78
                                      79, 80, 81, 100, 111, 122, 126, 129, 139

s. 1                  92
s. 8(d)                        84, 105, 106
s. 158                       125
s. 201(a)(b)                  83, 94
s. 203                 84
s. 204(a)(1)                  84, 87
s. 206                  84

Railway Labor Act, 1926                  74, 75
TABLE OF DELEGATED LEGISLATION

**CANADA**

Wartime Labour Relations Order, 1944 . . . 77, 80, 81

**NEW ZEALAND**

Economic Stabilisation Emergency Regulations 1942 . . . 203


Economic Stabilisation Regulations 1953 . . . 207

Economic Stabilisation (Remuneration of Sea-going Engineers) Regulations 1979 . . . 209

Industrial Districts Notice 1954 . . . 179

Remuneration (General Increase) Regulations 1979 . . . 208

Remuneration (General Increase) Regulations 1980 . . . 208

Remuneration (New Zealand Forest Products) Regulations 1980 . . . 211

Stabilisation of Remuneration Regulations 1972 . . . 203, 204

Wage Adjustment Regulations 1974-1977 . . . 205, 207, 208

Wage Freeze Regulations 1982 . . . 199, 214

Reg. 2(2) . . . . 214

Waterfront Strike Emergency Regulations 1951 . . . . 201
# TABLE OF CASES

## A.

<table>
<thead>
<tr>
<th>Case Details</th>
<th>Year</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acrow Ltd v Rex Chainbelt Inc. (1971)</td>
<td></td>
<td>289</td>
</tr>
<tr>
<td>Alcan Smelter and Allied Workers, Local No. 1 (1977)</td>
<td></td>
<td>24</td>
</tr>
<tr>
<td>Allen v Flood et al. (1898)</td>
<td></td>
<td>254</td>
</tr>
<tr>
<td>Allis-Chalmers Mfg Co. v N.L.R.B. (1954)</td>
<td></td>
<td>106</td>
</tr>
<tr>
<td>Amalgamated Grocers' Assistants I.U.W. v Wardell (1898)</td>
<td></td>
<td>238</td>
</tr>
<tr>
<td>American Cynamid v Ethicon Ltd (1975)</td>
<td></td>
<td>291</td>
</tr>
<tr>
<td>Anderson v Robertson (1948)</td>
<td></td>
<td>185</td>
</tr>
<tr>
<td>Anisminic v Foreign Compensation Commission (1969)</td>
<td></td>
<td>27, 70</td>
</tr>
<tr>
<td>Association of Commercial and Technical Employees, Local 1728 and McGeer et al. (1978)</td>
<td></td>
<td>52, 54, 57</td>
</tr>
<tr>
<td>Attorney-General v Smith (1950)</td>
<td></td>
<td>182, 282</td>
</tr>
<tr>
<td>Attorney-General for Quebec v Farrah et al. (1978)</td>
<td></td>
<td>66, 70</td>
</tr>
<tr>
<td>Auckland Clerical and Office Staff Employees' I.U.W. v New Zealand Forest Products Ltd (1981)</td>
<td></td>
<td>298</td>
</tr>
<tr>
<td>Australian Boot Trade Employees Federation v Whybrow &amp; Co. (1910)</td>
<td></td>
<td>177, 280, 281</td>
</tr>
<tr>
<td>Australian Federation of Air Pilots v Flight Crew Officers Industrial Tribunal (1969-70)</td>
<td></td>
<td>225, 228, 246</td>
</tr>
<tr>
<td>Australian Insurance Staffs Association v Atlas Insurance Co. Ltd (1931)</td>
<td></td>
<td>179</td>
</tr>
<tr>
<td>Australian Tramway Employees Association v Prahan and Malvern Tramway Trust (1913)</td>
<td></td>
<td>174, 228, 230, 233, 235, 237, 241, 242, 246, 250, 258, 259</td>
</tr>
</tbody>
</table>
B.

Baillie & Co. v Reese (1907) 188, 194
Blackball Mines v Judge of the Court of Arbitration (1908) 284
Blanche v McGinley (1912) 306
Bloedel, Stewart, and Welch Ltd v Stuart (1943) 79
Board of School Trustees of School District No. 39 (Vancouver) and C.U.P.E., Local 407 (1977) 124, 135, 145, 161, 162
Bond Brothers Sawmill Ltd and I.W.A. Local 1-424 and C.L.A.C. Local 44 (1974) 166
British Columbia Hydro and Power Authority and I.B.E.W. Local 258 and Local 213 et al. (1976) 154
British Columbia Hydro and Power Authority and International Brotherhood of Electrical Workers, Locals 213 and 258 et al. (1977) 42, 51, 53
British Columbia Institute of Technology and British Columbia Government Employees Union (1976) 135
British Columbia Packers Ltd et al. and British Columbia Council United Fishermen and Allied Workers Union (1974) 24, 26
Brunswick Masonary Contractor and Construction and General Labourers' Union, Locals 602, 1070 and 1093 et al (1979) 58
Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association (1924-25) 240

C.

Caledonian Collieries Ltd v Australian Coal & Shale Employees Federation (No. 1) (1930) 225
Camden Exhibition Display Ltd v Lynott (1965) 292
Canadian Association of Industrial, Mechanical and Allied Workers, Local 1 (British Columbia) et al. (1974) 36
Canadian Association of Industrial, Mechanical and Allied Workers, and Noranda Metal Industries Ltd (1975) 114, 120, 121, 128, 129, 132, 135, 142, 149, 151
Canadian Cellulose Co Ltd et al. (1976) 19, 44, 47, 48, 49, 57, 58
Canadian Gypsum Co. (1954), in re ... 36
Canex Placer Ltd et al. (1975) ... 24, 30
Canterbury A & P Labourers' Industrial Dispute (1907), in re ... 223
Canterbury Amalgamated Shop Assistants' I.U.W. v Canterbury Butchers I.U.E. (1958) ... 197
Canterbury Slaughtermen (1907), in re ... 301
Chapman v Rendezvous Ltd (1923) ... 188
Chappell v Times Newspapers Ltd (1975) ... 292
Christchurch United Tramway etc. I.U.W. v Christchurch Tramway Co. Ltd (1900) ... 238
C.J.M.S. Radio Montreal Ltd et al. (1979) ... 73, 90, 96
Clancy v Butchers Shop Employees' Union (1904) 5, 221, 228, 230
234, 235, 236, 237, 238, 240, 242, 246, 247, 248, 251, 258, 273, 276
Cominco Ltd et al. and International Union of Operating Engineers Local 115 (1979) ... 124
Cominco Pensioners Union, Sub-Local of the United Steelworkers of America, Local 651, and Cominco Ltd (1979) ... 158
Connecticut Coke Co. (1934) ... 100
Construction Labour Relations Association of British Columbia et al. (1975) ... 19, 114, 132
Cory Lighterage Ltd v Transport and General Workers Union (1973) ... 292
Corporation of the Township of Esquimalt and C.U.P.E. Local 333 (1975) ... 124, 132
Cozens v Brutus (1973) ... 54
Crevier v Attorney-General for Quebec et al (1981) ... 64, 69, 71
Crofter Hand Woven Harris Tweed Co. et al v Veitch et al. (1942) ... 253
Cromwell and Bannockburn Colliery Co Ltd. v Otago Board of Conciliation (1906) ... 179, 222, 225
Croven Ltd and International Union United Automobile, Aerospace and Agricultural Implement Workers of America Local 1090 (1977) ... 134
D.

Daily Mirror Newspapers Ltd v Gardner (1968) ........................................... 292
District 50, United Mine Workers of America, Local 13492 v N.L.R.B. (1966) .................. 140
Doleman & Sons v Ossett Corporation (1912) ................. 281
Dominion Directory Company Ltd (1975) .................. 149, 150
Douds v International Longshoremen's Association, Independent, et al. (1957) .................. 112

E.

Emms v Brad Lovett Ltd (1973) ........................................... 289
Emerald Construction Co. Ltd v Lowthian (1966) .................. 292

F.

Federated Clothing Trades of the Commonwealth of Australia v Archer (1919) .................. 228, 236, 241, 242, 245
Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation (1918-19) .................. 242
Federated Seamen's Union v Sanford Ltd (1930) .................. 228, 229
Federated Seamen's Union v Slaughter (1925) .................. 300
Federation of Telephone Workers of British Columbia and Dominion Directory Co Ltd (1975) .................. 126
Fibreboard v N.L.R.B. (1964) ........................................... 120, 139, 140
Forbes, ex parte Bevan, in re (1972) ........................................... 174
Ford Motor Co. Ltd v Amalgamated Union of Engineering and Foundry Workers (1968) .................. 227
Forest Industrial Relations Ltd et al. v International Union of Operation Engineers, Local 882 (1961) .................. 34
### G.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Relevance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gearmatic Co. and United Steelworkers of America Local 2592</td>
<td>1977</td>
<td>117, 124</td>
</tr>
<tr>
<td>George P. Pilling &amp; Son Co.</td>
<td>1939</td>
<td>100</td>
</tr>
<tr>
<td>Giles v Morris et al.</td>
<td>1972</td>
<td>256</td>
</tr>
<tr>
<td>Gisborne Slaughtermen, in re</td>
<td>1907</td>
<td>301</td>
</tr>
<tr>
<td>Government of British Columbia and Registered Nurses Association of BC</td>
<td>1977</td>
<td>44</td>
</tr>
<tr>
<td>Greater Vancouver Regional District and the Corporation of Delta</td>
<td>1979</td>
<td>19</td>
</tr>
</tbody>
</table>

### H.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hairdressers and Tobacconists' I.U.W. v Eslick Brothers</td>
<td>1901</td>
</tr>
<tr>
<td>Harder v New Zealand Tramways and Public Passenger Transport Authorities Employees' I.U.W.</td>
<td>1977</td>
</tr>
<tr>
<td>H.B. Contracting Ltd</td>
<td>1977</td>
</tr>
<tr>
<td>Health Labour Relations Association v Hospital Employees Union</td>
<td>1978</td>
</tr>
<tr>
<td>Highland Park Manufacturing Co.</td>
<td>1939</td>
</tr>
<tr>
<td>Hori v New Zealand Forest Service</td>
<td>1978</td>
</tr>
<tr>
<td>Hospital Employees Union, Local 180 and Cranbrook and District Hospital and Selkirk College</td>
<td>1975</td>
</tr>
<tr>
<td>Houde Engineering Corporation</td>
<td>1934</td>
</tr>
<tr>
<td>Hughes Boat Workers Inc. and U.A.W., in re</td>
<td>1980,</td>
</tr>
<tr>
<td>Hughes v Northern Coal Miners Workers' I.U.W.</td>
<td>1936</td>
</tr>
</tbody>
</table>

### I.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inspector of Awards v Petone Woollen Mill I.U.W.</td>
<td>1916</td>
</tr>
<tr>
<td>Inspector of Awards v R &amp; W Hellaby Ltd</td>
<td>1933</td>
</tr>
<tr>
<td>Inspector of Awards v Tregoweth</td>
<td>1948</td>
</tr>
<tr>
<td>International Union of Operating Engineers, Local 882 et al., Forest Industrial Relation Ltd. et al.</td>
<td>1961</td>
</tr>
</tbody>
</table>
J.

Jarvis v Associated Medical Services Ltd (1964) . . . . . 26

Joint Council of Newspaper Unions and Pacific Press Ltd (1976) . . . . . 41, 55, 135, 161

John Inglis Co. Ltd and International Brotherhood of Electrical Workers, Local 213 (1974) . . . . . 57

Jasper Blackburn Prods. Corporation (1940) . . . . . 100

K.

Kelder Construction Ltd (1978) . . . . . 58

Kidd Bros. Produce Ltd and Miscellaneous Workers Wholesale and Retail Delivery Drivers and Helpers Union Local 351 (1976) . . . . . 124, 151, 167

L.

Leon Hotels Ltd v Kauhausen (1979) . . . . . 9

Lodum Holdings Ltd, in re (1968) . . . . . 46, 56

Ladner Private Hospital Ltd et al. and Hospital Employees' Union Local 180 (1979) . . . . . 48, 57, 160

Ladner Private Hospital Ltd et al. and Hospital Employees' Union, Local 180 (1977) . . . . . 124

Lightfoot v Auckland Boilermakers' I.U.W. (1920) . . . . 300, 303

M.

MacDonalds Consolidated Ltd. et al. and Retail, Wholesale and Department Store Union, Local 580 (1976) . . . . . 144, 161

McCawley v The King (1920) . . . . . 25

McGavin Toastmaster Ltd and Bakery and Confectionary Workers International Union, Local 468 (1976) . . . . . 45

McMullin Holdings Ltd v Auckland Clerical Workers' I.U.W. (1967) . . . . . 277

Magner v Gohns (1916) . . . . 227, 229, 249
Mars Fine Foods Ltd (1954), in re 36
Martin and Robinson Ltd v Labour Relations Board (1954) 36
Medical Associate Clinic and Hospital Employees' Union Local 180 (1979) 45, 46
Melbourne and Metropolitan Tramways Board v Horan (1967) 228, 247
Metal Industries Association and Letson and Burpee Ltd. and United Steelworkers of America (1977) 124, 131
Metropolitan Life Insurance Co. v International Union of Operating Engineers (1970) 26, 27, 28, 34
Miko and Sons Logging Ltd v Penner (1976) 24
Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers Union, Local 351 and Grandview Industries Ltd (1974) 165, 166
Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers Union, Local 351 and London Drugs Ltd (1974) 6, 11, 132, 135, 163, 165, 166, 167
Mogul Steamship Co. Ltd v McGregor Gow & Co. et al. (1892) 252, 253, 254, 255, 257, 260
Montgomery Ward and Co. (1941) 100
Morgan v Fry (1968) 289, 306

N.

New Zealand Dairy Factories and Related Trades Employees' I.U.W. v New Zealand Co-operative Dairy Co. (1959) 256
New Zealand Engineering etc. I.U.W. v Court of Arbitration (1976) 285
New Zealand Engineering Union and Shortland Freezing Co. Ltd (1973) 298
New Zealand Federated Clerical and Office Staff Employees I.A.W.
271, 274, 275, 286, 316, 327, 328, 329, 331

New Zealand Federated Labourers etc. I.U.W. v Tyndall
and Others (1964) 284

New Zealand Government Railways Department v New

New Zealand Meat Processors' etc. I.U.W. (1964) 184, 185

New Zealand Waterside Workers' Federation I.A.W.
v Frazer (1924) 188, 223, 228, 281, 284

N.F.L.D. Association of Public Employees and
Carbonar General Hospital (1978) 34

N.L.R.B. v Adams Dairy (1965) 140

N.L.R.B. v J.H. Allison & Co. 138

N.L.R.B. v American Insurance Co. 107, 109, 125

N.L.R.B. v Borg-Warner Corporation (1958) 3, 98, 99, 101, 102, 103, 104
105, 107, 108, 109, 110, 111, 112, 113, 117, 120, 122, 123, 125
127, 128, 129, 130, 131, 136, 137, 138, 139, 141, 142, 143

N.L.R.B. v Corsicana Cotton Mills 106

N.L.R.B. v Darlington Veneer Co. 106

N.L.R.B. v Hart Cotton Mills Inc. (1951) 103

N.L.R.B. v Insurance Agents International Union

N.L.R.B. v Jones and Laughlin Steel Corporation (1937) 74, 138

N.L.R.B. v Magnavox Co. (1974) 110

N.L.R.B. v Niles-Bement-Pond Co. (1952) 103

N.M.U. (Texas Co.) (1948) 110
O.

Otago Clerical Workers Award, in re (1937) . . . . . 182

Otis Elevator Co. Ltd v International Union of Elevator Constructors, Local 82 (1973) . . 86, 112, 113, 114

Otis Elevator Co. Ltd and International Union of Elevator Constructors, Local 82 (1974) . . . . 153, 155

P.

Pacific Gillnetters Association et al. and British Columbia Council, United Workers' Union (1979) . . . . 124, 133

Parkhill Furniture and Bedding Ltd v International Moulders Union (1961) . . . . . 56

Performing Right Society v Mitchell and Booker (Palais de Danse) Ltd (1924) . . . . 220, 257


Philip Carey Mfg Co. (1963) . . . . . 110

Pittsburgh Plate Glass Co. (1969) . . . . . 119

Pruden v Assessment Authority of British Columbia (1976) . . 40, 41, 42, 43, 44, 46, 47, 48, 50, 55, 57, 60, 61

Pullman Trailmobile Canada Ltd and Miscellaneous Workers Wholesale and Retail Delivery Drivers' and Helpers' Union, Local 351 (1979) . . . . . 124

Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union (1978) 97, 109, 114, 115, 121, 123, 124, 125, 129, 131, 135, 137, 141, 142, 146, 148, 149, 150, 161, 162, 163

Pulp and Paper Industrial Relations Bureau and Pulp, Paper and Woodworkers of Canada et al. (1976) . . . . 124

Q.

Quinn v Leatham (1901) . . . . 253, 254, 257
R.


R v Commonwealth Court of Conciliation and Arbitration ex parte Whybrow (1910) 223

R v Commonwealth Industrial Court, ex parte Cocks (1908) 245

R v Gallagher, ex parte Aberdare Collieries Pty Ltd (1963) 177

R v Graziers Association of New South Wales, ex parte A.W.U. (1956) 223

R v Hamilton Knight, ex parte The Commonwealth Steamship Owners' Association (1952) 228, 235, 243

R v Kelly, ex parte State of Victoria (1950) 228, 231, 242, 246

R v Labour Relations Board (Ont.), ex parte Nor. Elec. Co. (1970) 26

R v Portus, ex parte A.N.Z. Banking Group Ltd (1972) 228, 230, 246, 248

Racal Communications Ltd (1980), in re 21, 27

Rooks v Barnard (1964) 289

Ross v Moston (1917) 301

Ruddock v Sinclair (1925) 306

S.

Scandore Paper Box Co. (1938) 100

Schechter Poultry Corporation v United States (1935) 74

Scott v Avery (1856) 281

Shell Oil Co., in re 106

Squamish Terminals Ltd and Canadian Stevedoring Co. Ltd and Pulp and Paper Workers of Canada, Local 3 (1975) 45

Stratford and Son Ltd v Lindley (1965) 289, 291, 292

Strong v L. Bava & Co. Ltd (1960) 194

Syndicat General de la Radio et al. (1979) 6, 133, 164, 167, 168
T.
Taylor and Oakley v Edwards J. (1900)  180, 194, 227, 228, 229, 279
Te Miha v Dunlop (N.Z.) Ltd (1975)  . . . .  300, 301
Texas and New Orleans Railway Co. v Brotherhood of
Railway Clerks (1930)  . . . . .  74
The Globe and Mail  . . . . .  169
Thomson & Co Ltd v Deakin (1952)  . . . . .  292
Tomko v Labour Relations Board (Nova Scotia) et al.(1975)  . .  65, 66
Toronto Electric Commissioners v Snider (1925)  . . . .  76, 79
Toronto Newspaper Guild v Globe Printing Co. (1953)  . . . .  26
Torquay Hotel Co. v Cousins (1969)  . . . .  289, 292
Transport Labour Relations and General Truck
Drivers (1976)  . . . .  41, 57, 61
Turner v Mason (1945)  . . . .  220, 257

U.
U.M.W. v Pennington (1965)  . . . . .  110
United Steelworkers of America, Local 6535 and
Cassiar Asbestos Corporation (1974)  . . . .  143, 161
United Steelworkers of America, Local 1005 v Steel
Co. of Canada Ltd (1944)  . . . . .  79

V.
Vancouver Island Publishing Co. Ltd and Vancouver
Typographical Union, Local 226 (1976)  . . . .  132, 135, 163

W.
Wellington Hotel etc. Employees' I.U.W. v Attorney-
General, ex rel Just (1951)  . . . . .  282, 283
Wellington Municipal Officers' Association (Inc.) v
Wellington City Corporation (1951)  . . . . .  283
Wellington Performing Musicians' Award (1912), in re 184
Western Wholesale Drug Ltd v Retail Wholesale and Department Store Union, Local 580 (1971) 86, 111, 112
Westinghouse Electric Corporation (1965) 140
Westinghouse Electric Corporation v N.L.R.B. (1967) 120
Weyerhaeuser Timber Co. (1949) 103
Whitwood Chemical Co. v Hardman (1891) 256
Wholesale and Retail Delivery Drivers Union and London Drugs Ltd (1974) 96
Wilson and Horton Ltd v Hurle (1951) 228, 237
Windsor Raceway Holdings Ltd and Windsor Raceway Union, Local 639 et al. (1979) 28
Workmen's Compensation Board Employees et al. (1974) 38

Y.

Yewens v Noaks (1880) 220, 257
ACKNOWLEDGEMENTS

I express my indebtedness to Professor Don McRae, of the Faculty of Law and past Director of the Graduate Programme, University of British Columbia, for the invaluable editorial instruction he gave me whilst I was resident at the University as a graduate student (1978-79). This thesis is the much improved for it. My sincere thanks go also to Mrs. E. Dobson, who did a wonderful job putting the pieces together in typing this thesis.
I. INTRODUCTION

"We do not believe in strikes as a negotiating weapon. We believe in arbitration as the ultimate answer".

per the Rt. Hon. W.E. Rowling
Newsmakers, Television One,

"The theory of the Code is that each side in collective bargaining is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike to force the other side to make the concessions".


This thesis examines the policies facilitating interest dispute settlement in British Columbia and New Zealand, under the Labour Code of British Columbia 1973\(^1\) and the Industrial Relations Act 1973 respectively. Apparent from the outset is that what one statute accepts as expedient and desirable in matters of interest dispute settlement, the other rejects. The study is principally, therefore, a comparative one, focussing in particular on the British Columbia reforms of 1973-74. Whereas New Zealand's industrial system has remained unaltered in essential respects

---

\(^1\) S.B.C. 1973, c. 122, hereinafter referred to as "the Code" or "the Labour Code". "The Board" refers to the British Columbia Labour Relations Board.
since the first Industrial Conciliation and Arbitration statute of 1894,² British Columbia in 1973 adopted an approach to interest dispute settlement that is today a pathfinder for North America.

No longer can British Columbia claim the dubious distinction of having "the worst [labour relations] record by far of any in Canada", as it was reputed to have in 1973.³ The reforms instituted at that time were a comprehensive response to the failings in British Columbia of post-war Canadian labour policy: that is, collective bargaining coupled with state intervention through conciliation and investigation of labour disputes.⁴ The sole emphasis henceforth was to be on the former, free collective bargaining, as the mechanism for resolving interest disputes. This, as the body responsible for developing the requirements of good faith bargaining under the Labour Code has reiterated, reproves of rigid standards of bargaining conduct imposed on parties by an external tribunal. Thus the British Columbia Labour Relations Board has consistently disclaimed the jurisdiction to evaluate the substantive positions of each party, insisting that it is for the parties themselves "to work out their own boundary lines between the area of mutual agreement and the area of unilateral action, whether the action be taken by the employer or the union...".⁵

² Industrial Conciliation and Arbitration Act 1894.
³ BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973) (Third Session), at 442 per D.A. Anderson (Member for Victoria).
⁴ See Chapter III. THE EVOLUTION OF CANADIAN LABOUR POLICY AND THE BRITISH COLUMBIA REFORMS, infra.
This signals the first of three fundamental differences this thesis examines between the British Columbia and New Zealand labour systems. Whereas British Columbia renounces any jurisdictional fetter on what may or may not constitute an interest dispute between management and union, central to the New Zealand Industrial Conciliation and Arbitration system is the legal concept of "dispute" which (through judicial construction of the term "industrial matters" to which the concept of "dispute" refers) determines the permissible subjects of industrial regulation in New Zealand. For those familiar with the legal controls attaching to categories of bargaining-subject in the United States, that the state exerts some measure of control over the subjects of bargaining in New Zealand may not itself be so surprising; in New Zealand it is the extent of control directly asserted by the state that distinguishes New Zealand's Industrial Conciliation and Arbitration system. Reference below to the United States National Labor Relations Act illustrates this. Although reserving to itself some degree of control over the range of subjects for bargaining, the state's presence in collective bargaining under this statute is considerably less pronounced than under the New Zealand industrial statute. The significance of the precedent-setting decision of the British Columbia Board in Pulp and Paper Bureau (1977), examined below, is that not even that degree of control which the state exercises over the substance of bargaining in the United States was acceptable to the British Columbia Board.

6 But cf., Chapter IV, Part D, The Possibility of Substantive Limitations.
7 Defined by the Industrial Relations Act 1973, s.2 (quoted infra, Part II).
8 Defined by the Industrial Relations Act 1973, s.2 (quoted infra, Part II).
9 Countenanced by the Supreme Court in N.L.R.B. v Borg-Warner Corporation, 365 U.S. 342 (1958), discussed in Chapter IV, infra.
10 Ibid.
11 Supra, note 5.
Inevitably, this part of the comparison of the two systems is about management's prerogatives, or "reserved rights". Given the wholesale rejection of legal constraints on bargaining subjects under the British Columbia Code, it would seem that the legal justifications for management's "reserved rights" have given way in British Columbia to a more urgent need for pragmatic accommodation of management-union differences. Such is not the case under New Zealand's conciliation and arbitration statute. Through early judicial antipathy towards the state's intervention coupled with the role of precedent, the legislation is today imbued with the common law approach to managerial prerogative: personified by the common law contract of service and the notion of sovereign authority which the common law borrowed from the traditional master-servant model. Part II examining the New Zealand system does not defend this perception of management-union relations. Aside the transformation of the market conditions which once may have commended this perception, opposing it are all the labour relations reasons which compelled the British Columbia Board to reject the American jurisprudence. Part I having examined these, Part II concentrates on the further arguments that can be made on legal and economic grounds for the abolition of the legal protection in New Zealand of management's prerogatives. Notwithstanding some eight decades of industrial development in New Zealand since the initial Act, the question still to be pondered is this: did the early courts see it to be their function to disavow in part the statutory language of Industrial Conciliation and Arbitration? Were the few judges who

12 But cf., the caution expressed in Chapter IV, Part D (noted supra, note 6).

13 See in particular Chapter IV, infra.
initially received the legislation simply discharging the usual functions of statutory interpretation, or were they in truth pursuing some conception of the public interest tied to last century's political economy?

Submitted below is that these early authorities fixing the jurisdictional scope of Industrial Conciliation and Arbitration were tempered not by Parliament's definitions but rather by their own need to curtail legislation aimed at supplanting the employer's freedom of contract in employment relations by a system of state regulation of labour disputes. The leading authority is a 1904 decision of the High Court of Australia.\textsuperscript{14} Despite the antiquity of this decision, its paramount importance today is undoubted; in two recent decisions of the New Zealand Arbitration Court (the body invested with the overall administration of the New Zealand labour relations system) the Court ruled the matters in issue to be non-negotiable by the unions solely on the strength of what this 1904 decision established.\textsuperscript{15}

This prefaces the second critical difference between the British Columbia and New Zealand labour systems: the administrative versus the judicial solution to labour disputes. In \textit{Pulp and Paper Bureau} the British Columbia Board issued this warning: "The wrong method is to rely on rigid controls, administered by an external tribunal, with the risk this poses that the ebb and flow of the collective bargaining regime might be frozen into the currently conventional pattern".\textsuperscript{16} The policy underlying the Board's warning is that it is for the parties themselves to determine

\textsuperscript{14} Clancy \textit{v} Butchers Shop Employees Union (1904) 1 C.L.R. 181 (H.C.A.) examined in Part II.


\textsuperscript{16} \textit{Supra}, note 5, at 80.
according to their relative economic strengths what is a fair and politic settlement, and to deny a party the product of his superior bargaining position is to court resentment, industrial protest, and ultimately loss of confidence in the industrial system itself. The British Columbia Board no longer has a monopoly over this policy. "Who, if not the parties", asked the Canada Labour Relations Board recently, "has intimate knowledge of the details and specifics of their respective situations?" With expressed deference to the British Columbia policy, this Board explained:

"It is this knowledge which is the key to compromise, concessions, quid pro quo's, exchanges and horse trading successful enough to produce a settlement which satisfies everyone to such a degree that production can continue and even increase for the benefit of the company and the partnership of employers and employees who work in it".

The New Zealand policy provides a stark contrast. Whereas British Columbia and its fellow jurisdictions prefer the flexible procedures of the permanently constituted board (in order, that is, to maximise the potential for "compromise, concessions, quid pro quo's, ...") New Zealand relies pre-eminently on judicial control of labour disputes. A labour relations system which pivots on a strict jurisdictional requirement fixing the scope of industrial regulation must inevitably bequeath the function of statutory interpretation to an adjudicative body in order to determine which bargaining

17 See e.g., Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers Union, Local 351 and London Drugs Ltd [1974] 1 Can L.R.B.R. 140, at 143 (the Board for this reason counselling caution in applications for first-contract arbitrations under section 70 of the Labour Code). See Chapter IV, Part D.

18 See generally, Noranda, supra, note 5; Pulp and Paper Bureau, supra, note 5.


20 Ibid.

21 Ibid.
demands comply with the Act's jurisdictional requirement. In New Zealand that body is the Arbitration Court, itself a designated Court of Record, albeit subject to the review powers of the High Court and subordinate to the New Zealand Court of Appeal on matters of law. In contrast, also to the position under the British Columbia statute, the general jurisdiction of the New Zealand courts is preserved with respect to torts committed in furtherance of labour disputes, which has seen in recent times interlocutory injunctions enjoining labour unions engaging in industrial action. Prior to 1973 the labour injunction was also commonplace in British Columbia. But now, in one limited respect only does the British Columbia Labour Code preserve the general jurisdiction of the superior courts in labour matters.

Of the Judiciary's basic inability to resolve management-union differences, the Minister of Labour in 1973 explained:

---

22 See the Industrial Relations Act 1973, s.32(1).
23 See s.48(5)(b) of the Act, expressly preserving the supervisory jurisdiction of the superior courts to correct excess of jurisdiction on the part of the Arbitration Court. Contrast Part I, Chapter II examining the legislature's attempt in British Columbia to exclude even this residual jurisdiction of the superior courts to review on grounds of jurisdictional error.
24 See the Industrial Relations Act 1973, s.51 (Arbitration Court may state a case for the New Zealand Court of Appeal on questions of law) and s. 62A (preserving appeals to the Court of Appeal on points of law).
25 See infra, Part II, VII. JUDICIAL CONTROL OF LABOUR DISPUTES.
26 For acknowledgement that there was "at one time a blizzard of injunctions" enjoining labour unions in British Columbia, see BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973) (Third Session), at 444 per G.S. Wallace (Member for Oak Bay).
27 See the Labour Code, s.32(2)(3), discussed infra, II. PERFECTING THE ADMINISTRATIVE SOLUTION.
The courts of law can only really catch a glimpse of the overall labour picture. Their interference in the past has been sporadic and fortuitous. The judges lack the intimate knowledge of industrial relations and collective bargaining. For these reasons...the new labour code has removed the court's jurisdiction over labour disputes...The new law seeks an administrative rather than a judicial solution to labour disputes".28

In contrasting this facet of the British Columbia Code with the New Zealand statute, Chapter II concentrates on the language the Code uses in seeking to exclude the courts. As apparent above, for the Labour Code to seek "an administrative rather than a judicial solution to labour disputes" is not novel;29 what does distinguish British Columbia is that it has gone further than any other jurisdiction in Canada in attempting to perfect the administrative solution. "[N]ovel, controversial, and arguably unconstitutional" is how one commentator described the critical provision, section 33.30 Against the background of judicial disobedience to the privative clause in the labour statute in Canada, this provision expresses the clearest legislative intent to deprive superior courts of the ability to wrest jurisdiction from the administrative board. The view advocated below is that despite a distribution of legislative power in Canada consonant with federalism the inherited notion of legislative supremacy is still the cardinal

28 BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973)(Third Session), at 399-400 (emphasis added).

29 The initial post-war reforms establishing the permanent labour board in Canada entrusted boards with substantially the same powers and administrative functions as those possessed today under labour statutes: see generally, H.D. Woods, Labour Policy in Canada, (2nd ed., 1973).

principle of the Canadian political system, such that the general relationship of the courts to the legislature is one commanding judicial obedience to the privative clause. The policy advocated then, is that provided the legislature expresses clearly its intent to divest courts of their supervisory jurisdiction, the judge's first constitutional duty must be to abide by, not disavow, the legislature's instruction.

The conclusion reached is that the Code does indeed express its intent clearly. Yet a number of arguments can be anticipated on the part of courts in support of the prerogative writ. Four are examined below. A further two, involving constitutional challenges to the Board's jurisdiction, are peculiar to the allocation of federal-provincial powers in Canada and will not be examined. The first is based on the proposition that there is a constitutional right of access to the courts for purposes of securing judicial review of inferior tribunals. The second is that the Board's expansive section 33 jurisdiction (namely, to define the extent of the Board's jurisdiction) is, when exercised, a function analogous to that of a "section 96" court, thus violating the constitutional requirement for federal appointment of judges. Doubtless it is simply a matter of time before both arguments are judicially tested in Canada. Until then, however, there is little to be gained from rehearsing them below; not only are these constitutional arguments special to Canada, involving matters external to the general relationship of courts to the

---

31 See particularly Bora Laskin's emphatic views on this matter; Laskin, Certiorari to Labour Boards: The Apparent Futility of the Privative Clause, 30 Can. B. Rev. 986 (1952).

32 See further Laskin, ibid, admonishing courts for disavowing their constitutional duty to abide by the privative clause.

33 But see now IIA. PERFECTING THE ADMINISTRATIVE SOLUTION - POSTSCRIPT.

34 Indeed, for judicial notice of the constitutional questions underlying the Code's jurisdictional provisions, see Leon Hotels Ltd v Kauhausen (1979) 79 C.L.L.C. para 15, 198 (B.C.S.C.), per Fulton J. See ibid.
administrative board, but also the jurisprudence on which they are based has been examined elsewhere. Of the remaining four that are examined, these are germane to the administrative solution to labour disputes and the ingenuity of courts to wrest jurisdiction from the administrative tribunal. Notwithstanding an obvious drafting defect in one of the Code's jurisdictional provisions, the conclusion is that only by disclaiming the rule of judicial obedience could courts resurrect jurisdiction from the Code and, to that end, compromise the administrative approach to labour problems.

It suffices to add that these issues do not arise under the New Zealand Industrial Relations Act 1973; the object of which is to facilitate, not prevent, judicial intervention. A separate chapter in Part II reveals the extent to which the New Zealand conciliation and arbitration system is reliant on judicial procedures. Also included is a chapter on the legality of strikes and lockouts under the New Zealand statute. This points to the third fundamental difference between the two jurisdictions. British Columbia in 1973 recognised it to be an essential condition of the Code's policy, the fostering of free collective bargaining, that parties be not simply at liberty but indeed encouraged to resort to the economic sanction as a means of compelling agreement. Provided certain prerequisites are satisfied (most notably, that parties have engaged in good faith bargaining):
"The theory of the Code is that each side in collective bargaining is entitled...to stick firmly to its bargaining positions, and then to rely on its economic strength...to force the other side to make the concessions...The assumption is that actual experience of the harm caused by [a strike or lockout] will lead one or both parties to realize that the costs of agreement are not quite so distasteful".38

As this statement of the Board indicates, the legitimacy of the economic sanction is fundamental to the Code's policy of free collective bargaining - "[the economic sanction] is a necessary constituent of collective bargaining"39 - such that it does not require separate treatment below. By comparison the New Zealand legislation is much less obliging with its more complex treatment of strikes and lockouts. What will become apparent, however, is that the Code's assumption, that unilateral action is the most efficient means of breaking the bargaining impasse (and is therefore to be encouraged), is the antithesis of conciliation and arbitration of labour disputes. Given the formal role conciliation and arbitration reserves to the state:

"We do not believe in strikes as a negotiating weapon. We believe in arbitration as the ultimate answer".40

38 Canadian Association of Industrial, Mechanican and Allied Workers, and Noranda Metal Industries Ltd [1975] 1 Can. L.R.B.R. 145, at 159 per the Board.

39 London Drugs et al., supra, note 17, at 143 per the Board.

40 Per the Hon. W.E.Rowling, Leader of the Opposition, Newsmakers, Television One, New Zealand, 18 July 1980. The statement was not tempered by party political considerations. Consider e.g., the Minister of Labour's warning to the unions involved in the Kinleith stoppage, the dispute which prompted Mr. Rowling's comment: "[T]he Government has made it clear that it will not accept large wage settlements 'gained as a result of strike action'...it should be remembered that the proposed settlement has been reached after a prolonged period of industrial action. 'A seven-week strike is not in the Government's interpretation of free wage bargaining...'"; Comment from the Capital, Christchurch Press, 3 March, 1980.
By and large this is the psychology the law in New Zealand endorses. To that extent arbitration is for New Zealand what strikes and lockouts are for British Columbia, thus pointing to the overriding difference in philosophy between the two systems: bi-laterally concluded terms and conditions of employment through free collective bargaining as opposed to arbitrated settlements externally imposed.

Further matters require attention. Although the examination is principally a comparative one the significance of the British Columbia reforms for Canadian labour policy ought to be noted. This is already accounted for in part by those chapters dealing with the main characteristics of the British Columbia system. However, a further chapter is included to examine those features, not elsewhere examined, which render the British Columbia statute a pathfinder for the Canadian jurisdictions. By comparison a separate chapter on New Zealand labour policy would be bereft of significance in view of New Zealand's unerring adherence to its Industrial Conciliation and Arbitration legislation, dating from its initial experimental statute of 1894.

Secondly, Part I examining the British Columbia system was researched during the period September 1978 to December 1979, whilst the author was resident in British Columbia. Access to British Columbia materials and Board decisions under the Code has not been possible since that time. Consequently, although no significant new policy direction is anticipated either on the part of the Board or the provincial legislature, Part I cannot account for developments that may have occurred since 1 January 1980 and the date of submission of this thesis.

Finally, what is advocated on the strength of this study does not amount to an emphatic rejection of one system in preference for the other. As the
British Columbia Board well recognises of the legislation is must administer, every labour relations system is a response to the particular needs and nuances of the labour relations community it must regulate. 41 Shaping these needs are a pot-pourri of influences, some economic in character, some industrial, some social, some purely historical. 42 For this reason no labour relations system should ever strive to be simply a fascimile of another.

Yet it is apparent that significant changes are long overdue in the case of New Zealand's extensively regulated procedures governing interest disputes. The radical solution would be the wholesale abolition of Industrial Conciliation and Arbitration in New Zealand. But no New Zealand government has promoted, or indeed is likely to promote, this alternative in the foreseeable future. 43 Thus a more realistic proposal for reform is that the Arbitration Court relax its interpretation of the industrial statute's jurisdictional requirement; relinquish its control over the subjects of bargaining in New Zealand; and thereby withdraw its legal protection of management's prerogatives in its relations with labour. It may also assist the Arbitration Court adopt a lower profile in interest disputes to encourage the bi-laterally concluded conciliated agreement 44 (as opposed to the arbitrated award of the Court) by legislative amendment recognising the economic sanction as the preferred mechanism for dispute settlement.

41 Hence the Board's early declaration that it did not intend importing "this entire body of American doctrine" (fixing the scope of the duty to bargain collectively under the Wagner Act) into British Columbia: "The scope of the obligation which we find in s.6 of the Labour Code will be developed on a case-by-case basis": Noranda, supra, note 38, at 162.

42 See generally the Board's discussion of "a typical town" in the province, characterised by a relatively stable population united by a single dominant industry; Pulp and Paper Bureau, supra, note 5.

43 See eg., the Government and Opposition statements in 1980, supra, note 40.

44 See the Industrial Relations Act 1973, ss. 67-83,
PART I
II. PERFECTING THE ADMINISTRATIVE SOLUTION

"The courts of law can only really catch a glimpse of the overall labour picture. Their interference in the past has been sporadic and fortuitous. The judges lack the intimate knowledge of the very dynamic process of industrial relations and collective bargaining. For these reasons,...the new labour code has removed the court's jurisdiction over labour disputes... The new law seeks an administrative rather than a judicial solution to labour disputes."

BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973) (Third Session), at 399-400 per the Hon. W.S. King, Minister of Labour.

A. INTRODUCTION

It is noteworthy that in the case of Canada and eight provinces, the initial post-war collective bargaining statutes contained privative clauses purporting to exclude judicial review of board decisions. As early as 1952, however, virtually upon the enactment of these clauses, Bora Laskin observed the "apparent futility" of these attempts to oust the superior courts.¹ "In the face of such enactments", Laskin cautioned, "judicial persistence in exercising a reviewing power involves an arrogation of authority only on the basis of constitutional principle (and there is no

¹ Laskin, Certiorari to Labour Boards: The Apparent Futility of the Privative Clause (1952) 30 Can B. Rev. 986.
such principle) or on the basis of some 'elite' theory of knowing what is best for all concerned.\textsuperscript{2} This objection to judicial review serves notice of the constitutional argument enjoining the court's obedience to the privative clause. Yet, the following decades of judicial activism in administrative law enabled Professor H.W.R. Wade to comment recently that it is to be hoped that courts will not be dissuaded by the Code's unusual provisions from assuming their traditional supervisory role.\textsuperscript{3}

In the light of these opposing views, this chapter examines whether the Minister's confidence in 1973 was warranted when he pronounced "the Code has removed the court's jurisdiction".\textsuperscript{4} The examination falls into two parts. The first (under the headings B. \textsc{the jurisdictional provisions}, C. \textsc{the background to section 33}, D. \textsc{approaches to section 33}) reveals why British Columbia felt driven to experiment with "novel,

\textsuperscript{2} Ibid., at 991.

\textsuperscript{3} Expressed in the guest lecture at the Administrative Law Conference, University of British Columbia 1979. But cf., Professor Wade's plea to courts for subterfuge rather than "naked disobedience" to the ouster clause, (1979) 95 L.Q.R. 163, and in (1977) 93 L.Q.R. 8, to avoid exposing their disobedience pleading to courts to retain the "highly artificial reasoning" sustaining the distinction between jurisdictional/non-jurisdictional error. Contrast Lord Diplock's dictum, \textit{infra}, corresponding to note 30.

\textsuperscript{4} See \textit{supra}, Chapter headnote. For Government Members' antipathy generally towards the courts in labour matters, see \textsc{british columbia legislative assembly debates} (1973) (third session) at 475 per Hon. G.R.Lea (Minister of Highways) and 933 per G. Liden (Member for Delta). The Opposition's major objections to the clauses excluding access to the courts appealed more to emotion than reason. See eg., G.B. Gardom (Member for Vancouver-Point Grey), eulogising the prerogative writ, "justice" and "equity" and "600 years of precedent" from Magna Carta to the present; \textsc{british columbia legislative assembly debates} (1973) (third session), at 1044. More than one member thought the retention of the prerogative writ "critical to the system of democracy as we know it" (per P.A. Anderson, at 1045). Editorial comment was similarly impassioned; see H.W. Arthurs, "The Dullest Bill": \textit{Reflections on the Labour Code of British Columbia} (1974) 9 \textsc{u.b.c.l.r.} 280, at 324.
controversial, and arguably unconstitutional" legislation. 5 Despite a drafting imperfection, the conclusion reached is that the Code's jurisdictional provisions can be penetrated only in disregard of the court's duty to the legislature: enjoining courts to give "[e]very enactment...such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects". 6 Through interacting one with another, these provisions preclude the usual conceptual justification for judicial review in face of the privative clause.

The second part reveals whether the legislature has in fact created a collective bargaining regime operating exclusive of the courts. As the headings here indicate (E. THE BOARD'S RETREAT and F. THE JUDICIAL INCURSION) not in every instance have the courts in British Columbia abided by the Code's instruction.

B. THE JURISDICTIONAL PROVISIONS

Discussed first is section 34(1), the principal intent of which is to grant the Board exclusive jurisdiction to resolve questions "arising under this act".

(a) Section 34(1)

"34.(1) The board has exclusive jurisdiction to decide any questions arising under this Act, and, upon application by any person, or on its own motion, may decide for all purposes of this Act any question, including, without restricting the generality of the foregoing, any question as to whether [in parts (a) to (w), a range of subject-matter arising under the Code]."

5 See Arthurs, ibid., at 326.

6 Interpretation Act, R.S.B.C.1976,c.42, s.8. Cf., Laskin's instruction, supra, note 1, at 990, that "[w]e must not...delude ourselves that judicial review rests on any higher ground that that of being implicit in statutory interpretation".
This is the provision which labours under the drafting imperfection noted above. The debates in 1973 indicate that the legislature intended not only to remove the court's review powers but also to bequeath the Board exclusive, original jurisdiction over all matters involving the Code, whether arising directly or incidently in the course of proceedings under it. However, not only does section 34(1) fail to invest this exclusive jurisdiction; the section, to the extent that it leaves the courts concurrent jurisdiction, also enhances the likelihood of judicial review of Board decisions.

(i) The drafting defect. The section confers jurisdiction in three stages. First, the opening words grant the Board exclusive jurisdiction, reinforced by the privative clause, to decide all questions "arising under [the] Act". The second stage, "and may decide for all purposes of this Act any question", is distinct from the first. These words denote concurrent jurisdiction in the Board and the courts to interpret and apply law external to the Code, where such law must be considered in the course of proceedings under it.

It is difficult to envisage a situation in which courts could exercise this original jurisdiction, since only the Board can preside over Code proceedings. Nonetheless, the consequences affecting the third stage by which section 34(1) confers jurisdiction confirm that the retention of concurrent jurisdiction, at the second stage, is a drafting error. The third stage is an extension of the second, bestowing jurisdiction by way

7 Eg., see the Minister's speech, supra, chapter headnote.

8 But cf., the 'external law' ground for review, infra, E. THE BOARD'S RETREAT and F. THE JUDICIAL INCURSION.
of specification (in parts (a) to (w)) of matters which the Board "may
decide for all purposes of this Act". As an extension of the second it
requires to be read in the same light, denoting concurrent and not
exclusive jurisdiction.

The Board has declined this reading, however, preferring in effect to
treat the specifications as extensions of the first rather than second
stage by which jurisdiction is granted. This is understandable in view
of the importance to the Code's operation of the matters so specified,
matters which the legislature intended to be the Board's exclusive concern.
And yet at least one British Columbia Court has served notice of concurrent
jurisdiction to determine these matters (the Court in this case disclaiming
jurisdiction to entertain questions not so specified).

In Pitura v Lincoln Manor et al. the issue was whether the Supreme
Court had jurisdiction to determine liability in tort for intimidation
and interference with contractual relations arising from a construction
contract. Munroe J. did not examine the sections bequeathing the
Board's jurisdiction, yet accepted that where the issue is whether the
Labour Code or a collective agreement has been breached the Board has
exclusive jurisdiction.11

9 E.g., see Construction Labour Relations Association of British Columbia
et al. [1975] 2 Can. L.R.B.R. 374, at 380 (declaring exclusive
jurisdiction with respect to part (h)); Canadian Cellulose Co Ltd et al.
[1976] 1 Can. L.R.B.R. 400, at 401-3 (declaring the same with respect
to parts (g) and (w)); Greater Vancouver Regional District and the Corp.
declaring the same with respect to parts (c), (d) and (g)).
11 Ibid, at 80.
These are questions not specified in parts (a) to (w). This is significant because Munroe J. affirmed the Court's jurisdiction to proceed with the common law action on the ground that "[the] letter of undertaking... is not a collective agreement between the plaintiff and the defendant union". In contrast to the former issue (whether breach of the Labour Code or a collective agreement has occurred), parts (c) and (g) of section 34(1) designate whether a collective agreement "has been entered into" and "is in full force and effect" to be questions for the Board.

In deciding, then, that the contested letter did not satisfy the Code's requirements so as to constitute a collective agreement, the Court effectively construed section 34(1) as allocating the questions in (a) to (w) concurrently to the courts and the Board. Indeed, the Court added that if the legality of a strike or lockout must be established in support of a claim for damages, the court must remit the matter to the Board for determination. Since this is a further issue not addressed by parts (a) to (w), presumably Munroe J. treated it as falling within the Board's exclusive jurisdiction conferred by the opening words of the section, "to decide any question arising under [the] Act".

Whatever the judge's perception of the court's relationship to the Board, these rulings comply with the drafting of section 34(1) which, on any reading, fails to bequeath the Board exclusive jurisdiction other than at the first stage.

12 Ibid.
13 Ibid, at 79.
(ii) An avenue for review? The existing ground for review, established on the 'external law' doctrine, is examined below. The possibility arises at this stage, however, of the courts extending their review jurisdiction on a further ground, coinciding with their concurrent jurisdiction over such matters as that in issue in Pitura.

It is not a necessary condition of jurisdiction shared concurrently with the courts that, by that fact, it be also reviewable. But consider the judicial presumption, that the legislature does not intend the foreclosure of judicial review in every instance when it invests an inferior tribunal with jurisdiction and decrees that the jurisdiction be immune from review.¹⁴ Labour cases in particular illustrate this where the legislature seeks to secure the independence of the administrative decision-maker from the outset, by granting exclusive and not concurrent jurisdiction.¹⁵ A fortiori where the initial jurisdiction confided is not exclusive - where the subject matter of the empowering statute does not render the issues wholly inappropriate for judicial decision - the courts can be expected to apply the presumption more readily.

Therefore, it may be that a superior court inclining towards a contrary view of the legalities would not be loath to upset a Board decision entered under parts (a) to (w) of section 34(1), whatever the effect of the Code's privative clause; otherwise, the courts may ask, why did the legislature preserve their original jurisdiction? However, to date the opportunity for the British Columbia courts to overturn the Board on any of these matters has not arisen.

¹⁴ For recent judicial acceptance of the presumption, see Re Racal Communications Ltd [1980] 2 All ER 634 (H.L.), at 638 per Lord Diplock.

¹⁵ See generally Laskin, supra, note 1.
As a result of the drafting defect, then, section 34(1), to the extent that it encourages judicial review, does not heed the Minister's statement in 1973, admonishing the courts for their past intervention and declaring that henceforth their jurisdiction is removed.\textsuperscript{16} This is pertinent since the legislature endorsed the Minister's statement when it enacted the Board's extraordinary mandate (section 33, discussed below) to determine the extent of its own jurisdiction; surely, it is anomalous to confer exclusive jurisdiction to determine jurisdiction and, at the same time, reserve to the courts their traditional powers to police jurisdictional error.

Consequently, section 34(1) is in need of strengthening (that section 33 is still capable of excluding the court's review powers notwithstanding\textsuperscript{17}). The amendment proposed is to remove the court's original jurisdiction for all purposes of the Code, deleting the existing words in parenthesis and substituting the italicized parts:

"34.(1) The Board has exclusive jurisdiction to decide any question arising under this Act, and, upon application by any person, or on its own motion, (may decide for all purposes of this Act any question, including) to decide for all purposes of this Act any question howsoever arising, and, without restricting the generality of the foregoing, has and shall exercise exclusive jurisdiction to decide any question as to whether [specifying paragraphs (a) to (w)]."

(b) Section 31

The second provision granting general powers to the Board reads:

"31. Except as otherwise provided in this Act, the Board has and shall exercise exclusive jurisdiction to hear and determine an application or complaint under the provisions of this Act and to make any order permitted to be made and, without limiting the generality of the foregoing, the board has and shall exercise exclusive jurisdiction in respect of

\textsuperscript{16} Supra, Chapter headnote.

\textsuperscript{17} See infra, D. APPROACHES TO SECTION 33.
(a) any matter in respect of which the board has jurisdiction under this Act or the regulations;

(b) any matter in respect of which the board determines under section 33 that it has jurisdiction; and

(c) any application for the regulation, restraint or prohibition of any person or group of persons from

   i) ceasing or refusing to perform work or to remain in a relationship of employment; or

   ii) picketing, striking, or locking out; or

   iii) communicating information or opinion in a labour dispute by speech, writing, or any other means.

The most exceptional feature of this provision is paragraph (b) in that it assumes the existence of the Board's section 33 jurisdiction (discussed presently). Also exceptional is paragraph (c) granting exclusive jurisdiction over inter alia strikes and lockouts. Reinforcing this is section 32(1) which stipulates that "no court has or shall exercise any jurisdiction in respect of...a matter referred to in section 31", and, in respect of the labour injunction\(^\text{18}\) that "no court shall make an order enjoining or prohibiting any act or thing in respect of".

(c) Other sections

Further provisions requiring mention are sections 32(2), 87 and 89. Section 87 divests the courts of jurisdiction in respect of torts (specifically, trespass and interference with contractual relations) committed in furtherance of strikes, lockouts, or picketing permitted by the Code. The companion provision is section 89. This excludes the conspiracy action in respect of acts done in contemplation or furtherance

\(^{18}\) BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973) (Third Session), at 399.
of a labour dispute which, in the absence of combination or agreement, would not be wrongful. 19

Overriding these provisions is section 32(2). This provision saves the court's jurisdiction where a "wrongful act or omission...causes an immediate danger of serious injury to any individual or causes an actual obstruction or physical damage to property". 20 By virtue of section 32(3), however, the court's jurisdiction to issue injunctive relief on an ex parte application does not survive.

(d) Section 33

The unique feature of the Board's jurisdiction is section 33. As well as being an independent source of jurisdiction, this provision strengthens the grants of exclusive jurisdiction in sections 31 and 34(1) and, not least, the privative clause in section 34(2): 21

"33. The board has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under this Act, a collective agreement, or the regulations, and to determine any fact or question of law that is necessary to establish its jurisdiction, and to determine whether or not or in what manner it shall exercise its jurisdiction".

19 See Miko and Sons Logging Ltd v Penner [1976] 4 W.W.R. 756 (per McKay J); Alcan Smelter and Allied Workers, Local No. 1 (1977), 3 B.C.L.R. 163 (per MacFarlane J); Pitura v Lincoln Manor Ltd et al., supra, note 10. For discussion, see Arthurs, supra, note 4, at 301-313.

20 For a Board decision disclaiming jurisdiction to entertain actual or apprehended breaches of the general law, see Canex Placer Ltd et al. [1975] 1 Can. L.R.B.R. 269. See also, Arthurs, ibid.

C. THE BACKGROUND TO SECTION 33

In Canada the inherited principle of legislative supremacy is modified by a distribution of legislative power consonant with federalism. But as Laskin earlier explained, the supremacy of the legislature is still the cardinal principle of the Canadian political system. The relationship of the judiciary to the legislature, therefore, is restrictively defined by the rule enjoining judicial obedience to the enacted word. This rule, and the relationship it so defines, is manifest in the general interpretative function assigned to the courts in applying statutes; so long as enactments remain within the federal-provincial allocation of legislative power, this function in Canada has never permitted judicial invalidation of statutes on constitutional grounds.

Consequently, if legislative supremacy be the cardinal principle, then the only justification for the courts assuming their supervisory role over inferior tribunals is to ensure the sanctity of the legislature's word - to ensure that the administrative agency created by statute complies strictly with the terms of its creation. Commonplace with the expansion of government this century is the privative clause. Contained in the empowering statute, it is itself a term of the administrative agency's creation, albeit as a direction addressed in this instance not to the statutory body but to the courts. Simply, it expresses the desire of the law-making organ that bodies performing certain specialised functions be

22 Supra, note 1, particularly at 989-91.
23 While not sovereign in the sense of unbridled legislative authority, the powers of the provincial legislatures are plenary within their provincial domain. See, eg., McCawley v The King [1920] AC 691, per Lord Birkenhead for the Privy Council, declaring the Queensland legislature to be "master of its own household" as a body "sovereign within its powers".
free from judicial constraints, and, if the usual policy applies, that they be unrestricted by the procedures that bind courts in the discharge of their functions.

In no field is that desire more clearly expressed, Laskin observed, than in labour statutes promoting settlement of disputes through collective bargaining. Yet the law reports attest that in no jurisdiction in Canada has the legislature successfully freed the labour board from judicial control.

Consider the Ontario labour statute containing the usual privative provisions. On each occasion these were considered, the court emphatically rejected the notion that they could be construed so as to empower the Board to err on a matter on which its jurisdiction depends. The reasoning is familiar. Since a "decision, order, direction, declaration or ruling" held to be made without jurisdiction is not, in truth, a "decision, order direction, declaration or ruling", there is in law nothing

24 Supra, note 1.
25 For a candid denial of the legislature's ability to exclude the courts, see Re British Columbia Packers Ltd et al., supra, note 21, at 609, per Addy J:

"There are numerous decisions of common law Courts of the highest jurisdiction over many years which have held that Courts of superior jurisdiction possessing powers of prohibition and entrusted with the duty of supervising tribunals of inferior jurisdiction, have not only the jurisdiction but the duty to exercise those powers notwithstanding privative clauses...". (Emphasis added)
26 Ontario Labour Relations Act, R.S.O. 1970, c. 232, ss. 95(1) and 97.
for the privative clause to protect. On the authorities, the most that these clauses have achieved is to exclude the prerogative writs where the Board's error, whether of law or fact, is designated 'non-jurisdictional'. However, administrative lawyers familiar with Anisminic v Foreign Compensation Commission know that the kinds of error so designated are few. (Recently, indeed, Lord Diplock acknowledged in the case of inferior tribunals, that "for all practical purposes" Anisminic "abolished" the category of 'non-jurisdictional' error of law.)

Thus, in Metropolitan Life Insurance Co v International Union of Operating Engineers, it was no answer that the Ontario Labour Board was within its statutory jurisdiction in embarking on the certification

---

28 The reference is to the privative clauses of the Ontario Statute, supra, note 26.


30 Re Racal Communications Ltd [1980] 2 All ER 634 (H.L.), at 638-9; Hence "[a]ny error of law ... made by ... [an inferior tribunal] in the course of reaching ... [its] decision on matters of fact or of administrative policy would result in ... the decision ... [being] a nullity". Cf., however, C.U.P.E., Local 963 v New Brunswick Liquor Corp. (1979), 25 N.B.R. (2d) 237 (S.C.C.), the Supreme Court Holding, reversing the New Brunswick Court of Appeal (21 N.B.R. (2d) 441), that the privative clause in the Public Services Labour Relations Act, R.S.N.B. 1973, c.P-25, s.101 denied the court's power to review. The decision is significant as indicating judicial recognition of the legislative policy in protecting the labour board's autonomy. However, its effect must not be overstated since the court did not impugn the traditional ground for review. E.g., at 245, Dickson J confined the decision to errors lying "at the heart of the specialized jurisdiction confided to the Board", also confining the court's acceptance of the legislative policy (above) to "a labour board's decision within jurisdiction" (emphasis added). For discussion, see Re Hughes Boat Workers Inc. and UAW (1980),102 D.L.R. (3d) 661 (S.C.C.) characterizing the question in terms of "reasonableness" (of the board's interpretation of its constituent statute) rather than "correctness".

31 Supra, note 27.
proceeding since, the Supreme Court held, the Board in the course of the inquiry stepped outside its jurisdiction by asking itself a question not assigned by the legislature. This, for purposes of the judicial inquiry, rendered it irrelevant that the Board's practice in these proceedings had been developed out of regard for the Act's principles facilitating appropriate bargaining units.

Significantly, following the Supreme Court's decision an amendment to the Ontario Act reinstated the practice struck down in Metropolitan Life. This indicates not only the legislature's disapproval of the court's decision but also its desire to protect what the court here failed to respect - the administrative tribunal's ability to expedite the settlement of labour disputes. Yet, while the amendment reinstates the Board's practice, it has not freed it from the jurisprudence of Metropolitan Life. Recently, the Ontario Board affirmed that while its former discretion in certification proceedings is preserved, it can still exceed its jurisdiction in such proceedings by asking itself "the wrong question". This acknowledgement of the Board, viewed against the legislature's desire to protect the Board's independence, shows the extent to which the conceptualism of Anisminic has minimised the effect of the privative clause in the labour statute.

It is against this background that section 33 of the Code reveals its purpose. It expresses the clearest legislative intent to deprive superior courts of the ability to resurrect jurisdiction from the privative clause.


33 Ibid, citing Metropolitan Life, supra note 27.
In the words of the Minister of Labour in 1973, commenting on the Code's procedure for an appeal from a three-man panel to a full-sitting of the Board:

"Allowing for a special appeal to an administrative agency, as provided in the Labour code, is an important innovation in Canadian labour law, ... It is a recognition of the unsuitability of review in the courts of administrative decisions by prerogative writs, such as certiorari et cetera, where the issue of jurisdiction and not the substance of a decision is considered." 34

Further:

"[T]o jeopardize the decision to court actions ... [could] emasculate the board's effectiveness to come to grips with labour problems. That certainly has been the problem in the past." 35

D. APPROACHES TO SECTION 33

This section concentrates on arguments that may be used to circumvent section 33. This is done not so much for the reason that a court would attempt these arguments (rather than grapple with these, history indicates that a court wishing to intervene would simply ignore section 33) 36 but rather to illustrate the logic in support of the Code achieving its object. Preceding this is a brief account of the way in which section 33 and its companion provisions interact so as to remedy "the problem in the past".

34 BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973) (Third Session) at 397 per the Hon. W.S. King. Cf., the Code, s.36.

35 Ibid.

36 As early as 1952, Laskin observed of labour cases that since it falls to courts to construe privative clauses, "they are in a position to interpret (that is, ignore) the legislative direction by simply refusing to give up their supervisory authority"; supra, note 1, at 990 (the parenthesis is Laskin's).
(a) The legislative interaction

Sections 31 and 34(1) reinforce the Board's unique section 33 jurisdiction. First, section 33, exclusively empowering the Board to determine the extent of its jurisdiction, renders the issue of jurisdiction itself a question arising under the Code. Section 34(1), conferring "exclusive jurisdiction to decide any question arising under this Act", thus complements section 33. To similar effect, second, section 31(a) confers "exclusive jurisdiction" over "any matter in respect of which the Board has jurisdiction under this Act"; the issue of jurisdiction itself being one such "matter". If that were not sufficient, section 31(b) extends that grant to also include "any matter in respect of which the board determines under section 33 that it has jurisdiction". Added to this, section 32(1) stipulates that "no court has or shall exercise any jurisdiction in respect of a matter that is ... referred to in section 31"; inter alia in respect of the Board's jurisdiction simpliciter or any matter the Board determines under section 33 to be within its jurisdiction. 37

---

37 For early acceptance, see Canex Place et al., supra, note 20, at 271. The Board accepted that a determination as to the extent of its jurisdiction pursuant to s. 33 operated, by virtue of ss. 31 and 32(1), (as amended, 1975, c.33, s.8), "to delimit the scope of the court's jurisdiction in respect of ... [the] same matters".
The main privative provision, however, is section 34(2):

"34(2) Except in respect of the constitutional jurisdiction of the board, a decision or order made by the board under this Act, a collective agreement, or the regulations, upon any matter in respect of which the board has jurisdiction, or determines under section 33 that it has jurisdiction under this Act, a collective agreement, or the regulations, is final and conclusive and is not open to question or review in any court on any grounds, and no proceedings by or before the board shall be restrained by injunction, prohibition, mandamus, or any other process or proceeding in any court, or be removable by certiorari or otherwise into any court". 38

In view of section 33, the salient parts of this clause are the words "upon any matter in respect of which the board has jurisdiction". Specifically, if a tribunal is empowered independently of its primary jurisdiction to determine what is, and what is not, within that jurisdiction, then any error it thereupon makes is 'non-jurisdictional' and within the scope of the privative clause. Indeed, the only explanation for the legislature expressly referring in that clause to section 33 is that it intended to emphasise this in the event of an application for review. The words in question ("or determines under section 33 that it has jurisdiction under this Act,...") are superfluous since section 31(b) unambiguously states that "the board has and shall exercise exclusive jurisdiction in respect of... (b) any matter ... [so determined] under section 33". Since, therefore, the section 33 reference could be excised without affecting section 34(2), presumably it was included out of an abundance of caution, directing the courts' attention to the reasoning excluding the usual avenue for review. Nevertheless, a number of arguments may be

38 Emphasis added.
attempted in support of the prerogative writ. Four are examined here.\(^{39}\)

(b) **Possible arguments**

(i) **The section 33 determination.** The first of these is avoidable by the Board. The Board, it has been seen, has the capacity to determine its jurisdiction, and to designate matters as being within that jurisdiction. For that purpose it may be argued that section 33 requires there to be a determination (that there is jurisdiction to determine a matter) and that it be expressly recorded by the Board in order to avail itself of the privative sections. In the absence of that preliminary measure, Board decisions on matters which it believes are its exclusive concern may be unprotected.

Despite the certainty of one commentator,\(^{40}\) the argument fails on three grounds. The first is based on section 32(1), which excludes the courts in respect of "a matter that is, or may be, referred to in section 31";\(^{41}\) section 31(b) referring to "[a] matter in respect of which the Board determines under section 33 that it has jurisdiction". The operative words being "or may be", section 32(1) thus excludes the court's review jurisdiction in respect of any matter which the Board may determine as being within its jurisdiction. Since the Board's section 33 jurisdiction is unfettered, this encompasses all matters which the Board proceeds to entertain - matters which the Board could, if it so wished, expressly designate as being within its jurisdiction.

---

39 See also Arthurs, *Supra*, note 4, at 329-39 for the constitutional arguments.

40 See Arthurs, *ibid*, at 328.

41 Emphasis added.
The second ground is closely related. Simply, if the Board can designate matters within its jurisdiction by express ruling, cannot the Board effect the same impliedly by reason of its proceeding with matters on which its decision depends? The difference between an express and an implied ruling for purposes of section 33 is the same as that between express and implied repeal of statutes. In result, there is no difference; for in the absence of express provision the legislature is deemed to intend the repeal of an earlier inconsistent statute. Similarly, the Board may be presumed to proceed with applications on the basis that it has addressed the issue of jurisdiction, especially since in the majority of cases the Board's jurisdiction is so clear as not to warrant mention.

This analogy to express and implied repeal would not succeed were it a stated condition of section 33 that each jurisdictional determination be expressed in the decision. But section 33 speaks only of a determination howsoever effected, impliedly or expressly.

The third ground is that the privative provisions of sections 32 and 34(2) achieve their purpose notwithstanding the section 33 determination, express or implied. The reason is that any matter which an inferior tribunal proceeds to entertain, in truth, raises the question whether it has jurisdiction. But where the Board's jurisdiction is in question, section 33 and 34(1) direct that the matter be for the Board alone to determine, thus bringing the issue of jurisdiction itself within the protective terms of section 32 and 34(2).
Hence it is enough that the Board possesses its section 33 jurisdiction, regardless of whether the determination be express, implied or made at all. A Board decision disputed on jurisdictional grounds is (to quote section 34(2)) "a decision made by the Board...upon [a] matter in respect of which the Board has jurisdiction".

(ii) **Natural justice.** The Supreme Court of Canada has affirmed that failure to comply with the rules of natural justice is a matter affecting jurisdiction, not procedure.  

Consequently, unless the Code relieves the Board of the obligation to comply with the rules, bias or failure to afford parties the opportunity to be heard will render Board proceedings reviewable. 

In light of the Code's objective, one would expect the legislature to designate the Board its own master in determining minimum standards of justice for all purposes of the Code's procedures. That expectation caused confusion at the outset, however. The uncertainty of the politicians during the legislative debates, whether the Code ought to exclude the rules, is recorded in Hansard. In the clause by clause examination of the Bill, the Attorney General debated the Opposition's call for access to the courts. In the event of denial of natural justice, the Attorney General refuted that judicial redress was no longer possible.

"And when I suggest in this Bill that the right to go to the courts in terms of a denial of natural justice is still present, I say that it's present in terms of all our inferior tribunals in the Province of British Columbia.... It isn't true to say that regardless of any error there is no access to the courts... [I]n spite of ... [the privative clause], the rules of common law apply and the question of natural justice applies.... As I say, the unwritten laws of England apply to this inferior tribunal... ."43

Compounding the uncertainty, the Minister of Labour endorsed the Attorney General's speech, yet reiterated to the House that the object of the legislation was to remove the judiciary from the Province's labour relations. 45

Which of the Minister's views prevails is unresolved. On the one hand, section 21, though empowering the Board to determine its own practice and procedure, stipulates that it "shall give full opportunity to the parties to any proceedings to present evidence and to make submissions".46 In the normal case, a decision given in breach of that requirement would render it amenable to the prerogative writs. On the other hand, if breach of natural justice be a jurisdictional error, it is a logical necessity that a body empowered to determine the extent of its jurisdiction is empowered to determine whether it need comply with natural justice.

43 BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973) (Third Session), at 926-27 per the Hon. A. MacDonald.

44 Ibid., at 927 per the Hon. W.S. King, commenting "[t]he Attorney General has made the point very well .... ."

45 E.g., "[t]he dynamics of labour relations defy the strictures of the ancient prerogative writs of the courts, writs originated to meet very different problems from those which are faced today in labour relations;" ibid, at 397.

46 Emphasis added.
In this sense, there is a conflict between the mandatory requirement of section 21 and the Board's expansive section 33 jurisdiction. It was early recognised by the Board that the draftsman may not have anticipated all the effects of the Code's major reforms. Observing that "different parts of the Code may not fit perfectly together", the Board resolved that it had a commitment to make the legislation work: "to smooth off the rough edges in the legislation to the extent this is legally permissible". In that case, the Board adhered to its commitment by recognising the need "to afford natural justice to the parties, as embodied in s.21". In resolving thus, the Board did not go as far as to disclaim its section 33 jurisdiction to discharge its functions in disregard of the rules, as indeed it is technically empowered to do. However, on the assumption that the Board would be loath to invite an application for review attendant on the ruling that it had this jurisdiction, it is unlikely that the Board will renego on its commitment to respect the section 21 requirement.

Finally, it is not expected that a court would uphold a Board decision in breach of natural justice under the third limb of section 33, conferring "exclusive jurisdiction ... to determine ... in what manner it shall exercise its jurisdiction". It is likely that this would be

48 Ibid.
construed as empowering the Board with regard to procedure not affecting jurisdiction. 50

(iii) Jurisdiction "under this Act" The jurisdictional provisions pivot on section 33. The third argument on which a court might evade these provisions involves a restrictive interpretation of section 33. This requires focussing on the primary jurisdiction that the section confers on the Board: namely, "to determine the extent of its jurisdiction under this Act, ..." 51 By so doing, it is possible to treat the Board's section 33 jurisdiction as being circumscribed by the jurisdiction possessed under the Code independently of section 33. The section 33 jurisdiction could not then be invoked by the Board to determine matters held, as a matter of statutory construction, to be in excess of the Code. Further, the fact that the jurisdiction conferred by section 33 is exclusive would not defeat this reasoning, nor therefore a court ruling that the Board had asked itself "the wrong question".

The difficulty with this argument is that the Board, in determining the extent of its jurisdiction "under this Act", is also endowed by section 33 with the "exclusive jurisdiction ... to determine any fact or question of law that is necessary to establish its jurisdiction". 52 This second limb mandates

50 Cf., Int'l Union of Operating Engineers, Local No. 882 et al., Forest Industrial Relations Ltd et al. (1961), 28 D.L.R. (2d) 249 (B.C.C.A.), holding under the Labour Relations Act (B.C.) that the Board's power to determine its own practice and procedure (see now, the Code, s.28) did not extinguish the obligation to comply with natural justice.

51 Emphasis added.

52 Emphasis added.
the Board to construe the Act for the very purpose of establishing jurisdiction. Furthermore, what the Code's provisions enact are themselves questions arising under the Act so as to fall exclusively within the Board's section 34(1) jurisdiction. Hence, the Board is insulated from judicial review even were a court able to establish, as a matter of construction, that the Board claimed jurisdiction under section 33 on an erroneous view of its enabling statute; in short, the function of statutory interpretation normally reserved to the courts for this purpose is transferred to the Board.  

(iv) External law The 'external law' approach is an extension of the third argument in that it too postulates the restrictive effect of the words "under this Act". Although no more tenable than the third, this approach is one on which the British Columbia courts have intervened. The following examines the development of the doctrine and the Board's response to it.

E. THE BOARD'S RETREAT

(a) Re Pruden

Early in the Code's operation, the Board did not seek to qualify section 33. In Workmen's Compensation Board Employees et al., the Board on applications for certification of two Crown agencies was required to determine

53 See particularly s.32(1), by reference to s.31(a), precluding the court's jurisdiction to review determinations of law or fact made under s.33.

54 s.33.

whether the doctrine of Crown immunity exempted the agencies from collective bargaining under the Code. The Board noted that its predecessor under the Labour Relations Act had consistently declined jurisdiction.\(^{56}\) In holding under the new legislation that the agencies were not exempt, the Board confined the issue to "a very difficult question of the extent of its jurisdiction under s.33".\(^{57}\) This involved the Board in a consideration of section 35 of the Interpretation Act, granting the Crown's immunity from statute.\(^{58}\) In applying that section, the Board made no mention of possible judicial scrutiny. In fact, the Board acknowledged its responsibility to the legislature, not the courts:

"The legislature contemplated that this Board would take a responsible attitude in respecting the legal framework from which it derives its jurisdiction. By the same token, when it enacted provisions such as ss.33 and 34, it certainly did not envisage that the Board would adopt a narrow, legalistic approach in defining the scope of its powers... In applying such legal concept as "Crown agency", the Board must see that it fits sensibly into the contemporary realities of industrial relations and labour law policy in British Columbia".\(^{59}\)

---

56 Ibid., at 136.
57 Ibid., at 135.
58 s.35 reads:

"No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, Heirs or successors, unless it is expressly stated therein that her Majesty shall be bound thereby."

59 Supra, note 55 at 136 (emphasis added).
This passage is not indicative of an administrative tribunal mindful of the prerogative writ; that the board's inquiry involved law external to the Code did not dissuade the Board from claiming exclusive jurisdiction to dispose of the matter. This is no longer the case.

In Pruden v Assessment Authority of British Columbia, the Supreme Court held, quashing the decision of the Board, that the Board erred in its interpretation of the statute creating the British Columbia Assessment Authority. The Board assumed jurisdiction on the ground that the relevant sections of the Act and the Code were not in conflict. Section 20 of the Assessment Authority of British Columbia Act provides:

"20(1)(a) Every person employed by the Crown or by a Municipality in respect of assessment, and who is designated by the authority, shall, ... be deemed to be an employee of the authority."
(2) Where there is a conflict between this Act and any other Act, this Act prevails.
(3) The Labour Code of British Columbia Act applies to employees under this Act."

The Authority did not designate Pruden, an employee of the municipality succeeded by the Authority, as an employee pursuant to section 20(1)(a). The Board held that the juxtaposition of this section and section 53 of the Code, governing employee successor rights, required the Authority to designate every person whose employment survives the succession; that the discretion reserved to the Authority pursuant to section 20(1)(a) was confined to those instances where there were legitimate business reasons for discontinuing the employment.

However, quashing the order that Pruden be constituted an employee of the Authority, Hutcheon J. held that the right to re-employment inferred from section 53 of the Code was repugnant to section 20, which conferred an unfettered discretion to designate successor employees. On appeal Seaton J.A., delivering judgment for the British Columbia Court of Appeal, upheld Hutcheon J.'s decision that the Board erred in its interpretation of the external statute.

The Board's attitude has been to not challenge the correctness of that decision. In granting certiorari, Hutcheon J equivocated:

"It may be argued that by reason of one or more sections of The Labour Code, the board has exclusive jurisdiction to decide questions having to do with the construction of The Labour Code. The same argument cannot be made with respect to the construction of other statutes." 64

The Board took the earliest opportunity to resolve his Honour's equivocation. Even before Hutcheon J.'s decision was reported, Chairman Weiler in Transport Labour Relations and General Truck Drivers resolved that section 33 did indeed insulate from judicial review "only Board decisions interpreting the Code, not our readings of external statutes." 65

62 Ibid.
63 [1977] 5 WWR 296
64 Supra, note 60, at 191 (emphasis added).
The second reported instance of judicial review of a Board decision is Re British Columbia Hydro and Power Authority. The issue was whether the British Columbia Hydro and Power Authority Act had eliminated the Board's jurisdiction to enforce the Code's good faith bargaining requirements pending changes to the Hydro pension scheme. The Joint Council of Unions argued that the Board's decision attracted its section 33 jurisdiction. Disagreeing, the Board noted that the determination it was required to make "is not one under this Act (Labour Code)". Citing Pruden v Assessment Authority of British Columbia:

"That fact does not prevent the Board from proceeding to determine the issue, but it allows that decision to be reviewable by the courts in the normal manner".

The Board determined that the obligations imposed by the Code were compatible with the Hydro statute, and rejected the employer's argument that it was relieved of the duty to negotiate. The British Columbia Supreme Court was of contrary opinion, following which the Supreme Court of Canada upheld the Court of Appeal's decision to reinstate the Board's ruling.

The initial proceeding is reported 73 D.L.R. (3d) 103 (B.C.S.C.) per Murray J.

S.B.C. 1964, c.7, ss.4, 53(1)(6), 55 and 55A.

The Code, ss.6 and 63.


Ibid.

Supra, note 66. Murray J held, quashing the Board's decision, that Hydro had an unfettered statutory authority to set up and administer the pension scheme. His Honour believed that it would be anomalous for Hydro to have a concomitant duty to negotiate the same.

(1977), 80 D.L.R. (3d) 159.

In the initial proceeding before Murray J, the jurisdiction of the superior courts to review the Board's decision on the Hydro statute was not in issue, counsel for the Board agreeing that the power existed.\(^74\) (The matter of jurisdiction was not again raised in the appeals.) Judicial review of Board decisions involving the application of 'external law', then, seems settled. The difficulty in supporting it in light of the Board's section 33 jurisdiction is discussed below.\(^75\)

(b) Statutes Incorporating the Code

The influence of *Pruden* is evident not only with respect to the Board's principal jurisdiction under the Code. The Board, by incorporation of the powers conferred by the Code, is entrusted with the administration of a number of labour statutes of specific application.\(^76\) The usual incorporation clause is contained in the Essential Services Disputes Act:\(^77\)

"2(2) unless inconsistent with this Act, the definitions, provisions and procedures of the Labour Code of British Columbia...apply to this Act."

This clause is read in conjunction with section 39A of the Interpretation Act, stipulating:

\(^74\) *Supra*, note 66, at 104.

\(^75\) See *infra*, F. THE JUDICIAL INCURSION.

\(^76\) Listed by the Board, *infra*, note 80 at 403.

\(^77\) S.B.C. 1973, c.83.
"39A. Where an enactment provides that another enactment applies, it applies with the necessary changes and so far as it is applicable."78

Six months prior to Pruden,79 the Board explained the legislative premise underlying the reform of British Columbia labour law. In Canadian Cellulose Co Ltd et al.,80 it explained the integrated policy of the statutes vesting jurisdiction in the Board, a policy aimed at establishing one body responsible for all phases of the Province's labour relations. In this case the Board examined the incorporation clauses under the Collective Bargaining Continuation Act.81 Quoting Hansard,82 the Board held that it had exclusive jurisdiction to administer the Act, explaining that a decision in favour of co-ordinate jurisdiction in the courts would be anathema to "the whole development of labour law in this province": that it "would make a mockery of the orderly system of dispute settlement...now operative under the Code".83 For example:

78 Enacted S.B.C. 1976, c.23, s.14. CF., Health Labour Relations Association v Hospital Employees Union (1978), 78 C.L.L.C. para 14, 174 (B.S.C.S.), per Murray J., commenting on the ground for decision in Re Government of British Columbia and Registered Nurses Association of British Columbia, (1977), 78 D.L.R. (3d) 737 (B.C.C.A.). Murray J. accepted that the Court of Appeal's ruling, that the Public Services Labour Relations Act, S.B.C. 1973 (2nd sess.) c.144 contained no mutatis mutandis clause, was made in oversight of the Interpretation Act, s.39A. Murray J. commented that s.39A "makes a mutatis mutandis incorporation clause applicable to all legislation such as section 26 of the Public Services Labour Relations Act and section 2(2) of the Essential Services Disputes Act".

79 Supra, note, 60.


81 Ibid. The Collective Bargaining Continuation Act, S.B.C. 1975, c.83, s.7, recites its own mutatis mutandis clause in language equivalent to the Interpretation Act, s.39A. Section 7 reads, "[u]nless inconsistent with this Act, the Labour Code of British Columbia applies, with the necessary changes and so far as it is applicable".

82 Ibid., at 404-405.

83 Ibid., at 403.
"It is not difficult to imagine a situation in which the parties to a dispute under the Collective Bargaining Continuation Act would be required to shuttle back and forth between the courts and the Board as the legal ramifications of the dispute unfolded."84

The Board repeated the policy opposing co-ordinate jurisdiction:

"[I]t would be inconsistent with a fundamental legislative premise to have two tribunals administering one body of labour law. The major theme of the 1973-4 reforms was the establishment of the Labour Relations Board as the body responsible for all phases of labour policy in British Columbia. Apart from its functions under the Labour Code, the Board was entrusted with a legislative mandate under five other statutes - ... The intention of the legislature was to have one integrated perspective on all facets of the collective bargaining process, rather than several isolated bodies each developing labour policy within its own domain."85

Recently, in Medical Associate Clinic and Hospital Employees' Union Local 180, the Board reconsidered its jurisdiction pursuant to the incorporation clauses in the Essential Services Disputes Act. This case involved an application under that Act to have the Board declare applicable

84 Ibid.
85 Ibid. See also Squamish Terminals Ltd and Canadian Stevedoring Co Ltd and Pulp, Paper and Woodworkers of Canada, Local 3 [1975] 2 Can. L.R.B.R. 289, at 293. In McGavin Toastmaster Ltd and Bakery and Confectionary Workers Int'l Union Local 468 [1976] 1 Can. L.R.B.R. 440, the first application to the Board for an interpretation of the Collective Bargaining Continuation Act, the Board did not discuss its jurisdiction other than to comment, "[b]y virtue of s.7 of that Act, the Labour Relations Board, acting under the relevant provisions of the Labour Code, is required to deal with disputes arising under...[it]". In Canadian Cellulose Co Ltd et. al., ibid, at 401, the Board explained that dictum thus:

"...s.7 of the Act appears to incorporate the Labour Code in its entirety and with it the tribunal which is charged (under Part II of the Code) with the task of its interpretation and enforcement. Section 7 explicitly states that 'the Labour Code applies, with the necessary changes and so far as it is applicable', and there is no other agency, judicial or otherwise which is provided for'. (Emphasis added.)

a section permitting a union to elect binding arbitration. To make this declaration the Board was required to first determine (inter alia) whether the Union was a "health care union" within the meaning of the Essential Services Disputes Act.87

As in the earlier case involving the Collective Bargaining Continuation Act, counsel's objection was that there was no jurisdiction in the Board to administer the legislation; in Medical Association Clinic et al., counsel argued in the alternative that any jurisdiction it possessed was reviewable. The Board noted that counsel relied "on such cases as British American Oil Company Limited (1963), 44 WWR 416; Lodum Holdings Ltd (1968) 67 WWR 38; and Assessment Authority of British Columbia [1976] 6 WWR 185".88 The Board did not comment on counsel's argument as to how Pruden v Assessment Authority of British Columbia affected the issue, but proffered that the combined effect of the incorporation clauses was to render applicable to the Essential Services Disputes Act sections 31, 33 and 34 of the Code.89 The Board inclined to the view, then, that not only did it possess jurisdiction to decide matters assigned by that Act, but also that its jurisdiction was exclusive and

87 Essential Services Disputes Act, s. 6(1), reads:

"6(1) Where a fire-fighters' union, policemen's union, or health care union and an employer ... have bargained collectively in good faith and fail to conclude a collective agreement or a renewal or revision of it, the trade union may elect ... to resolve the dispute by arbitration."

See also s.1, defining a "health care union".

88 Supra, note 86, at 36.

89 Ibid., at 37.
unreviewable. However, in contrast to the attitude earlier expressed in construing the Collective Bargaining Continuation Act, the Board expressly defined to rule further than that it had jurisdiction, refusing the legislature's invitation to hold that incorporation of the Code negatived the potential for review. The Board expressed its caution thus:

"This is a brief sketch of some of the arguments in support of the proposition that the Board's jurisdiction over the issues in this case - including the issue of whether the HEU is a health care union - is an exclusive jurisdiction. Having given that outline, we should say that it is not our intention at this time to express any firm view on that subject. At an absolute minimum, it is clear to us that the Board is legally entitled to exercise an original jurisdiction ... ."91

Although, as noted, the Board did not indicate how Pruden affected its jurisdiction under this Act, the Board's reference to Health Labour Relations Association v Hospital Employees' Union92 is a clue. In that case Murray J. treated the Essential Services Disputes Act as a statute external to the Code (the incorporation clauses notwithstanding), but which, subject to the court's power of review of inferior tribunals, the Board may interpret and apply for purposes of the Code.

Here, the question was whether the court had jurisdiction to determine whether an arbitrated award under that Act constituted a collective agreement. Murray J. held that section 34(1) of the Code dealt with "two

90 Canadian Cellulose Co Ltd. et al., supra, notes 80 and 85.
91 Supra, note 86, at 38.
separate and distinct matters". First, his Honour accepted that it confers exclusive jurisdiction on the Board to decide any question arising under the Code. Second, his Honour stated that it empowers the Board to decide for purposes of the Code questions otherwise arising, namely, whether a collective agreement has been entered into or is in full force or effect: this "may very properly" be decided by the Board for purposes of the Code "even although that collective agreement has been imposed by the Essential Services Disputes Act". However,

"[a]s the matters before me do not arise under the Labour Code but under the Essential Services Disputes Act, I do not consider that section 34 deprives me of jurisdiction in this case."

In Murray J's opinion, then, any Act other than the Code is 'external law' within the meaning of Pruden, the Code's incorporation notwithstanding.

Citing Health Labour Relations Association et al., the Board repeated its caution in claiming jurisdiction under the Essential Services Disputes Act in Ladner Private Hospital Ltd. et al. and Hospital Employees' Union, Local 180. The following dicta illustrate the Board's acceptance of Murray J's decision, applying the 'external law' approach to statutes incorporating the Code:

93 Ibid. (observing the pending application to the Labour Relations Board "in which section 34(1)(c) and (g) of the Labour Code are invoked").

94 Ibid., affirmed in Ladner Private Hospital Ltd. et al., infra, note 96 (B.C.L.R.B.).

95 Ibid. Contra, Canadian Cellulose Co. Ltd et al., supra, note. 80.

"As a general proposition, the Board is entitled to take into account statutes other than the Labour Code in the course of adjudicating issues under the Code itself... . If it is necessary for the Board to interpret and apply legislation external to the Code, its jurisdiction to do so is an original one and subject to judicial review." 97

Applying that "proposition":

"Nor is there anything in the Essential Services Disputes Act which would suggest that this authority of the Board to consider statutes other than the Labour Code is inapplicable in the case of that statute." 98

With reference to Counsel's objection to the Board's jurisdiction:

"[T]he most that can be said about a decision under Section 34(1) (g) of the Code is that the Labour Relations Board will be required to consider the effect of Section 6 of the Essential Services Disputes Act .... In this respect, we accept the dicta of Murray J in the Health Labour Relations Association decision, supra, as a correct expression of the Board's jurisdiction." 99

In this light it cannot be contended that the Board disclaimed its stated policy in construing the Collective Bargaining Continuation Act 100

97 Ibid., at 187.
98 Ibid., at 188.
99 Ibid., at 189.
100 Canadian Cellulose Co. Ltd., et al., supra, note 80.
for reasons other than the way in which the judiciary, commencing with Pruden, has penetrated the Board's exclusive jurisdiction. The ease with which those inroads have been made is attributable mainly to the abbreviated manner in which these statutes have bequeathed jurisdiction to the Board; incorporation of the Code's provisions by general clauses invites the characterization of the statutes as legislation external to the Code. For this reason it is difficult to understand why the draftsman elected not to duplicate in these statutes (with the necessary modifications for the purposes of each) sections 31-34 of the Code, thereby excluding the 'external law' approach pursuant to the Board's jurisdiction to determine its jurisdiction under each Act respectively.

F. THE JUDICIAL INCURSION

(a) 'External law' and section 33

In Pruden, Seaton J.A. for the Court of Appeal explained the retention of the court's power to review:

"[W]e have not been required in this case to consider the Board's exclusive jurisdiction, the privative clauses in the code or the court's power to grant certiorari respecting decisions of the Labour Relations Board of British Columbia." 101

This was stated in response to counsel's position, that "the interpretation of the [external] Act by the board is [not] protected by the privative clauses of the code": 102

102 Ibid.
"His position was that the Board was entitled to interpret the Act as part of its function but such interpretation was open to review on certiorari."

Without further reference to the Code, the Court of Appeal affirmed Hutcheon J's decision to quash; counsel's concession inviting the Court's oversight of the Board's section 33 jurisdiction.

The language of section 33 is unambiguous. Not only does it give the Board "exclusive jurisdiction to determine the extent of its jurisdiction under this Act" (that is, the Code). It also grants the Board "exclusive jurisdiction ... to determine any fact or question of law that is necessary to establish its jurisdiction". These words do not confine the Board to questions of law or fact arising on the Code's provisions: read literally, the exclusive jurisdiction "to determine any fact or question of law" embraces any statute or rule of common law where, in the Board's opinion, the determination is necessary for it to establish jurisdiction. Seaton J.A. for the Court of Appeal reasoned otherwise, however. Characterizing the issue as one of 'external law', the judge thought it axiomatic that the court's power to review survived. 103

Re British Columbia Hydro and Power Authority 104 illustrates the error in that assumption. Here, it was not disputed that in the absence of the Hydro statute the Board had exclusive jurisdiction to enforce the Code in order to

104 Cited supra, notes 66, 69, 72 and 73.
compel the Authority to bargain collectively. Whether the statute did pre-empt the Board's jurisdiction (that is, in circumstances where it was otherwise conceded) involved a question of law requiring determination. Section 33, in these circumstances, is explicit. Further, as evidence that the determination was necessary in order for the Board to establish jurisdiction, the Court of Appeal and Supreme Court of Canada upheld the Board's jurisdiction on the very interpretation of the Hydro statute as that on which the Board proceeded. As with the Board, then, these courts could not determine jurisdiction irrespective of the 'external law' determination.

The same necessity for the Board to entertain 'external law' arose in Association of Commercial and Technical Employees, Local 1728 and McGeer et al. Though no application for review was made in this case, the Board's acceptance of Pruden further illustrates the criticism. Here the Board held that it had original jurisdiction to rule on a "somewhat murky area of quasi-constitutional law" in order to establish jurisdiction to entertain an unfair labour practice complaint. Allegations were made against a Minister of the Crown (and others) in respect of statements about members of a certified
bargaining unit seeking successorship rights in educational establishments. It was alleged that these violated section 5 of the Code, in that they amounted to "coercion or intimidation" capable of compelling persons to cease to be members of a trade union. The Minister's objection to the Board's jurisdiction was that his statements, made as Member of the British Columbia Legislative Assembly, were protected by the parliamentary privilege of freedom of speech. Rejecting this, the Board ruled:

"[R]esolution of this issue requires a judgment from the Board about a complex and somewhat murky area of quasi-constitutional law, all of which is external to the Labour Code itself. But all parties were agreed that the Board does have an original jurisdiction to make up its own mind about the legal question, once if [sic] was raised in the course of an unfair labour practice complaint which was properly brought under the Labour Code. Of course, since our judgment here turns on the interpretation of a body of law outside the Labour Code, this is not a matter within the Board's exclusive jurisdiction under Section 33 et al. of the Code." 109

This decision, that the Board had only an original jurisdiction to resolve the Minister's objection, is pertinent in that the objection was raised in the course of a matter "properly brought under the ... Code". The issue, therefore, was the same as in Re British Columbia Hydro and Power Authority: whether the Board's jurisdiction was ousted by external law in circumstances where there was no dispute that it otherwise existed.

To reiterate, section 33 designates "exclusive jurisdiction" in the Board "to determine any fact or question of law that is necessary [for the Board] to establish its jurisdiction ... under this Act". The canons of

109 Ibid. (emphasis added).
statutory interpretation require that words of enactment be given effect;\textsuperscript{110} that plain words be given their ordinary meaning;\textsuperscript{111} but that this be declined where it would result in an absurdity or otherwise negate the legislature's intent.\textsuperscript{112} No absurdity, nor negation of the legislature's intent, results from attributing the words of section 33, above, their ordinary meaning. Thus, to construe the Code as granting only a concurrent, reviewable jurisdiction over these 'external law' issues necessitates excising from section 33 the second limb, empowering the Board with regard to "any fact or question of law".\textsuperscript{113} Confirming this, consistency requires that the single jurisdiction granted by section 33 \textit{vis a vis} each of the three limbs be either concurrent or exclusive. Contrary to the view in \textit{Association of Commercial and Technical Employees, Local 1728} and McGeer, it cannot be both exclusive and concurrent depending on the character of the law affecting jurisdiction, that is, as being exclusive (and unreviewable) when involving the Code and concurrent (and reviewable) when involving 'external law'.

\textsuperscript{110} Cf., Interpretation Act, s. 7(1), specifying that "[e]very enactment shall be construed as always speaking".

\textsuperscript{111} See \textit{Cozens v Brutus} [1973] AC 854 (H.L.), discouraging attempts to define ordinary words of enactment not used in an unusual sense.

\textsuperscript{112} Cf., Interpretation Act, s. 8, \textit{supra}, A. \textsc{Introduction}.

\textsuperscript{113} S.33 (emphasis added).
(b) 'External law' and competing policy regimes

Attendant on the 'external law' approach, the Board in *Transport Labour Relations and General Truck Drivers* acknowledged the considerable potential for review resulting from the need to interpret statutes empowering other tribunals. Commenting in this case on the "uneasy interaction" of the Code and the Anti-Inflation Act:

"The Labour Code does not exist as a lonely legal island. Its practice must be meshed in a coherent way with other integrated segments of the legal system, whether these be employment standards, human rights, occupational health and safety, or price and income controls. ... this Board ... does not exist in an institutional vacuum. We are an administrative tribunal with the primary responsibility to interpret and apply a comprehensive collective bargaining law. But it the Anti-Inflation Board which is the primary jurisdiction over the wage and price controls." 115

Deferring to *Pruden*, the Board conceded that any decision based on these "other segments of the legal system", 116 even though such decisions be

---

114 [1976] 2 Can. L.R.B.R. 374, discussing Hutcheon J's decision, supra note 60. See also *Joint Counsel of Newspaper Unions and Pacific Press Ltd* [1976] 2 Can. L.R.B.R. 342 at 346: the Board has "not only the responsibility, but also the duty" to consider external legislation "insofar as it impinges on disputes coming before us under the Labour Code".

115 Ibid., at 385. See also at 381, commenting that the Labour Code does not exist "in an insulated legal vacuum".

116 Ibid.
exclusively for purposes of the Code, would be amenable to judicial review.\textsuperscript{117} Such was not the case in British Columbia prior to \textit{Pruden}, however. Indeed in \textit{Re Lodum Holdings Ltd},\textsuperscript{118} the potential for review which the Board acknowledged in these circumstances\textsuperscript{119} caused Dryer J. to reject the 'external law' ground as the test for jurisdiction.

In an application to quash two decisions of the Board's predecessor under the Labour Relations Act, the issue before Dryer J. was whether a transaction concluded by the company was a "sale, lease, or transfer" within the meaning of section 12(11) of that Act. If so, pursuant to section 12(11) any existing collective agreement would continue to bind the company notwithstanding the transaction. The judge agreed that neither he nor the Board could determine this by reference to the enabling statute alone; indeed, that "the whole law must be considered".\textsuperscript{120} Counsel further submitted, citing \textit{Parkhill Furniture and Bedding Ltd v International Moulders Union},\textsuperscript{121} that whenever a tribunal is required to apply legal principles external to the enabling statute, it must do so correctly to be within its jurisdiction. His Honour did not agree, holding the question here to be one assigned to the exclusive jurisdiction of the Board. Whether it erred in applying "the whole law", then, was not a ground on which to attack the Board's decision, holding the applicant in this instance to be bound by the existing collective agreement. In so finding, the court did not doubt the potential for judicial review were it to accept counsel's "external law" argument:

\begin{itemize}
\item \textsuperscript{117} \textit{Ibid.}, at 386
\item \textsuperscript{118} (1968), 67 W.W.R. 38 (B.C.S.C.).
\item \textsuperscript{119} \textit{Supra}, note 114.
\item \textsuperscript{120} \textit{Supra}, note 118, at 48.
\item \textsuperscript{121} (1961), 34 W.W.R.13 (Man.C.A.), affirming (1960-61) 33 W.W.R.176.
\end{itemize}
"In determining almost any question that comes before a labour relations board or any other statutory or other inferior tribunal, the whole law must be considered. In very few situations can the question be determined by reference to the enabling statute alone, and even when, at first sight, it might appear to be so, that does not so appear because the other principles of law involved in the decision are so unassailable as to achieve little prominence in the inquiry. Furthermore, the principles under which certiorari is to apply must be applicable to all inferior tribunals and not merely to those which operate under a statute with simple confines." 122

Although Pruden overrules Re Lodum Holdings Ltd, neither Hutcheon J. nor the Court of Appeal referred to this decision, possibly for the reason that counsel for the Board in Pruden conceded the 'external law' ground for review. 123 Alternatively, it may be that their Honours were cognizant the Code had indeed excluded the traditional ground affirmed by Dryer J.

(c) 'External law' and the labour statute

Finally, the potential for review arises not only where policy regimes as those acknowledged in Transport Labour Relations et al. 124 impinge on the Board's jurisdiction: contrary to the legislative reform, 125 it arises also within the broad framework of the Province's labour regime.

In Ladner Private Hospital Ltd et al. and Hospital Employees' Union Local 180, 126 the Board rejected the argument that it had no jurisdiction under section 34(1)(g) of the Code to determine whether an award arbitrated under the Essential Services Disputes Act constituted a collective agreement.

122 Supra, note 118 (emphasis added). Quaere, whether the 'external law' issue in Association of Commercial and Technical Employees, Local 1728 and McGeer, et al, supra, note 107, was "so unassailable as to achieve little prominence in the inquiry".

123 Supra, corresponding to notes 101 and 102.

124 Supra, note 114.

125 See Canadian Cellulose Co Ltd et al., supra, note 80.

In so doing, the Board also confirmed the 'external law' ground for review. This was despite not only the Code's incorporation into that Act, but also its observation that "there is now...a substantial proportion of collective bargaining disputes in this Province to be settled by binding arbitration under that legislation".127

This case involved issues exclusively within the Province's labour regime: the application was made under the Code128 and involved "significant issues of policy" the Board noted, issues critical to the Province's labour relations.129 But because the Essential Services Disputes Act - itself a labour statute - was incidently involved in the application, the Board affirmed the potential for review. This was "unavoidable in view of the judgment of Murray J. in the Health Labour Relations case",130 the policy basis of the Board's decision on the Essential Services Disputes Act notwithstanding:

127 Ibid, at 191 (emphasis added)

128 Namely, under s.65(1), seeking a s.28 order directing the Hospitals to comply with the terms of the arbitrated agreement.


"The parties should realize that the answers to intensely legal questions do not necessarily dictate the outcome of cases of this kind. Section 34(1)(g) gives the Board a discretionary jurisdiction as to whether a particular document will be given the force of a collective agreement under the Code at any particular moment in time".

See also, John Inglis Co Ltd and Int'l Brotherhood of Electrical Workers, Local 213 [1974] 1 Can. L.R.B.R. 481 (B.C.L.R.B.); Canadian Cellulose Co Ltd et al., supra, note 80.

130 Ibid., per the Board.
"In making this judgment under the Code, we are directed to have regard to the objects of the Code set out in section 27. We are unable to perceive any industrial relations considerations which would compel us to conclude that the arbitration ... has failed to impose collective agreements .... On the contrary, ... unless there are compelling industrial relations considerations which dictate a contrary conclusion [i.e. considerations comprising the Board's policy], the Board will be inclined to find that the result of an arbitration under the Essential Services Disputes Act is a collective agreement in force and effect .... This inclination is a product of the purposes and objects of the Code articulated in section 27:

(a) securing and maintaining industrial peace, and furthering harmonious relations between employers and employees;

(b) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade-unions."131

At least for purposes of those statutes incorporating the Code, this case shows it is a misnomer for courts to talk of "external law" qua the ground for review of Board decisions. Aside being extensions of the Code through the incorporation clauses, these statutes and the Code comprise the Province's labour legislation, to be administered according to the labour policy to which the Board gave effect in that case. Certainly, the Minister in 1973 was anticipating the removal of the court's jurisdiction over "labour disputes" - not simply those to be governed by the Code - when he spoke of the court's inability to grasp "the overall labour picture". 132

131 Ibid., at 191, the Board noting "the mounting frustration of these employees ... which has already generated some job action - to be understandable".

132 BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES, supra, chapter headnote.
G. CONCLUSION

Given post-war labour policy in Canada, it is problematic that the settlement of the three-cornered constitutional debate of the seventeenth century, guaranteeing freedom from abuse of executive power, is today expressed in terms of the citizen's right of access to the courts.\textsuperscript{133} Pruden \textit{v} Assessment Authority of British Columbia\textsuperscript{134} is a reminder of that right, and the judiciary's ability to preserve it when threatened by privative provisions. Yet, it cannot be said that the tribunal responsible for administering the British Columbia legislation was insensitive to that reminder, since to have challenged \textit{Pruden} would have set the Labour Relations Board and the courts on a collision course which only the courts could have won. The Board's immediate acceptance of that decision can best be described as an attempt to protect its autonomy in those areas most critical to the Code. To have challenged \textit{Pruden} on a literal construction of the Code would have risked further scrutiny of its jurisdiction, and the possibility of the judiciary undermining further the legislative policy.

The speeches in the House in 1973 suggest that judges in British Columbia would be loath to re-enter the labour relations arena.\textsuperscript{135} But labour disputes invariably work to the economic detriment of some party

\textsuperscript{133} E.g. see the Opposition speeches, \textit{BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES}, \textit{supra}, note 3.

\textsuperscript{134} \textit{Supra}, notes 60 and 63.

\textsuperscript{135} \textit{BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES} (1973) (Third Session), at 935 per G.H. Anderson (kamloops).
and courts have seldom declined the opportunity to find a violation of legal right where property interests are threatened. It is not unlikely that the Board's response to Hutcheon J's decision was devised in the knowledge of this.

Since Pruden, there has been no attempt to penetrate further the Code's privative clauses, the inroads made in that case seemingly satisfying the judiciary's desire for lordship over the administrative tribunal. The compromise apparently reached may satisfy those who believe that the scope of judicial review ought to reflect the relative expertise of the judge and the administrative decision-maker; the former trained to determine the limits of the law, the latter mandated to apply policy in accordance with the law. Where the administrative decision-maker is faced with legal issues preliminary to its policy regime, issues in respect of which the agency has no special qualification, it might be thought that the retention of the court's jurisdiction to make the final determination is desirable. Exponents of this view, then, might welcome Pruden.

But for the judiciary to delve further into the British Columbia Code would be not only an unwelcome intrusion, but also an assertion of judicial supremacy over the legislature. Laskin warned of this as early as 1952, "why the courts, as one agency of government, should not respect the

---

136 See e.g., B. Bercusson, One Hundred Years of Conspiracy and Protection of Property: Time for a Change (1977) 40 M.L.R. 268

137 Transport Labour Relations and General Truck Drivers, supra, note 65.

138 But not with respect to the 'external law' ground for review under labour statutes incorporating the Code.
authority and responsibility of another agency, the legislature, in matters where no issue of distribution of legislative power arises.\textsuperscript{139} The Code sought to, and did, exclude the orthodox justification for penetrating the privative clause. "[The Privative clause] cannot be intended to transform tribunals into judicial libertines", the Supreme Court explained recently: "the view that tribunals are not competent to set the limits of their own jurisdiction is firmly entrenched".\textsuperscript{140} Although the connotations of the word "libertine" are better ignored, this is exactly what the British Columbia legislature intended, and by clear words of enactment did, when it enacted section 33.

How justified, then, is Professor Wade's recent comment, counselling courts not to be dissuaded by the Code's novel privative provisions?\textsuperscript{141} This is difficult to reconcile with his teachings on legislature supremacy: "that the rule enjoining judicial obedience to statutes is one of the fundamental rules on which the legal system depends".\textsuperscript{142} Since Professor Wade's opinions are entitled to the greatest respect, it would be enlightening to learn the basis on which he would distinguish the Code as being inherently different from other statutes. True, his thesis is that the "rule" is

\textsuperscript{139} Supra, note 1, at 1002.

\textsuperscript{140} Re Hughes Boat Workers Inc. and UAW (1980), 102 D.L.R. (3d) 661 (S.C.C.), at 665-6 per Reid J delivering judgment of the Court.

\textsuperscript{141} Supra, note 3.

rather "the ultimate political fact" on which legislative supremacy hangs but this cannot, of itself, vindicate distinguishing the Code as an instrument unworthy of the court's loyalty. Even accepting what judges in Canada may perceive of their constitutional authority, does not the public interest in devising workable procedures for minimising labour disruption demand that loyalty?

143 Ibid, at 188.
IIA. PERFECTING THE ADMINISTRATIVE SOLUTION - POSTSCRIPT

"There has been academic concern with the permitted scope of privative clauses... Opinion has varied... It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot be immunized from review of decisions on questions of jurisdiction".


A. THE DECISION IN CREVIER

The Supreme Court delivered its hallmark decision in Crevier v Attorney-General for Quebec et al.\(^1\) on 20 October 1981, subsequent to the time of writing of the foregoing chapter on the privative provisions of the British Columbia Code.\(^2\) The issue for the Supreme Court was whether the Professions Tribunal, established under the Quebec Professional Code,\(^3\)

\(^1\) (1981), 127 D.L.R. (3d) 1 (S.C.C.), per Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ., Laskin C.J.C. delivering judgment for the Court.

\(^2\) Supra, II. PERFECTING THE ADMINISTRATIVE SOLUTION.

\(^3\) R.S.Q. 1977, c. C-26, s.162.
could competently exercise the extensive powers conferred upon it, or whether these were such as to offend section 96 of the British North America Act, 1867. The Tribunal was given powers to confirm, alter, or quash any decision by a discipline committee constituted under the Professional Code, including powers encompassing review of fact or law and jurisdiction, the exercise of which was reinforced by a privative provision ousting judicial review.

The Quebec Court of Appeal availed itself of the usual construction to be placed on privative clauses and held that the language employed did not contemplate foreclosing the Superior Court's inquiry where there had been a want or excess of jurisdiction on the part of the Professionals Tribunal. The Supreme Court disagreed: as a matter of ordinary construction "[t]hat is not the case, having regard to the embrasive terms of s.194 of the Professional Code", the Supreme Court held. This rejection of the Court of Appeal's interpretation invited the Supreme Court's further finding, distinguishing Tomko v Labour Relations Board (Nova Scotia) et al. that "...it is...impossible to see [the Professions Tribunal's] final appellate jurisdiction as part of an institutional arrangement by way of a regulatory scheme for the governance of the various

---

4 Principally under s.175, albeit see also, s.169 also singled out by Laskin C.J.C. for comment: supra, note 1, at 2.
5 Section 194.
7 Supra, note 1, at 8.
professions". Refuting what at least one member of the Quebec Court of Appeal preferred to believe, Laskin C.J.C. explained:

"The Professions Tribunal is not so much integrated into any scheme as it is sitting on top of the various schemes and with an authority detached from them, although, of course, exercising that authority in relation to each scheme as the occasion requires. There is no valid comparison with the cease and desist orders which the Labour Relations Board in the Tomko case was authorised to issue in its administration of a collective bargaining statute".10

However, reflecting on the Supreme Court's main substantive determination Laskin C.J.C. observed, "This Court has hitherto been content to look at privative clauses in terms of proper construction and, no doubt, with a disposition to read them narrowly against the long history of judicial review on questions of law and questions of jurisdiction".11 Of the "section 96" challenge his Honour further observed, "It is enough to deflect s.96 if the privative clause is construed to preserve Superior Court supervision over questions of jurisdiction...".12 What if, however, as in the instant case, the language is too specific to admit of such a construction? "[I]s the clause constitutionally valid?" asked Laskin C.J.C.13 Following Attorney-General for Quebec et al. v Farrah et al., his Honour replied:

9 Supra, note 1, at 11.
10 Ibid.
12 Ibid, at 12.
13 Ibid.
"In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s.96 Court. ...this is the first time this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction".15

B. **LASKIN C.J.C.'s VOLTE-FACE?**

It is ironic that it was Professor Bora Laskin (as he then was) who once observed the "apparent futility" of the various post-war attempts to oust the court's jurisdiction over matters assigned to the labour board.16 "In the face of such enactments", Laskin cautioned, "judicial persistence in exercising a reviewing power involves an arrogation of authority only on the basis of constitutional principle (and there is no such principle) or on the basis of some 'elite' theory of knowing what is best for all concerned".17 The irony is that three decades hence it is Bora Laskin qua Chief Justice of Canada who delivers the very decision of the Supreme Court18 unequivocally affirming the existence of just such a principle. In 1952 he was adament. "We must not...delude ourselves", Laskin instructed, "that judicial review rests on any higher ground than that of being implicit in statutory interpretation":19

---

15 Supra, note 1, at 12 and 13.


17 Ibid, at 991.

18 Supra, note 1.

19 Supra, note 16, at 990.
"We may well feel that judicial supremacy is the highest of all values under a democratic regime of law, and a value to which even the legislature should pay tribute. But we have not enshrined it in any fundamental constitutional law or in our political system. On the contrary, the cardinal principle of our system of representative government, inherited from Great Britain, has been the supremacy of the legislature. In Canada this has been modified only through a distribution of legislative power consonant with federalism and by a few guaranties such as those relating to education, language and the independence of the judiciary. We must not then delude ourselves...".20

Perhaps the saving qualification in that quotation is Laskin's general reference to Canada's distribution of legislative power. But Laskin was at pains to dispel any suggestion that this, or any aspect of the Canadian constitutional setup, abridged his "cardinal principle" of legislative supremacy for the specific purpose of enjoining judicial obedience to the privative clause. In addition to the quotation above berating courts for their disobedience and disavowing any constitutional justification for their "persistence",21 Laskin reiterated, "At the threshold of this inquiry it may be well to make the assertion that there is no constitutional principle on which courts can rest any claim to review administrative board decisions".22 And upon this acknowledgement "In constitutional matters involving the distribution of legislative power, judicial supremacy is an accepted fact",23 he concluded: "Yet the question remains why the courts, as one agency of government, should not respect the authority and responsibility of another agency, the legislature, in matters

20 Ibid.
21 Ibid, at 991.
22 Ibid, at 989.
23 Ibid, at 1002.
where no issue of distribution of legislative power arises". Contrast Laskin C.J.C.'s judgment in Crevier: recurring throughout is the reference to a "provincially-appointed statutory tribunal", the basis of the "section 96" challenge. Would it really have been judicially improper for his Honour, in recognising the academic concern expressed with regard to the permitted scope of the privative clause in Canada, to have included, amid the four citations given (dating indeed from the time of his own publication), reference to his own critique?

C. AFTER CREVIER

There is little use now in pleading for judicial recognition of the legislative policy underlying section 33 of the British Columbia Code. In fact, on the strength of Crevier one must speculate whether those provisions of the Labour Code which emphatically preclude review even on jurisdictional grounds are any longer constitutionally valid. Can these reasonably be construed to preserve Superior Court supervision over the Board's jurisdiction? On the foregoing it is submitted not.

24 Ibid.
25 Eg., see the quotation, supra, text, corresponding to note 15.
27 Supra, II. PERFECTING THE ADMINISTRATIVE SOLUTION.
Accordingly it seems that the sole focus now must be on the distinction between errors of law within jurisdiction and jurisdictional error: the former may be validly insulated from judicial review, the latter not. Herewith the British Columbia Board must be resigned to the freedom which the conceptualism of Anisminic\textsuperscript{28} gives courts to needlessly and gratuitously interfere in issues of labour relations policy more appropriately referred to the administrative agency - after all it was judicial enthusiasm for this freedom which caused British Columbia to experiment with its novel method of foreclosing judicial intervention on grounds of jurisdiction. (Is it not also significant that in the two cases in which the Supreme Court has upheld the legislature's intent and ruled in favour of the privative clause precluding all curial review, it has been for purposes of upholding the "section 96" challenge to the agency's jurisdiction?\textsuperscript{29}) On the other hand, perhaps there has been more cause for optimism exhibited recently in cases such as C.U.P.E. Local 963 v New Brunswick Liquor Corporation,\textsuperscript{30} where the Supreme Court willingly deferred to the expertise of the Labour Relations Board in specialist matters confided to it. Perhaps this suggests that courts will not now interfere with Board decisions unless the error obviously goes to jurisdiction? But the fact remains that no matter now tolerant the courts or extensive the judicial goodwill, the decision is nonetheless their's, the judges', to resolve what is jurisdictional and what is not - and history may well have it that this depends as much on what the judge had for breakfast as any legal consideration.

\textsuperscript{28} [1969] 2 A.C. 147 (H.L.). See the discussion, \textit{ibid}, text, corresponding to note 25 et seq.

\textsuperscript{29} Attorney-General for Quebec et al. v Farrah et al., \textit{supra}, note 14; Crevier v Attorney-General for Quebec et al., \textit{supra}, note 1.

D. GENERAL

In retrospect the weight of academic opinion prior to Crevier probably supported the argument upheld in that case, such that the "section 96" challenge to the Board's jurisdiction was more a matter of "when" than "if". Yet this does not detract from the British Columbia experiment in jurisdictions where the "section 96" problem does not arise and the sole issue is the appropriate drafting of an effective privative clause.
III. THE EVOLUTION OF CANADIAN LABOUR POLICY
AND THE BRITISH COLUMBIA REFORMS

A. INTRODUCTION

The duty to bargain collectively as a mechanism for interest-dispute settlement is an American innovation dating from the Wagner Act of 1935.¹ Prior to its adoption by the Canadian jurisdictions, the policy that had monopolised Canadian labour legislation since MacKenzie King's original Industrial Disputes Investigation Act² was state intervention through conciliation and investigation of labour disputes. However, whereas the failings of this system of normative intervention in labour disputes was not least among the reasons for the adoption of the Wagner principles in post-war Canada, they did not displace in its entirety Canada's indigenous policy of conciliation and investigation of labour disputes. In this sense post-war labour policy in Canada has been markedly ambivalent in attempting to integrate the two methods of dispute settlement. Of significance for Canada, British Columbia is the first jurisdiction to break with the ambivalence: conciliation beyond the mediation stage is

² Industrial Disputes Investigation Act, S.C. 1907, c.20.
discarded by the Code. It may be noted that whilst a shift in emphasis in the same direction is discernible elsewhere in Canada, these developments fail to rid the labour statute of Canada's former dependence on normative intervention.

This chapter traces the stages by which the Wagner principles were adapted to meet the needs of labour legislation north of the border, culminating in the British Columbia reforms of 1973-74. The chapter following reveals the second critical feature of the duty to bargain collectively in British Columbia, of significance for North America generally. It will be seen that the United States Supreme Court has developed an elaborate jurisprudence around the statutory duty to bargain in good faith under the National Labor Relations Act. In British Columbia this jurisprudence has been rejected. Aimed at developing meaningful negotiations, the Code's collective bargaining regime reproves of legal constraints on the bargaining exchange. It is, in particular, this feature of the Code's policy that is contrasted with the New Zealand Industrial Conciliation and Arbitration system examined in Part II.

B. THE STATUTORY BASIS OF AMERICAN POLICY

Today, the duty to bargain collectively in good faith is the linchpin of North American labour legislation. The earliest experiment with the

3 See generally, H.D.Woods, Labour Policy in Canada (Toronto, Macmillan of Canada, 2nd ed., 1973); A.W.R.Carrothers, Collective Bargaining Law in Canada (Toronto, Butterworths, 1965), Ch.4. The former, used extensively by the writer, is the leading study on Canadian labour policy and the development of its legislation.

legal right of workers to negotiate through freely-chosen representatives was instituted by the United States Railway Labor Act of 1926.\(^5\)

Unsuccessfully challenged in 1930 as being beyond the constitutional authority of Congress, this Act made it a legal requirement for railway management to negotiate exclusively with the representatives so chosen.\(^6\)

Seven years hence, Congress passed the National Industrial Recovery Act in an attempt to extend that right beyond the railway industry into all sectors of the private economy; but in 1935, in *Schechter Poultry Corporation v United States*, the Supreme Court declared the statute to be *ultra vires* the federal authority.\(^7\)

Undaunted, Congress that same year enacted the "Second New Deal", originating as a Senate Bill introduced by Senator Wagner in March 1934.\(^8\)

Unlike its forerunner, however, the Supreme Court in 1937 declared this Act - the National Labor Relations Act, 1935 - to be constitutionally valid.\(^9\)

\(^5\) 45 U.S.C.A.


\(^7\) 295 U.S. 495. For commentary on the "First New Deal", see ibid., at 260-262.

\(^8\) Ibid., at 260-347.

\(^9\) *N.L.R.B. v Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) (per Chief Justice Hughes for the Supreme Court).
This statute, modelled on the Railway Labor Act of 1926, incorporated four principles: the freedom of workers to choose their representatives, compulsory recognition, compulsory bargaining, and exclusive bargaining rights. Thus conceived was, what was to become, the cardinal feature of North American labour law - the majority union's right to exclusive representation. The object was to maximise collective bargaining in order to minimise labour conflict. To achieve this the promoters of the Wagner Act saw it to be their first task to cull employer opposition to the development of an orderly and systematic labour movement. The legal requirements written into the Wagner Act were circumscribed accordingly. Imposing duties on employers to respect the new legislative rights conferred on workers, the Wagner Act shunned reciprocity in exacting nothing of workers' organisations. In 1947, however, the Taft-Hartley Amendment to the Wagner Act redressed the balance by making the bargaining obligation mutual, requiring workers' representatives to approach the bargaining table with the same commitment - to good faith bargaining - demanded of employers.

C. THE EARLY EXPERIMENTS IN COLLECTIVE BARGAINING

The passage of the Wagner Act was to prove equally fundamental to the development of Canadian labour law. Canadian unions, particularly those affiliated to the American Federation of Labor and the emerging Congress of Labor...

10 Summarised by Woods, supra, note 3, at 65.


12 Labor Management Relations Act, 1947. For the events that impassioned the demand to curb union power during the 40's, see Schwartz, Koretz, ibid., at 548-49.
Industrial Organizations, exerted pressure almost immediately for legislation of the Wagner design. Until this time Canadian labour policy was firmly committed to compulsory conciliation in substitution for the work stoppage in industrial disputes. This was the legacy of the federal Industrial Disputes Investigation Act of 1907. A legacy it was since, in the Snider decision of 1925, the Privy Council held the federal Act to be unconstitutional as infringing on the exclusive right of the Provinces to legislate on property and civil rights matters. Ironically this had the effect of strengthening the policy: as a result of the decision all Provinces other than Prince Edward Island either enacted legislation declaring applicable the provisions of the federal Act to disputes within the Provinces' jurisdiction or enacted an Industrial Disputes Investigation Act of their own modelled on the federal Act.

To sketch the procedures thus duplicated or declared applicable upon a dispute arising, the 1907 Act empowered the Minister of Labour for the Dominion to appoint a Board of Conciliation and Investigation. The Board's function was to inquire into and to endeavour to effect a settlement of the dispute. It was given power to, inter alia, enforce the attendance of witnesses and to compel the production of documents. If no settlement was arrived at, it was to make a full report and a recommendation for settlement to the Minister. After a reference to the Board a lockout or strike was, by section 56, declared to be unlawful and any breach of this provision was punishable by a fine.

13 See Woods, supra, note 3, at 66-7.
15 See the discussion in Snider, ibid.
With the passage of the Wagner Act, however, this national policy was tested by provincial experiments recognising collective bargaining as a right. These early experiments with Wagner principles were patterned on the draft statute of the Canadian Trades and Labor Congress, urged on the provincial governments in 1936-37. Yet they did not profoundly affect the basic Canadian system, the introduction of collective bargaining rights supplementing rather than replacing the policy of compulsory conciliation and investigation of specific disputes. For example, two provinces (Alberta and Nova Scotia) enacted legislation endorsing freedom of association for employees, the right to recognition for unions and the right to collective negotiations with management. However, while importing the Wagner principles of free collective bargaining, neither Province in 1937 imported the administrative machinery necessary to assure their implementation. In the absence of the permanently-constituted labour board, workers confronting employer opposition to the new legislation were forced to seek relief either by striking or through the impractical alternative of turning to the courts. In this respect, not for a further seven years did a Canadian jurisdiction accommodate labour's enthusiasm for the American policy.

The initial move to adopt the administrative machinery of the Wagner Act occurred in British Columbia in 1943 with the passing of an amendment to the British Columbia Industrial Conciliation and Arbitration Act, 1937.

16 Woods, supra, note 13.
17 See the Wartime Labour Relations Order, P.C. 1003, 1944, discussed infra.
18 S.B.C. 1937, c.31.
Under the amendment employees could still elect to bargain through representatives, but if the majority of the employees so electing belonged to one trade-union, that union was accorded the right to bargain on behalf of all the employees. The amendment, by not establishing a labour relations board to administer the certification and bargaining rights, did not adopt the administrative structure of the Wagner Act. However, a number of functions it did entrust to the Minister of Labour for those purposes renders British Columbia the first of the Canadian jurisdictions to move in the direction of the Wagner Act, the Minister substituting in this instance for the permanent administrative agency. The "major breakthrough" resulting in the implementation of "the full principle and procedure" of the Wagner Act occurred one month later in Ontario. Unlike the ad hoc basis on which the British Columbia Act was administered, the Ontario statute created a specialised agency to administer certification and bargaining rights, and invested it with the power to deal with employer recalcitrance. In substitution for the investigation and conciliation machinery retained by the British Columbia Industrial Conciliation and Arbitration Act, 1937:

19 See Woods, supra, note 3, at 83-4. On being notified of an election by workers to select bargaining representatives, the Minister was empowered, inter alia, to take whatever steps he deemed necessary to satisfy himself that a majority of the employees affected were members of the trade-union claiming the bargaining rights and that the election of the bargaining representatives was properly conducted.

20 Ibid., at 83-85.
"Freedom of association was guaranteed; bargaining was compulsory and specialized machinery was established to enforce the policy. The court was authorized to receive complaints of violation of the law. It could issue restraining and compliance orders, direct reinstatement of persons discharged contrary to the provisions of the law, and assess damages to the injured employee. These functions, together with the certification authority and the power to conduct investigations and votes, meant that Ontario was accepting, as policy, the right to collective bargaining, and was establishing a special authority to guarantee its exercise."\(^\text{21}\)

The agency entrusted with the functions of the Ontario Collective Bargaining Act 1943 differed (at least in status) from the National Labor Relations Board established by the Wagner Act, and labour boards in Canada today, in the sense that the Ontario agency was designated a special branch of the Ontario High Court. While, ostensibly, this emphasised a judicial solution to labour disputes, the functions of the Ontario Labour Court were little different in nature from the partly adjudicatory and partly administrative functions performed today by labour boards. Many of the Court's functions in fact were delegated to the Registrar of the Court, a non-judicial officer invested with the permanent administration of the legislation. Thus it is probably true, as one commentator states, that

\(^{21}\) Ibid, at 85. Cf., U.S.W.A. Local 1005 v Steel Co. of Canada Ltd [1944] 2 D.L.R. 583, at 587, in which the Ontario statute was distinguished from all pre-war legislation in Canada as protecting the right to organise freely and bargain collectively. Contrast the Snider decision, supra, note 14, in which the Industrial Disputes Investigation Act, 1907 was described as a "sedative measure" operating only at the point where a dispute has arisen, providing cooling off procedures, but not so as to confer protection of freedom of association in collective bargaining. See also, Carrothers, supra, note 3, at 51, distinguishing the Ontario statute from pre-war British Columbia legislation, the latter "regarded principally as a device for preventing strikes and lockouts" (citing Bloedel, Stewart and Welch Ltd v Stuart [1943] 1 D.L.R. 183, affirming [1942] 4 D.L.R. 648, at 650).
the Ontario agency "constituted the first [comprehensive] administrative machinery in Canada for the operation of a general collective bargaining law".  

D. THE IMPETUS FOR A NATIONAL POLICY

Much of the impetus for the development nationally along the lines of the Ontario legislation was provided by the exigencies of war, and the need for a positive labour policy in a situation that emphasised industrial peace and institutional stability. The war economy, amid general shortages, rising demands, and increased economic activity, exposed the shortcomings of the normative interventionalist policy of the Industrial Disputes Investigation Act. The pressure for change which Canadian unions had exerted following the Wagner Act intensified. In 1940, the federal Government issued a statement of principles, implemented subsequently by Orders-in-Council, 23 endorsing the right of workers to negotiate freely through their trade-union with employers (or the representatives of employers' associations) with the view to concluding a collective agreement. 24 This policy, responding to the Wagner Act, was carried over into the Wartime Labour Relations Regulations proclaimed in force in February 1944. 25 The ad hoc three-member boards operating under the

22 Carrothers, ibid., at 50.

23 P.C. 7440, 1940, declaring a wages policy; P.C. 8253, 9514 and 10195, 1941, establishing a general wage-control system under the National War Labour Board; P.C. 8021, 1941, declaring the right of peaceful picketing; P.C. 4020, 1941, providing for a special inquiry; and P.C. 7307, 1943, providing for supervised strike votes.

24 For the further Government declarations of 1940 endorsing that right, see Carrothers, supra, note 3, at 52; Woods, supra, note 3, at 85-94.

25 P.C. 1003, 1944.
earlier Order-in-Council were replaced by a permanent National War Labour Board and provincial regional boards, operating on a co-operative federal-provincial basis. This instrument established on a national basis, then, what Ontario had established the previous year on a regional basis.

For the reason that it gave Canada the administrative machinery for the operation of a general collective bargaining system, the 1944 Order-in-Council is acclaimed as creating "Canada's first comprehensive labour policy, embracing union organization, contract negotiation and contract administration". Moreover, "of all the sources that influenced the contents of post-war legislation, the Wartime Labour Regulations of 1944 had the most direct impact":

"This order reflects experience under the Industrial Disputes Investigation Act, the American Wagner Act of 1935, the British Columbia Act of 1937, the Ontario Act of 1943, and the two wartime Orders-in-Council establishing the National War Labour Board...It also contained provisions peculiarly its own. It may fairly be described as Canada's first comprehensive labour policy...".

Broadly speaking, the significance of the 1944 instrument lies in the fact that it combined for the first time, on a national level, the two streams of experience that had influenced Canadian labour policy prior to the war. Borrowing from the Wagner Act, the Wartime Labour Relations Regulations fused the machinery of compulsory collective bargaining - hitherto

26 Carrothers, supra, note 3, at 53.
27 Ibid.
28 Ibid.
experimented with by a number of Provinces - with the indigenous policy of suspending the work stoppage pending compulsory conciliation and investigation of labour disputes.

The extension of the wartime measure to employer-employee relations otherwise exclusively within the jurisdiction of the Provinces was effected pursuant to Parliament's emergency powers. Its constitutional validity was short-lived, therefore; but its twin principles of compulsory collective bargaining and compulsory conciliation survived to establish a labour relations system that was peculiarly Canadian. The federal statute to succeed the wartime measure was the Industrial Relations and Disputes Investigation Act, 1948. Uniformity was encouraged, and most Provinces adopted the 1948 Act in the immediate post-war period as the blue-print for provincial legislation. Understandably, there were many minor and even some major differences between the federal and respective provincial statutes (the most notable being the omission from the Saskatchewan Act of the machinery for compulsory conciliation of interest disputes). But with the emphasis on uniformity, the federal system that originated as a wartime expedient survived peacetime conditions to establish a national labour policy unique to Canada.

29 R.S.C. 1952, c.152.

30 Principally by the Minister of Labour in the federal Government, the Hon. H. Mitchell, speaking to a conference of labour ministers in October, 1946 (Labour Gazette, Vol. XLVI, 1946, at 1524), advocating that the wartime regulations had operated satisfactorily and that failure to pursue a uniform labour policy would be detrimental to the development of a stable industrial environment.

31 The 1946 conference resolving in favour of "the adoption as far as practical of uniform collective bargaining legislation by the provinces and the Dominion"; ibid., at 1525.

E. POST-WAR POLICY AND THE AMBIVALENCE TO BARGAINING

Despite Canada's adoption of American principles, distinguishing the American from the Canadian system established in 1948 are the differing interventionalist policies traditionally advocated in the United States and Canada. American policy, particularly at the federal level, is strongly accommodative in the sense that it is aimed at assisting parties to resolve their differences without reference to, or imposition of, standards external to the parties. Accomodative intervention thus seeks to avoid third party appraisal and evaluation of the parties' bargaining positions. Its object is to encourage parties themselves to make whatever concessions may be necessary to reach agreement in bi-lateral settlement of the dispute (usually with the aim of avoiding or ceasing the costly work stoppage), and for this reason can properly be described as an extension of the collective bargaining process. The Taft-Hartley Act, 1947 preambles the American policy thus:

"...it is the policy of the United States that...(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements...and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes".  

33 See generally Woods, supra, note 3, Ch. V, for the differences in policy in the United States and Canada.

34 Labor Management Relations Act, 1947, s.201(b). See also s.201(a) declaring "[t]hat it is the policy of the United States that (a) sound and stable industrial peace and the advancement...of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining...".
The agency responsible for implementing that policy is the Federal Mediation and Conciliation Service,\(^{35}\) which is assisted in its task by the statutory duty imposed on parties to its proceedings to exert every reasonable effort to reach an agreement. Section 204(a)(1), the provision imposing this duty, thus preserves throughout mediation and conciliation the overriding statutory obligation on the parties to bargain collectively in good faith\(^ {36}\) as the mechanism for reaching settlement.\(^{37}\)

The method and extent of intervention in Canada following the federal Act of 1948\(^ {38}\) differed in minor respects according to the jurisdiction, but in the main followed the precedent established by the Industrial Disputes Investigation Act of 1907. Post-war Canada thus tended towards normative intervention, involving the application of external standards by a conciliation officer or board in imposing or in justifying recommendations for a settlement. Despite the inevitable variations noted, post-war Canadian conciliation policy is suitably represented by the federal Industrial Relations and Disputes Investigation Act, 1948. H.D. Woods summarised the Act's conciliation machinery thus:

35 Section 203, stipulating (inter alia) that it is "the duty of the Service...to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation" (emphasis added).

36 Section 8(a)(5), creating an unfair labour practice for refusal or failure to comply.

37 For further indication of the American policy, see s.206, denying the President's Board of Inquiry in disputes causing or likely to cause a national emergency the power to make recommendations for settlement of the dispute (albeit requiring the President to publish the Board's report setting out the facts in the dispute and each party's statement of its position).

38 Industrial Relations and Disputes Investigation Act, 1948.
"Briefly, this forbids the taking of a strike-vote, or engaging in strikes, until a union that is entitled to give notice to require an employer to commence collective bargaining has given such notice, until a conciliation officer has been requested as provided in the legislation, has failed to effect an agreement, has reported his failure to the Minister, and has recommended the setting up of a conciliation board, and until the board has functioned and reported to the Minister and seven days have elapsed from the date of receipt of this report by the Minister. Only then may a strike vote be taken or a strike or lockout commenced. The Minister has some discretion to short-circuit some of the steps; but aside from this limited degree of uncertainty, the alternatives open to the parties are to settle by themselves or to proceed along the path of compulsory conciliation as a means of reaching either a settlement or the time when they may resort to the strike or lockout".39

In the conventional analysis of labour relations, as premising an economic-power relationship, normative intervention through conciliation meant that the Canadian system was more uniquely Canadian than an amalgam of Canadian and American principles. Under the federal Act of 1948, the alternatives availing the parties were "to settle by themselves or to proceed along the path of compulsory conciliation".40 In practice, this meant proceeding directly along the path of compulsory conciliation: a labour relations system would be superfluous were no mechanisms and sanctions required to assist the parties to settle. Accordingly, normative intervention was the first means of effecting settlement. Only where that failed to produce a settlement were the parties actuated by the requirement to bargain collectively. Indeed, prior to which the prohibition on economic sanctions meant that the opportunity to settle through collective bargaining was more illusory than real, thus further illustrating Canada's dependence on normative intervention.

39 Woods, supra, note 3, at 165, summarising the effect of s.21.
40 Ibid.
Saskatchewan stood apart as the sole Canadian jurisdiction that neither imposed the conciliation service on the parties, nor inhibited the bargaining process by prohibiting the work-stoppage where attempt was made to conciliate a dispute at the parties' request. At the other extreme was British Columbia. In 1968 it replaced conciliation boards, the second stage intervening-agency, with a Mediation Commission. Described by one writer as "a court-like agency for intervention in negotiation disputes", this body represented the high-watermark of normative intervention in post-war Canada: a "public orientated agency, designed to pressure the parties into accepting 'correct' solutions [to labour disputes]". Whereas the conventional conciliation board is ad hoc in the sense that its functions are confined to specific disputes, the Mediation Commission operated on a permanent basis as part of the formal machinery for dispute settlement. The first objective of the usual conciliation board is "to endeavour to bring about agreement between the parties in relation to the matters referred to it". It suffices to contrast this with the extreme normative language of the British Columbia Mediation Commission Act, 1968. Section 14(7) required that "a hearing by the Commission shall be concluded by delivery to the Minister of the Decision with respect to the Statement of Matters in Dispute". "Decision" was defined thus:

41 Trade Union Act, R.S.S. 1953, c.259. See supra, note 32.


43 Woods, supra, note 3, at 173.

44 Ibid.

45 Eg., Industrial Relations and Disputes Investigation Act, 1948, s.32; Ontario Labour Relations Act, R.S.O. 1960, c.202, s.22.
"15.(1) The Decision shall state the terms and conditions of a collective agreement which in the opinion of the Commission would be a fair and reasonable collective agreement between the parties, together with reasons supporting the opinion held by the Commission.

(2) A Decision shall not be held to be defective by reason of the fact that it states the substance only of the terms and conditions of a collective agreement, without prescribing the precise language in which the collective agreement shall be written".

As with other Canadian jurisdictions from 1948, the British Columbia Mediation Act, 1968 included the duty to bargain collectively as the dual mechanism for effecting settlement. Owing to the potential for second-stage intervention however, particularly at the insistence of the Minister of Labour where he was of the opinion that "the public interest is or may be affected by a dispute", this further mechanism was a wasting asset.

As under present legislation, the obligation to discharge the duty to bargain collectively was the prerequisite of the lawful work-stoppage. Since to invoke the work-stoppage as contemplated by the bargaining mechanism was likely to instigate intervention - at the behest of the employer perceiving the tactical advantage of delay or by the Minister in the public interest - British Columbia paid only lip-service to the role of

46 Section 5(1). Section 49 sanctioned the obligation by making it an offence for a party to refuse or fail to bargain collectively as required by s.5(1).

47 Section 11(2), thereby activating the Act's procedures for second-stage intervention via the Commission in the event of the parties failing to settle with the assistance of a Mediation Officer.

48 Cf., s.17, permitting the parties to conclude a collective agreement during the Commission's proceedings. Contrast the legal obligation on the parties under the Taft-Hartley Act, s.204(a)(1), buttressed by the unfair labour practice, supra, note 36.


50 Section 11(1).

51 Section 11(2).
collective bargaining in labour disputes. From the point of view of the accommodative procedures in the United States, state intervention was the primary method of dispute settlement.

F. THE CULMINATION OF CANADIAN POLICY: THE FIRST INNOVATION OF THE BRITISH COLUMBIA CODE

Section 151(b) of the Labour Code of British Columbia repealed the Mediation Services Act which, in 1972, replaced the Mediation Commission Act, 1968. An interim measure only, the Mediation Services Act, 1972 abolished second-stage normative intervention - to which the 1968 Act was committed - and introduced single-stage conciliation at the discretion of the Minister. When enacted the following year, the Labour Code did not capitulate on what this interim measure had achieved; indeed, the Code completed what this 1972 Act initiated by introducing a mediation service that would augment rather than substitute for its collective bargaining regime.

This emphasis on accommodative procedures designed to assist the bargaining relationship, to which this section is devoted, is the Code's first innovation. However, British Columbia was not alone in this respect. In the early 1970's a shift in policy from normative to accommodative intervention was discernible elsewhere in Canada also.

It is not coincidence that the first Canadian examination of the good faith bargaining requirement did not occur until 1966. 52 At that time, it

was believed that the "overwhelming stress" placed on compulsory conciliation in Canada had had the effect of obscuring the obligation to bargain collectively; which, it has been noted, was adapted from the Americans to redress the shortcomings of state intervention. The noticeable paucity of Canadian cases gave credence to the belief that "in some ways this stress has had the effect of precluding the...[bargaining] requirement". This was despite the increasing realisation in the mid-1950's that state intervention through compulsory conciliation and investigation was no longer a viable cornerstone of Canadian labour policy - by this time some contended that reliance on conciliation induced more labour unrest than it settled. Thus, by the late 1960's, it seemed that Canada had three options: to retire the state from performing any role in labour matters, thus allowing complete freedom in bargaining; to move toward the enforced arbitration of the contents of collective agreements; or to enhance the role of collective bargaining by stipulating minimum standards of bargaining conduct.

53 Ibid., at 409.
54 Ibid.
55 The most vocal of the early critics was Woods, Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal (1955) 21 Can.Jo. Ec. and Pol. Sci. 151; Labour Relations Law and Policy in Ontario (1958) 1 Can. Pub. Admin. (No. 2) 1. The argument advanced was that compulsory conciliation imposed on parties relieved them of the responsibility pending conciliation to effect the necessary compromises; a period during which, moreover, neither party need fear any compulsion to settle as a result of the work-stoppages. For later statistics, indicating that the greater the number of employees involved in a dispute, the less likely it is to be settled by conciliative measures (accounting hence for the significant contribution of conciliation boards to the total man-hours lost through work-stoppages), see Woods, supra, note 3, at 191-207.
Given the extent of state involvement since the initial Industrial Disputes Investigation Act and the great public demand in Canada for industrial peace in times of instability, the first option was not a contender. Nor was the second a likely option, given that arbitration could not expect to succeed where normative intervention through conciliation had failed. Thus, the viable option was the third, endorsed by two jurisdictions other than British Columbia in the early 1970's by the additional emphasis on collective bargaining.

It is a shift rather than a change in policy in these jurisdictions for the reason that the two-stage conciliation process is preserved. Many of the sections in the respective statutes reproduce procedures codified by the federal Act of 1948; some in fact reproduce procedures established by the

---

56 Cf., Woods, ibid., at 169, footnote 39, identifying the British Columbia Mediation Commission Act, 1968 with "the sort of vigorous intervention frequently advocated by members of the public, especially when their patience with the inconvenience of work-stoppages has been strained".

57 For recent reproval of compulsory arbitration of interest disputes, reviewing the reasons why this method has been discouraged in North America, see C.J.M.S. Radio Montreal Ltd et al., supra, note 4, at 369-371 (per Can. L.R.B.). Cf., infra, note 58.

58 But cf., the British Columbia Essential Services Disputes Act, S.B.C 1977, c.83, permitting binding arbitration of interest disputes in essential industries in substitution for the work-stoppage. This legislation is but one example of the exception made throughout Canada with respect to essential services in the public sector. For comment, see P.C.Weiler, Making a Virtue out of Necessity (Reflections on Strikes by Essential Public Employees), Keynote Address, 27th Annual Conference, Industrial Relations Centre of McGill University (April, 1979). See also the recent inclusion in the Ontario Labour Relations Act, R.S.O. 1970, c.232, s.34(c)(1) (inserted S.O. 1975, c.76, s.7), authorising the parties at any time after the giving of notice to bargain to refer the dispute to an arbitrator or board of arbitration for a final and binding settlement. By virtue of ss.2, an agreement pursuant to that provision supercedes all of the Act's procedures for resolving interest disputes.
initial conciliation and investigation Act of 1907. Nonetheless, the shift in policy is apparent. In 1948, Parliament preambled its statute "An Act to provide for the Investigation, Conciliation and Settlement of Industrial Disputes". This Act was the prototype for post-war, provincial legislation. In 1970, Ontario reformulated its labour law thus:

"Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade-unions as the freely designated representatives of employees".

Manitoba followed the Ontario precedent in 1972 by inserting a preamble declaring the same. Parliament too has redefined the object of the Canada Labour Code to emphasise the role of collective bargaining. In 1972 it added the preamble:

"Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
And whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada...".

59 In particular, the Minister's discretion to publish the conciliation board's report recommending terms of settlement as a device to concentrate public pressure on the parties to settle; see eg., Canada Labour Code, R.S.1970, c.L-1, s.170(b). By virtue of s.168(1), the conciliation commissioner (or board) is obligated to include in his (or its) report to the Minister "his or its findings and recommendations" (emphasis added). The Ontario statute is silent as to the matter of publication, but presumably an express prohibition would be required to prevent the Minister's publication of conciliation reports. Note that the same requirement is exacted of a conciliation board pursuant to s.31(l), to "report its findings and recommendations to the Minister". Contrast the British Columbia Labour Code, infra.

60 Industrial Relations and Disputes Investigation Act, 1948.
62 Manitoba Labour Relations Act, S.M. 1972, c.45.
These declarations repeat what American legislation has expressed since 1935. The shift in policy they disclose amounts to a statutory discretion to the respective Ministers to convene conciliation as an adjunct to the bargaining process, and not as a substitute for it. Unlike the British Columbia statute, however, the legislation in these jurisdictions (in particular, those provisions dealing with the Minister's discretion to convene second-stage conciliation) does not guarantee the system of accommodative intervention that complements collective bargaining in the United States. The Canada Labour Code is a good illustration.

Under the 1948 statute the discretion in the Minister to convene conciliation was not hedged by legal criteria. At the first stage of intervention, all that was required prior to the Minister instructing a conciliation offer was either that bargaining had commenced or that it had not commenced in the required time. In addition, conciliation services were available on a party's request. Overriding all else, the Act authorised first-stage intervention "in any case in which in the opinion of the Minister it is advisable". At the second stage, the Minister's authority to appoint a conciliation board was not fettered by the need for a conciliation officer's report. The Act authorised intervention "in any

64 Wagner Act, s.1, declaring it to be "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by encouraging the practice and procedure of collective bargaining. ... Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury... ."

65 Industrial Relations and Disputes Investigation Act, 1948, s.16.

66 Ibid.

67 Ibid.
case where in the opinion of the Minister a Conciliation Board should be appointed. The Act thus imposed no barrier to normative intervention at a stage when the potential for settlement through negotiation had not been exhausted.

That position is unaltered today. Under the revised statute of 1970, the Minister's discretion to convene conciliation is unfettered whether he be acting on his own initiative or upon receiving notice from the parties "of their failure to enter into or revise a collective agreement." On receiving notice from the parties, section 164(1) specifies the Minister's options. He may (a) appoint a conciliation officer; (b) appoint a conciliation commissioner; (c) establish a conciliation board - an alternative second-stage agency to (b); or (d) notify the parties of his election not to exercise his discretion to do any one or more of the above, whichever the case. In the absence of notice, section 164(2) empowers the Minister to take any of the actions in (a) to (d) above where he "considers it advisable to take any [such] action". In this light, then, any change in the policy of the Canada Code is not discernible on the Act's provisions: the discretion to substitute normative intervention for collective bargaining remains the same as under the Code's predecessor.

---

68 Section 17.
69 Cf., Canada Labour Code, s.163, inviting a party to inform the Minister of their failure to conclude an agreement.
70 New by S.C. 1972, c.18.
71 Quaere, Wood's comment, supra, note 3, at 165, footnote 20; that "ministerial discretion has been substantially increased" as a result of the four options specified by s. 164 (ibid.). Despite the specification, the unfettered nature of the discretion is unaltered; if at all the discretion being reduced by reason of the specification.
Nonetheless, the emphasis in the preamble inserted in 1972 on the practice and procedure of collective bargaining is a declaration of principle which can be expected to influence ministerial discretion in favour of first-stage, accommodative intervention.\(^72\)

By comparison the British Columbia Code is not dependent for the efficacy of its policy on ministerial discretion. Distinguishing it from the Ontario, Manitoba and Canada statutes, the British Columbia statute removes normative intervention in interest disputes by making provision for intervention by way of mediation only. Section 69 empowers the Minister to "appoint a mediation officer to confer with the parties" on the request of either party to the dispute. The Minister is endowed with the same power where, during the course of collective bargaining, "he is of the opinion that the appointment is likely to contribute to more harmonious industrial relationships between the parties".\(^73\) This language, and that specifying the officer's function ("to confer with the parties"), is strongly accommodative in spirit.\(^74\) The Code is notable for the omission of any second-stage, conciliation procedure. It suffices to note that Part VII of the Code, authorising the Minister to appoint a special officer to confer with the parties to a dispute, hold hearings, make recommendations and "such orders as he considers necessary or advisable",\(^75\) is confined to disputes of right arising during the currency of a collective agreement.

\(^{72}\) Cf., the inclusion of option (d), implicit in the discretion formally existing, bringing to the Minister's attention that he need not accede to requests for or institute of his own motion conciliation proceedings where, foreseeably, settlement is more imminent through collective bargaining.

\(^{73}\) Section 69(2).

\(^{74}\) Cf., the American policy, Labor Management Relations Act, 1947, s. 201(a)(b), supra.

\(^{75}\) See ss. 113 and 114.
Further, there is in the legislation an absence of the provision common
to other jurisdictions authorising the Minister to publish all or part
of an investigating officer's work; a ploy dating from the original
conciliation and investigation Act to concentrate the pressure of public
opinion on the parties to settle on the recommended terms of settlement.
The omission of this from the British Columbia statute also mitigates the
otherwise 'normative requirement' that a mediation officer, appointed to
confer with parties, make a report to the Minister setting out the matters
upon which the parties have and have not agreed; just as it mitigates the
otherwise 'normative discretion' reserved to the Minister pursuant to
section 64(4) to direct the mediation officer to include in his report
recommended terms of settlement. Lest it be doubted, the accommodative
spirit of the legislation is confirmed by the fact that the Minister's
discretion under Section 64(4) does not arise unless either or both parties
expressly request the mediation officer to so include such recommended terms.

The remaining provision of the Code requiring mention is section 70.
On its face, this section may evince a strong desire for normative intervention
at the initial stage of the bargaining relationship. This section empowers
the Board to impose a "first collective agreement" where the newly certified
bargaining unit is frustrated in its attempts to utilize its status to
conclude a first agreement. Ostensibly, this is an extreme normative approach

76 See supra, note 59.
77 See Woods, supra, note 3, at 164.
78 Section 69(3).
to initial management-union disputes in the sense that an external agency is legally empowered to arbitrate a settlement specifying terms and conditions that will bind parties for the first-contract year. Yet the purpose of the section 70 agreement does not constitute an exception to the general scheme of the Act.

In the legislative debates in 1973 the Minister of Labour explained that its purpose was to promote the bargaining relationship - and thus the resolution of disputes by mutual agreement - where one party was intent from the outset on obstructing the relationship. This is discussed below. Presently, it suffices to mention that the Board has been careful not to lose sight of the object of this "unusual device", emphasising restraint, reiterating that "the remedy is intended only for the very exceptional case, the one in which the real stumbling block to agreement is employer distaste for the process of collective bargaining as such". Consequently, it cannot be said that the potential for arbitration at this initial stage exists other than in-aid-of the Code's expressed object: "to improve the practices and procedures of collective bargaining" as the means "for promoting conditions favourable to the orderly and constructive settlement of disputes between employers and...trade-unions".

---

79 BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973) at 517, per the Hon. W.S. King.

80 Infra, Chapter IV.


82 Section 27(1)(b)(c).
G. SUMMARY

The first innovation of the British Columbia Labour Code is the omission of the machinery for normative intervention to effect settlements of labour disputes. Coupled with the acceptance of economic sanctions as the method to resolve impasse in the bargaining exchange, this places British Columbia first among the Canadian jurisdictions to culminate the evolution of labour policy from compulsory conciliation of interest disputes to free collective bargaining. The second innovation stems from the policy of the body responsible for the administration of the Code's bargaining regime. In defining the substantive scope of the duty to bargain collectively, the British Columbia Labour Relations Board has rejected the categories of bargaining-subject on which the United States Supreme Court has developed its jurisprudence for delimiting the parties' legal obligations in interest disputes.

83 Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union, supra, note 4 (B.C.L.R.B.).
IV. THE DUTY TO BARGAIN COLLECTIVELY IN BRITISH COLUMBIA: THE AMERICAN JURISPRUDENCE REJECTED

"But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement."

per Justice Burton, delivering the majority decision of the Supreme Court in N.L.R.B. v Borg Warner 356 U.S. 342 (1958), at 349.

"The significance about...[the Code's provisions defining the duty to bargain in good faith] is that they deal only with how a party negotiates and not what it negotiates."

A. THE AMERICAN JURISPRUDENCE

The evolution of the jurisprudence the Supreme Court eventually countenanced in *N.L.R.B. v Borg-Warner Corporation*\(^1\) has been exhaustively treated by a number of writers, who have examined both the legislative history of the bargaining requirement and the early interpretations placed upon it.\(^2\) However, a skeletal outline of the background to this landmark decision\(^3\) will clarify the Supreme Court's reasoning and the substantive scope of the bargaining obligation the decision established under the National Labor Relations Act.

(a) The early board decisions and the Taft-Hartley amendment

The rules delineating the scope of the bargaining obligation which *Borg-Warner* sanctioned have their genesis in the early decisions of the National Labor Relations Board. As early as 1939, four years following the passage of the Wagner Act, the N.L.R.B. was moving toward a classification of bargaining subjects in disposing of unfair labour practice allegations. In one early decision, the N.L.R.B. held that an employer could not insist of the union that it organise the employer's competitors as a condition of

---


agreement over the bargaining table. That decision was followed in 1940 by a similar N.L.R.B. ruling, holding an employer could not demand in negotiations that the union post a performance bond as a condition of agreement on other terms. While in other decisions, the N.L.R.B. singled out terms urged by one party as imposing an affirmative duty on the other to negotiate, holding a refusal or failure to do so constituted an unfair labour practice. These decisions were consequences of the N.L.R.B.'s policy announced upon the passage of the Wagner Act. Declared the Board in 1936:

"Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the intent to adjust differences and to reach an acceptable common ground...The Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining."  

The N.L.R.B. thus emphasised that it was the party's mental state - whether he had "the intent to adjust differences and to reach an acceptable common ground" - which was the decisive factor in determining whether he had breached the Act. Since this could be ascertained only by inferences from observable conduct, this resulted in the Board developing general criteria for ascertaining an employer's intent, which involved the Board in scrutiny of the

---

7 1 N.L.R.B. Ann. Rep. 86-88. See also, Atlantic Ref. Co., 1 N.L.R.B. 359 (1936), at 368. For the origins of this policy under the National Industrial Recovery Act, 1933, s.7(a), see Connecticut Coke Co., 2 N.L.R.B. 88-89 (1934); Houde Engineering Corp., 1 N.L.R.B. 35 (1934) (Old Compilation).
8 Ibid.
reasonableness and type of employer proposals and counterproposals. It was but a short step for critics of the N.L.R.B.'s policy to contend that the Board was attempting to prescribe the terms of agreements, and that unless the law were amended to check the Board it would proceed further in the direction of regulating the substance of bargaining. The industrial unrest that followed World War II heightened the critics' perceptions of the Board's policy, and in 1947 the Taft-Hartley amendment to the 1935 Act was passed. Urging the need for amendment, Representative Hartley submitted the House Report on the amendment Bill.

"[T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make.

... These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements."  

The bill the House supported (but which was altered substantially pursuant to Senate amendment) sought to mitigate the consequences of the Board's policy by specifying in the definition of collective bargaining topics of compulsory negotiation. The object was to confine strictly the Board's policy to those bargaining subjects elaborated, thus eliminating

9 For cases establishing the Board's criteria, see Fleming, supra, note 2, at 991-92; Duvin, supra, note 2, at 253-54 et seq.

10 Duvin, ibid., at 254.


unfair labour practices on the part of the employer for refusal or failure to negotiate matters not so elaborated. According to the specification of subjects proposed, this would have restricted compulsory negotiation to wages, hours, work requirements, employee discipline, promotion, job assignment, seniority, vacations, plant health and safety, layoff, recall and grievance procedure. The Senate amendment to the bill however, which subsequently passed into law, deleted from the definition these specified topics and substituted the general indicia "wages, hours, and other terms and conditions of employment". Section 8(d) of the 1947 Act reads:

"[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...but such obligation does not compel either party to agree to a proposal or require the making of a concession..."

Given the Senate's acceptance of the criticism of the N.L.R.B., its amendment is puzzling since to leave intact the Board's policy in respect of "other terms and conditions of employment" effectively preserved the Board's freedom to designate union demands as being compulsory bargaining subjects. Further, in the little congressional discussion of

13 But cf., N.L.R.B. v Borg-Warner Corp., supra, note 1, in which the Supreme Court upheld an unfair labour practice on the part of the employer for imposing a bar to further negotiations pending agreement on a non-mandatory subject of bargaining.


15 Ibid.

16 For a criticism of the Board's policy, see J.J. Adams and R.L. Coleman, Can Collective Bargaining Survive the Board? (1963-64) 52 Georgetown L.J. 366, the criticism "result[ing] from the Board's expansion of the subjects of bargaining to include the core of management's responsibility", at 366. Contra, B.C. Sigal, The Evolving Duty to Bargain (1963-64) 52 Georgetown L.J. 379, urging the need for vigilance on the part of the Board "to assure that all factors materially bearing on the employment relationship...be subject to collective bargaining", at 380.
section 8(d)\textsuperscript{17} it is perplexing that the House Conference Report stated that although the amended provision "did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, [it] had to a very substantial extent the same effect as the House bill in this regard".\textsuperscript{18} On the contrary, numerous decisions following the Taft-Hartley Act 1947 attest to the evolving meaning of "other terms and conditions of employment"\textsuperscript{19} - not that this is surprising when one considers the plethora of industrial enterprise governed by the National Labor Relations Act and the inevitable social and industrial changes that accompany technological advancement in the developed economy.\textsuperscript{20} Indeed, the decision itself in \textit{N.L.R.B. v Borg Warner Corporation}\textsuperscript{21} exemplifies the imprecision of the section 8(d) criteria, in that it is generally agreed that the Supreme Court might properly have held the employer counterproposal in issue to be of the type that might legitimately be insisted upon as a condition

\textsuperscript{17} Noted by Duvin, \textit{supra}, note 2, at 267.


\textsuperscript{19} For new items held to be mandatory subjects of bargaining, see \textit{N.L.R.B. v Niles-Bement-Pond Co.}, 199 F.2d 713 (2d Cir. 1952) (Christmas bonuses); \textit{N.L.R.B. v Hart Cotton Mills, Inc.}, 190 F.2d 964, 972 (4th Cir. 1951) (rental of company owned houses; but cf., 206 F.2d 33 (5th Cir. 1953); \textit{Weyerhaeuser Timber Co.}, 87 N.L.R.B. 672 (1949) (price of meals furnished by the employer); \textit{Fleming Mfg. Co.}, 119 N.L.R.B. 452 (1957) (free coffee at coffee breaks during working hours). For discussion, see \textit{supra}, note 16; A.S. Manson, \textit{Technological Change and the Collective Bargaining Process} (1973) 12 West Ont. Law Rev. 173, at 175-187.

\textsuperscript{20} See Manson, \textit{ibid.}; Sigal, \textit{supra}, note 16. See also \textit{Borg-Warner, supra}, note 1, at 358-59, per Justice Harlan (diss.), observing the "unsettled and evolving" character of employment relations, and the contract provisions evolving in response to socio-economic change.

\textsuperscript{21} \textit{Ibid.}
of agreement. 22 The Taft-Hartley amendment failed, then, not only to clarify the scope of compulsory negotiation under the National Labor Relations Act but also to allay the critics' fears of increasing N.L.R.B. intrusion into the substance of bargaining.

However, one feature of the amendment seldom acknowledged is that it countenanced the classification of bargaining subjects the Board had developed in earlier decisions. 23 Congress disapproved of the way in which the Board was applying the good faith bargaining standard, resulting in an unacceptable method of inquiry focussing on the employer's substantive bargaining position. Rather than eliminate the Board's policy, Congress sought to confine it to specified subjects of bargaining most proximate to traditional employment relations. 24 In addition to wages and hours of employment, the initial Hartley Bill specified some ten further subjects of bargaining (listed above) that would have entitled the Board to uphold an unfair labour practice against an employer for failure or refusal to negotiate. The Senate amendment's replacement of these subjects by the general words "and other terms and conditions of employment" did not affect the legislative intent - to confine the duty to limited topics of bargaining. 25 For this reason, it should not be thought that the premise on which the majority reached its decision in N.L.R.B. v Borg-Warner Corporation was foreign to the legislation.

22 See, e.g., Fleming, supra, note 2, commenting that "the view that the ballot clause was a mandatory bargaining subject is hardly open to doubt". Justice Harlan, leading the dissent in Borg-Warner, recorded his disagreement with the majority view (holding the ballot clause to be a voluntary and not mandatory bargaining subject).

23 E.g., supra, notes 4-6.

24 Albeit, with only partial success; see supra, note 19.

25 See supra, note 12.
(b) N.L.R.B. v Borg-Warner Corporation

(i) The decision. The issues arose following the N.L.R.B. certification of the United Automobile Workers in 1952 as the bargaining agent for the Wooster Division of Borg-Warner. In concert with a Local affiliated to the U.A.W., the Union presented the company its bargaining demands. The legal questions eventually adjudicated by the Supreme Court arose out of two counterproposals presented by the Company. The Company refused to settle with the Union unless the agreement contained, first, a "ballot clause" (calling for a pre-strike vote of employees - union and non-union - as to the employer's final offer in future negotiations) and, second, a "recognition clause" (acknowledging the substitution of the Local for the U.A.W. as the employees' bargaining agent). The Union capitulated to the company's demands, but thereupon filed a charge of violation of section 8(a)(5) of the National Labor Relations Act.

At the first stage of the proceeding, the trial examiner found no bad faith throughout the negotiations, but recommended that the company be found guilty of an unfair labour practice for insisting on the inclusion of the two clauses as a condition of settlement. Justice Burton, delivering the opinion of the Supreme Court, explained:

"He reasoned that, because each of the controversial clauses was outside the scope of mandatory bargaining as defined in s.8(d) of the Act, the Company's insistence upon them, against the permissible opposition of the unions, amounted to a refusal to bargain as to the mandatory subjects of collective bargaining."27

27 Ibid., at 347-48.
The N.L.R.B. (two members dissenting) adopted the trial examiner's recommendation, holding the company to have committed a per se violation of section 8(a)(5) in respect of each clause demanded. However, in the Board's petition to have its order enforced, the Court of Appeals set aside that portion relating to the "ballot clause", upholding the Board's cease and desist order with respect to the "recognition clause" only: observing the ballot clause to be a variation of the no-strike clause which had already been declared to be bargainable, the Court of Appeals felt compelled to hold the former to be a mandatory bargaining subject.

Thereupon, owing to "the importance of the issues and because of alleged conflicts among the Courts of Appeals", the Supreme Court granted leave to appeal and reversed that decision (four Justices dissenting). Justice Burton held the company's insistence with respect to the "ballot clause" to be a per se violation of the Act, upon the ground that the clause did not regulate the employment relationship so as to qualify as a mandatory subject warranting a party's insistence. Rather:

"[i]t relates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. It settles no term or condition of employment - it merely calls for an advisory vote of the employees...[It] deals only with relations between employees and their unions."
(ii) **Comment.** Even assuming the validity of the principle on which the court premised the issues (that is, that it is no less analytically possible than it is desirable that bargaining subjects be classified so), the decision raises more questions than it resolves. For example, Justice Burton for the majority thought it important in the dictum, above, that the clause did not create rights and duties between employer and employee *inter se:* "it merely calls for an advisory vote of the employees...it deals only with relations between employees and their unions."\(^{33}\) Would the decision have been different, therefore, had the clause sought to bind the employees through their union to accept or reject the company's last offer, whichever the case, according to the outcome of the vote? Presumably it would since it was on this basis that Justice Burton distinguished the "ballot clause" from a "no-strike clause", the latter "prohibit[ing] the employees from striking during the life of a contract".\(^ {34}\) Accordingly, "[i]t regulates the relations between the employer and the employees" so as to justify bargaining to impasse, concluded Justice Burton.\(^ {35}\)

Yet, how sensible is this distinction?\(^ {36}\) The obvious criticism, applicable generally to the principle *Borg-Warner* affirmed, is revealed by the party's respective positions in this case. If the ballot procedure was not a matter proximately affecting the employment relationship so as to justify resort to economic sanctions on reaching impasse, why then were the parties deadlocked over the matter - the one party insisting the clause be included, the other insisting it be not included?

---

33 Ibid. (emphasis added)
34 Ibid., at 350.
36 Cf., the discussion by Fleming, *supra*, note 2, at 1001-1005.
However, the major criticism of the Borg-Warner decision is directed at the extent of N.L.R.B. interference with the substance of bargaining that results from reducing the issues to the tight legal confines of the Borg-Warner *"per se"* approach. Since the British Columbia Labour Relations Board has rejected this approach, it is better to defer this criticism until the analysis of the Board's policy in British Columbia.

(iii) The "Borg-Warner straight-jacket". The American jurisprudence is explained by Justice Burton, speaking for the Supreme Court in Borg-Warner:

"The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining...This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement."38

Three categories of bargaining subjects can be distilled from the dictum. The first includes mandatory subjects, pertaining to the section 8(d) criteria, "wages, hours, and other terms and conditions of employment". Refusal or failure to bargain over contract proposals within this category

37 See generally, the discussions, *supra*, note 2.

38 *Supra*, note 26, at 349.
is a per se violation of the Act. The correlative of the duty is the right to resist the other party's proposals, and to invoke economic sanctions as the principal determinant for breaking impasse. 39

The second category includes voluntary or permissive subjects. Upon characterising the "ballot clause" in Borg-Warner40 thus, the Supreme Court had two alternatives. Either the Supreme Court could have determined that the company's insistence on including the clause in the agreement was, in the circumstances of the total situation, a negation of the statutory language to bargain over "wages, hours, and other terms and conditions of employment": 41 or that insistence on the clause was, per se, an unfair labour practice. The trial examiner's affirmative finding of good faith notwithstanding, Justice Burton in the above dictum42 opted for the latter, thus positively excluding from the duty legal subjects of a "non-mandatory" nature. With respect to voluntary or permissive subjects then, parties are free to voluntarily negotiate such matters provided a party's proposal does not constitute a bargaining ultimatum (hence Justice Harlan's dissent, dismissing 'voluntary bargaining' as a contradiction in terms 43).

39 Expressed thus by Justice Burton, ibid.: "The duty is limited to those subjects, and within that area neither party is obligated to yield. National Labor Relations Board v American Insurance Co., 343 U.S. 395,... As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree."

40 Supra, note 26

41 Cf., the Harlan dissent, ibid.

42 Supra, note 38.

This distinguishes the second from the third category pertaining to illegal subjects, which may not be proposed for incorporation in a labour contract. In the Borg-Warner case, the issue over the "recognition clause" was easily disposed of for this reason, for all the tribunals agreed that the object of the clause was in contravention of the Act's policy guaranteeing the certified unit's right of exclusive representation. Insistence on contract proposals within this category is, per se, a violation of the duty to bargain collectively, even where those proposals otherwise pertain to the mandatory subjects of "wages, hours, and other terms and conditions of employment".

Obviously, the "per se" rule pertaining to the third category of bargaining subjects imposes considerable restriction on the parties' freedom to define their relationship. No one, however, has challenged the justification of the rule: confining the substantive scope of bargaining to lawful subjects is little different from denying private individuals the capacity to enforce an illegal contract. Rather, it is the voluntary-mandatory dichotomy that is the critical feature of the American jurisprudence, which commentators attack as imposing an unwarranted restriction on the parties' ability to force the concessions required for mutually acceptable solutions to labour problems. But despite the


45 Eg., U.M.W. v Pennington, 381 U.S. 657 (1965).

46 Eg., Fleming, supra, note 2, at 996-97, observing that the decision in Borg-Warner, supra, note 26, had the effect of changing the bargaining result in opposition to the company's superior economic position to achieve its bargaining demand. See generally, the discussions, supra, note 2.
"almost unanimous support" among commentators for the Harlan dissent in Borg-Warner, "there is no reason to anticipate release from the Borg-Warner straight-jacket; both labor and management have learned to live with it". 47

B. THE JURISPRUDENCE REJECTED

(a) The former deference to Borg-Warner

"The crucial undefined standard" is how the Board, in the first year of the Code's operation, described the duty "to bargain collectively in good faith...and to make every reasonable effort to conclude a collective agreement":

"This obligation originally evolved within American law and formed an important element in the original Wagner Act. The various Canadian statutes have followed this American lead in more or less the same language as now exists in the Code. For a variety of reasons, the Canadian concept has remained almost totally under-developed by comparison with its American counterpart (see Palmer, 'The Myth of Good Faith in Collective Bargaining', (1966) 4 Alberta Law Rev. 409). In this case, the B.C. Labour Board will give its first interpretation of the scope of the duty imposed by...the Code." 48

Under the earlier British Columbia Mediation Commission Act49 Aikins J. in Western Wholesale Drug Ltd. v Retail Wholesale and Department Store Union, Local 580 50 was absolved from deciding whether the Borg-Warner "per se" rule

47 Duvin, supra, note 2, at 272-273.
49 S.B.C. 1968, c.26 (discussed supra, Ch. III).
respecting voluntary bargaining subjects attached to the obligation imposed by this statute to bargain collectively;\(^{51}\) his Honour found the union to have breached the obligation by raising as an ultimatum to further negotiations an issue which the parties were powerless to negotiate. However, observing the lack of Canadian authority in point his Honour nonetheless referred to *Borg-Warner* \(^{52}\) and *Douds v International Longshoremen's Assn., Independent, et al.* \(^{53}\) - which counsel for the plaintiff cited - as having "derived some assistance." \(^{54}\) "[B]ut lacking the complete corresponding American statutory provisions," \(^{55}\) the Judge declined to comment further on these American authorities.

Two years hence in *Otis Elevator Co. Ltd v International Union of Elevator Constructors, Local 82 et al.*, the British Columbia Court of Appeal upheld a decision below declaring a strike illegal pursuant to the same Act.\(^ {56}\) Although not expressly referring to *Borg-Warner*, their Honours cited *Western Wholesale Drug Ltd* and affirmed the voluntary-mandatory division of bargaining subjects. Nemetz J. explained the division for purposes of the former British Columbia statute thus:

"The inclusion of non-mandatory subjects of bargaining (i.e. other than rates of pay, wages, hours, of employment and other conditions of employees) are not barred from discussions in collective bargaining. The purpose of the legislation is to promote industrial peace and thus allow the parties full freedom of discussion." \(^{57}\)

\(^{51}\) S.24.
\(^{52}\) 356 U.S. 342 (1958).
\(^{53}\) 241 F.2d 278 (1957) (N.Y.C.A.)
\(^{54}\) *Supra*, note 60, at 214.
\(^{55}\) Ibid.
\(^{56}\) (1973), 73 C.L.L.C. para. 14, 166.
\(^{57}\) Ibid.
Accordingly:

"[T]he court should be reluctant to examine the content of the proposals and counter proposals...placed on the table during collective bargaining unless it can be shown that: (a) the proposal requires either party to commit a criminal offence or (b) it is clearly discernible that a non-mandatory proposal has been raised as a condition precedent to bargaining on mandatory issues..."  

In identifying mandatory, voluntary and unlawful subjects, the court did not go as far as to affirm the much criticised "per se" rule governing a party's insistence on voluntary subjects: in Borg-Warner the Supreme Court held that merely to insist on a non-mandatory subject in opposition to the other's resistance is an unfair labour practice.  

In Otis Elevator Co. Ltd Nemetz J. qualified his dicta, above, by two further requirements: that a party seeking concessions on non-mandatory subjects be acting "with the object of deliberately obstructing collective bargaining", and that "such bargaining does not, in fact, proceed".  

This need to establish the intended effect of the party's obstruction aligns the approach more with the Harlan dissent, which emphasised the need for an evaluation of the total situation in order that a party's insistence on a particular item be found to violate the Act.

Nonetheless, the court affirmed the Borg-Warner principle to the extent that, first, unyielding insistence on mandatory subjects could not, of itself, found an unfair labour practice, and, second, that non-mandatory subjects - that is, "other than rates of pay, wages, hours of employment and

58 Ibid.

59 See Justice Burton's dictum quoted in the text, supra, corresponding to note 38.

60 Supra, notes 57 and 58.
other conditions of employees" — were deserving of scrutiny where a party's insistence upon such non-mandatory matters inhibits the bargaining exchange. Contrary then to what the Board has since established in British Columbia, the approach in *Otis Elevator Co. Ltd* turned upon the substance of the contract proposal and its characterisation according to the voluntary-mandatory division of subjects.

(b) *Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union* 62

From the outset the British Columbia Labour Relations Board warned that it intends to develop bargaining standards that are appropriate to British Columbia, stating firmly that while it will consider decisions from other sources it will not import doctrine wholesale from other jurisdictions. 63 Repeating the need to develop policy on a case by case basis, the Board in 1975 observed the lack of statutory guidelines as to what conduct is, and what conduct is not, in violation of the duty: "[t]he right of deciding what those guidelines shall be is the exclusive jurisdiction of the Board under s.34(1)(h) and they shall be developed case by case". 64 Citing *Noranda Metal Industries Ltd*, 65 the Board in broad terms rejected the American doctrine by instructing "[w]hat is significant about...[the Code's provisions]

---

61 Cf., Nemetz J., ibid.
63 See Canadian Association of Industrial, Mechanical and Allied Workers, and Noranda Metal Industries Ltd, supra, note 48, at 162.
65 Supra, note 48.
is that they deal only with how a party negotiates and not what it negotiates". Two years hence in Pulp and Paper Industrial Relations Bureau, the Board, for the first time, was seized of the opportunity to deal specifically with the American doctrine.

The Union wished to bargain about improvements to its existing employee pension plan established in 1975. In addition to seeking the improvements for workers retired under the 1975 plan, the Union also sought improvements for employees who had retired prior to 1975 by bringing them under the umbrella of the existing plan. The Bureau, as the accredited bargaining agent for the companies affected, refused to discuss the latter proposal. Its position was that the Union was not legally entitled to bargain in respect of retired workers who were neither in the bargaining unit nor subject to the Union's certification.

In alleging the Bureau to have violated the Code, the Union did not seek to impugn the Bureau's "genuine and sincere effort" to conclude an agreement. On the contrary its case was that "the legal duty to bargain attaches to particular topics which one party wants to place on the bargaining agenda" and that as the matter of retiree pension benefits was a mandatory subject of bargaining the Bureau's refusal to negotiate the Union's proposal constituted a per se violation of the Code.

66 Supra, note 64.
67 Supra, note 62, at 65.
68 Ibid.
The Bureau replied that while it was not precluded from discussing the issue, any negotiations on its part were voluntary. Further, although not counter-petitioning the Union for unyielding insistence on what the Bureau contended was a voluntary subject, in accordance with American doctrine the Bureau did contend that the Union would be disabled from striking to force agreement upon it. The Board dismissed the arguments of both parties, however, along with the Union's complaint in this case.

(c) "Legitimate" bargaining subjects and the "employee" concept

The Bureau argued from a legal standpoint that the Union's statutory mandate - pursuant to its certification as the bargaining unit - was confined to "employees", denoting active and not retired members of the workforce. The Board conceded at the outset that there were "a wide variety of provisions in the statute" to support the argument, that basically "[t]he Code is designed to furnish collective bargaining to employees". The Board cited section 46, designating a trade-union's exclusive bargaining authority pursuant to its certification in terms of a "unit", which is defined as a "group of employees". The definitions of "collective agreement" and "dispute" were also cited, as were the sections obligating the union wishing

69 Ibid.
70 Ibid.
72 The Code, s.45.
73 Section 1.
74 Ibid.
to invoke strike action to have first bargained collectively\textsuperscript{75} and to have received the support of a majority of the "employees in the unit affected".\textsuperscript{76} Nonetheless, to quote the Board:

"In our view, it would not be fruitful to pursue the ambivalent legal question of whether retired workers are 'employees' within the unit and thus entitled to full union representation and collective bargaining with the employer."\textsuperscript{77}

It is discussed below that much of the Board's incentive for rejecting the Borg-Warner doctrine was to remove from the bargaining table legal issues likely to inhibit the bargaining exchange\textsuperscript{78} (hence the Board's admitted preoccupation generally with practical labour relations considerations\textsuperscript{79}). Indeed, exemplifying its dislike of strictly legal approaches to labour problems the Board was able to point to a number of reasons why retiree pension benefits have come to be accepted by the labour relations community as a "legitimate" subject for negotiation.\textsuperscript{80}

Noted first was the altruistic concern of the active employees for their retired brethren, particularly where there exists the community of interest

\textsuperscript{75} Sections 6 (creating the unfair labour practice for failure or refusal to comply with the duty imposed by s.63) and 80(a), specifically prohibiting strikes and lockouts until attempts to conclude an agreement through collective bargaining have failed.

\textsuperscript{76} Section 81 (emphasis added by the Board).

\textsuperscript{77} Supra, note 62, at 71.

\textsuperscript{78} Eg., see Gearmatic Co. and United Steelworkers of America, Local 2952 [1977] 1 Can. L.R.B.R. 243 (B.C.L.R.B.), at 247.

\textsuperscript{79} See s.27(l).

\textsuperscript{80} The quotation marks denote the adjective used by the Board to avoid the implication that there are categories of bargaining subjects within the Code's bargaining regime; see infra.
that typifies the regional industries of British Columbia. The Board's reference was to "a typical town in which the major industry is a pulp mill, a sawmill, or a smelter". But superceding the altruistic concern, the Board held the Union's proposal was not devoid of benefit to the active members of the bargaining unit. It was explained in light of the dissipating effect of inflation on negotiated pension levels that active employees have a direct interest in assuring the regular adjustment of retiree pension levels - to assure that the active employee will receive the benefits of his equity accumulated through that portion of the unit's economic package devoted annually to the pension which he, the active employee, will ultimately receive. For this reason, the Board rejected the argument that the subject of bargaining in dispute bore no nexus to the employees comprising the unit.

This finding is significant for two reasons. First it is improbable that a judicial tribunal enjoined to apply the cannons of statutory interpretation would have concluded thus. As the Board noted, on being certified a trade-union's exclusive authority is to "bargain collectively on behalf of the unit and to bind it by a collective agreement"; "unit", suffice it to add, is defined as "a group of employees". Thus viewed aside the other provisions emphasising terms and conditions of employment and the role and status of employee in the bargaining process, a tribunal disposed towards the judicial solution to labour disputes would likely hold the active employee's interest in improving retiree pension levels to be too remote to fall within a trade-union's bargaining authority. Not that the Board

81 Supra, note 62, at 66.

82 Ibid., at 66, referring respectively to ss.46 (emphasis added) and 1.

83 Eg., ss.1 (re "collective agreement" and "dispute"), 45 (re certification pursuant to majority employee support) and 81 (re strike mandate).
was unaware of this it seems, for in introducing the Bureau's argument on the statutory provisions it footnoted the American decisions dealing with retiree pension benefits. In 1969 the N.L.R.B. held this matter constituted a mandatory bargaining item, denoting that it proximately affected active employees so as to qualify as a term or condition of employment. But, on appeal, observed the Board, the federal Circuit Court of Appeals resolved that the matter of retiree pension benefits did not comply with the statutory definition of bargaining subjects and reversed the N.R.L.B., thereupon the Supreme Court affirming the federal Circuit Court of Appeals.

Secondly, that retiree pension levels are a legitimate bargaining subject illustrates the broader substantive scope of the duty under the British Columbia Code. Consider the elaborate jurisprudence that has evolved around the issue of subcontracting in the United States. In the interests of employment security within the bargaining unit, unions have sought to extract agreements over the bargaining table to regulate or prevent subcontracting. But in line with the American decisions on retiree pension benefits, American courts hold that a union can insist on agreement to impasse only where significant detriment to the employees outweighs management's economic advantage in dealing with persons outside the bargaining unit. Instructing that decisions "at the core of entrepreneurial power" do not attract the duty to bargain, "[t]hose management decisions...which impinge only indirectly upon employment security should be excluded from the area subject to the duty

84 Supra, note .62, at 66.
87 For discussion, see Manson, Technological Change and the Collective Bargaining Process (1973) 12 West. Ont. Law Rev. 173, at 180-84.
of collective bargaining", explained Justice Stewart in the leading case. 88

Now contrast the Board's instruction in Pulp and Paper Bureau, included by way of analogy to its decision on retiree pension benefits:

"One can think of several examples in which a union negotiates contract provisions whose immediate impact is on persons outside the unit, but which are sought by the trade-union because ultimately they protect the interests of employees inside the unit. The Board recently dealt with that kind of provision...in H.B. Contracting Limited [1977] 2 Canadian LRBR 296. The issue in that case was whether rates negotiated in the collective agreement for work done by "owner-operators" - who it was conceded were neither employees nor part of the bargaining unit at the time - were enforceable under the Labour Code. The panel found that the contract provision was a perfectly legitimate feature of the collective bargaining under the Code". 89

(d) "[T]he fundamental policy of the Code - the fostering of free collective bargaining".

The paragraph heading is quoted from Noranda Metal Industries Ltd, in which the Board for the first time held that it would be contrary to the Code's policy to hold that a party's refusal to make the concessions necessary to secure agreement is, in and of itself, an unfair labour practice. It would be obstructive of free collective bargaining, the Board explained, were it to involve itself in evaluating the substantive positions of each party, "to decide which is the more reasonable, and then to find the other party to be committing an unfair labour practice for not moving in that direction": 91

88 Fibreboard v N.L.R.B., 379 U.S. 203(1964) (Justice Stewart delivering a separate opinion). See also, Westinghouse Electric Corporation v N.L.R.B. 387 F.2d 542 (4th Cir.1967), rev'ing 369 F.2d 891 (1966) in which the court stated: "...since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend on whether a given subject has a significant or material relationship to wages, hours or other conditions of employment" (emphasis added). See further, the authorities Manson cites, ibid.

89 Supra, note 62, at 74.


91 Ibid.
"The theory of the Code is that each side in collective bargaining is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike [or lockout, resemble] to force the other side to make the concessions". 92

The policy thus established excludes the distinction based on the contents of bargaining demands which the parties in Pulp and Paper Bureau urged the Board to endorse. However, any doubts that might have survived Noranda Metal Industries Ltd, Pulp and Paper Bureau unreservedly dispelled:

"The whole point of a system of free collective bargaining is to leave it to the parties to work out their own boundary lines between the area of mutual agreement and the area of unilateral action, whether the action be taken by the employer or the union. And in the final analysis, the test of whether a particular objective is sufficiently pressing to one party to have moved into the area of mutual agreement is the price that the party is willing to pay for such a move: either by concessions elsewhere in the contract or by the losses inflicted by a work stoppage". 93

92 Ibid.

93 [1978] 1 Can L.R.B.R. 60, at 79-80. The Hon. W.S. King, Minister of Labour at the time of the Code's enactment, explained the interdependence of conflict and collective bargaining, BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973), at 399: "The right to strike, lockout and picket, as outlined in Part V are the measures provided to ultimately resolve collective bargaining - which are conflicts [sic]...The paradoxical situation is that collective bargaining is the ability to resolve, conflict by conflict. This is the purpose of the economic weapons which the parties hold..." Contrast the Minister's statement immediately preceding that comment: "The obligation to bargain set out in section 63 in Part IV is the very keystone of the Act. The law contemplates that if collective bargaining is characterized by good faith and reason, the parties will succeed in negotiating and executing a collective agreement". Quaere, the meaning of "good faith and reason" when it embodies the intentional infliction of loss on the other resulting from the work stoppage.
This was stated in contradistinction to the *Borg-Warner* doctrine, confining the economic determinant of settlement to matters categorised under the National Labor Relations Act as "mandatory" (or "statutory") bargaining subjects. Since - as the conventional analysis of management-union relations holds - the institution of collective bargaining premises the relative power positions of the parties, the Board summarily dismissed the notion of "voluntary" or "permissive" bargaining as a verbal contradiction. The Board reiterated Justice Harlan's oft-quoted confession in *Borg-Warner*; he being a judge "unable to grasp" a concept of bargaining that denies a party's ability to force agreement on the very terms which that party proposes. The Board agreed that the right to bargain without the right to insist is (quoting Justice Harlan) "as foreign to the labor world as it would be to the commercial world", and to those experienced in contract negotiations is no right at all. Hence the Board's approval of Justice Harlan's summary of *Borg-Warner*:

---

94 The graphic illustration of this analysis portrays the operation of a company's business as a perpetual struggle between workers and management for a larger share in the profits from their joint enterprise; depicted in T. Hadden, *Company Law and Capitalism* (London, Weidenfeld & Nicolson, 2nd ed., 1977), at 428, by the suspended guillotine atop of the "profit cake", flanked by two teams in a tug-of-war, cloth caps on one side, management executives on the other. In contrast to labour theory elsewhere, North America is singularly devoted to the conventional "conflict model" of management-union relations, attributable to the high esteem in which the classical economic theory is held in Canada and the United States. For a contrary analysis, refuting the traditional conception of "private enterprise" as being based on the antagonistic interests of property owners and workers, see P.A. Joseph, *Management's Labour Relations Prerogatives and the Unproductive Debate: Still the Classical Economics and the Entrepreneur's Lot* (1979) 14 U.B.C. Law Rev. 75. For perspectives of management-union relations elsewhere, see Hadden, *ibid.*, at 425-85.

95 *Supra*, note 93; at 75-76.

96 356 U.S. 342 (1958), at 352, footnoted by the Board, *ibid.*, at 76.

"To me all of this adds up to saying that the Act limits effective 'bargaining' to subjects within the three fields referred to in S. 8(d), that is, 'wages, hours, and other terms and conditions of employment', even though the Court expressly disclaims so holding".

In *Pulp and Paper Bureau* the Board thus perceived that to endorse the arguments based on the voluntary-mandatory dichotomy of bargaining subjects would stultify the uninhibited bargaining regime the Code sought to create. It held therefore that the duty to bargain is a single, global obligation to conclude an entire collective agreement: that the duty does not create a set of separate obligations to bargain, obligations attachable to each of the items placed on the bargaining table.99

*Pulp and Paper Bureau* establishes, then, that the *Borg-Warner*, "per se" rules governing (1) refusal or failure to bargain on designated mandatory subjects, and (2) forbidden insistence on subjects not so designated, are not part of the Code's bargaining regime. In giving decision, however, the Board conceded further reasons why "there...are no absolute, 'mandatory' judgments to be gleaned from the Labour Code about the desirability of canvassing...subject[s] at the bargaining table".100

(e) The unworkable standard of forbidden insistence and the potential for litigation

Epitomising the administrative approach to labour disputes is the question "what practical labour relations purpose will be served by this decision of the Board?"101 The Board has asked this question in disposing

98 Ibid.
99 Supra, note 93, at 80.
100 Ibid., commenting at 79.
101 See e.g., the speech of the Minister of Labour in 1973, BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973), at 399-400, remonstrating the need to exclude the judiciary from the Province's labour relations; see supra, Ch. II.
of applications involving each facet of the Code's operation. The standards it addresses are, to quote one decision, "the principles and policies which reflect the contemporary industrial setting which is governed by...[the] Code"; another, "the reasonable expectations of the province's labour relations community". Not surprisingly, therefore, the Board has acceded to what it terms "its obligation", qua the body responsible for the Code's operation, "to remove from the bargaining table legal issues which are cluttering up or impeding the collective bargaining process". In Pulp and Paper Bureau, the Board listed two further reasons in this regard why "its obligation" prevented it from countenancing the Borg-Warner rules.


103 Board of School Trustees of School District No.39 and C.U.P.E., Local 407, ibid.

104 Metal Industries Association and Letson and Burpee Ltd. and United Steel-workers of America, ibid, declaring that the "language of the statute" should be interpreted accordingly.

105 Gearmatic Co.(a Division of Paccar of Canada Ltd.) and United Steelworkers of America, Local 2952 [1977] 1 Can.L.R.B.R. 243, at 247 (emphasis added) affirmed in Metal Industries Association, ibid., at 152. Cf., BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES (1973), at 396 and 398,per Hon. W.S. King, Minister of Labour: "I think that central to the whole new concept of this new legislation is the role that the new Labour Relations Board will play as the agency which will be responsible for administration of industrial relations in the province...It is a structure which will give much greater flexibility...[The Board] won't be dealing in a strictly legalistic sense as the courts have done in the past."
First, it is appropriate to recall Justice Harlan's dissent in *Borg-Warner* since the judge believed that "forbidden insistence" with respect to non-mandatory subjects was an unworkable standard by which to assess the propriety of bargaining conduct. He believed that to endorse the right to "propose" a term but not to "insist" on it as a condition of agreement was "so inherently vague and fluid a standard" as to invite an unfair labour practice allegation whenever a party sought to effectively exercise the right. For this reason indeed, Justice Harlan postulated that the standard, "so inherently vague and fluid", effectively extinguished the right because of "a party's fear that strenuous argument might shade into forbidden insistence and thereby produce a charge of an unfair labor practice". Thus, even assuming the validity of the characterisation of particular subjects within the voluntary-mandatory classification, Justice Harlan believed the *Borg-Warner* rules to be incapable in fact - or, if capable, only with considerable uncertainty and at the parties' peril - of achieving the purposes for which they were designed.

Repeating these reservations in *Pulp and Paper Bureau*, the Board observed the proviso to the Taft-Hartley Amendment ("...but such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession"), and noted that even

109 *Supra*, note 93, at 75-76.
were a subject labelled as "mandatory" that would not require a party to agree to its inclusion in a collective agreement. This meant that the legal duty under the National Labor Relations Act required no more than that a party discuss an issue, and, provided it exert a bona fide and reasonable attempt to reach agreement, that it will discharge the duty notwithstanding unyielding insistence to the point of impasse. The Board 'contrasted' these legal incidents with the legal right to refuse to include in an agreement a ("voluntary") subject which the other party is at liberty to propose. This, at least for purposes of enforcing the legal standards, was a distinction without a difference in the Board's opinion: "[H]ow can an external body draw the boundary line between the legal duty to discuss an issue, with a bona fide and reasonable effort to agree about it, and the legal power to refuse to mention the issue in the collective agreement?"

The Board's second reason is closely related. It believed the problem posed by the need to discern, in the context of the negotiating room, the precise subjects on which a contesting party is insisting in opposition to the other's resistance to be insurmountable. Notwithstanding the policing function the Borg-Warner rules imply, the dynamics of the

111 For affirmation that the Code's omission of the s.8(d) proviso does not alter this position under the British Columbia legislation, see Federation of Telephone Workers of British Columbia and Dominion Directory Co. Ltd. [1975] 2 Can L.R.B.R. 345, at 353, citing Noranda Metal Industries Ltd., supra, note 90.

112 Supra, note 93, at 79. See also, infra, part (f) The labour relations board and the consequence of legal regulation, depicting the N.L.R.B.'s attempts to apply the standards under the National Labor Relations Act, and part (h) The evolution of bargaining subjects, depicting the need for flexibility according to the particular requirements of individual industries.
bargaining process defy the structural analysis required of the strategies by which issues are moved into the contract zone. A party's disagreement, observed the Board, ostensibly might be over wages, hours or one or more other "mandatory" items of bargaining while, contrary to the party's stated position, the real object of its disagreement is aimed at the inclusion of a "voluntary" item in opposition to the other's refusal.113 Perceptibly, the party is in a lawful position to strike or lockout, and to maintain that position to eventually secure a contract that incorporates the "voluntary" item. So contrary to what Borg-Warner envisages, the product of the bargaining strategy is that the party purportedly adopting the stance on the "mandatory" items creates a potential trade-off on those items to secure a result that, in real terms, is achieved through a per se violation of the duty.

For these reasons therefore, the Board dismissed the Borg-Warner rules as mere verbal symbols, not bargaining realities. In answer to the question, "what practical labour relations purpose would be served by this decision of the Board" were it to adopt Borg-Warner:

"All in all, the need to produce legal answers to issues such as these would gradually subject the course of collective bargaining to searching scrutiny by the Labour Board: with the potential result that parties could channel their efforts into preparing for litigation, rather than engaging in fruitful negotiations. ...In our judgment, it is inconsistent with the objectives of the B.C.Labour Code to start this Board down that path..."114

113 Ibid., at 65-66.

114 Ibid., at 79 (emphasis added).
(f) The labour board and the consequence of legal regulation

Discussed here is an important pragmatic reason— for rejecting Borg-Warner pertaining to the efficacy of the labour board. The Union's case, it has been seen, was that the Code imposed a duty on the Bureau to bargain on the specific issue of retiree pension benefits, and that its refusal to do so was a violation of the Code. Implicit is that the Board did not construe the Union's case to mean that every conceivable item it wished to raise at the bargaining table would impose a legally enforceable duty on the other vis a vis each item raised. Rather, it construed the Union's case as meaning that only certain items raised in the course of negotiations would be mandatory for these purposes (explaining hence the Bureau's reply, that while the disputed subject of bargaining could voluntarily be incorporated in a contract it was not subject to the Code's compulsion).

Obviously, therefore, to implement the distinction posed some external body would be required "to draw the line", and "in the case of the Labour Code, that would have to be the Labour Board". The Board did not comment further, but given the controversy the N.L.R.B. has generated in drawing that line under the National Labor Relations Act (which controversy persists

---

115 See e.g., supra, part (e) The unworkable standard of forbidden insistence and the potential for litigation.

116 Supra, note 93, at 65. Cf., the Board's comments were the union to oppose the construction, in that event, noting that a union might legally require an employer to negotiate "its executive salaries, dividends, prices, corporate acquisition position, and every other aspect of its affairs (and similarly a union could be legally required to bargain about its treatment of members, its dues structure, its political affiliations, and so on)."

117 Ibid., at 78.
despite the Taft-Hartley amendment) the thrust of the Board's comment is clear: to adopt the Borg-Warner division of bargaining subjects would ultimately subject the Board to the same criticism that has plagued the N.L.R.B. since the initial Wagner Act.\textsuperscript{118} That the Supreme Court has proved it is no better equipped than the N.L.R.B. to draw that line\textsuperscript{119} is inconsequential - this does not mitigate the loss of integrity the latter has suffered in the eyes of participants aggrieved by N.L.R.B. decisions denying the product of superior bargaining power.\textsuperscript{120}

The potential of the American approach to reverse accommodations of differences bi-laterally determined according to bargaining strength is illustrated below with reference to Borg-Warner.\textsuperscript{121} Nevertheless, consider

\textsuperscript{118} For criticism, see the references supra, notes 2 and 16 (particularly Adams and Coleman, Can Collective Bargaining Survive the Board? (1963-64) 52 Georgetown L.J. 366). This has been discussed supra, but consider further the comments of Justice Brennan writing the majority opinion of the Supreme Court in N.L.R.B. v Insurance Agents International Union A.F.L.-C.I.O., 361 U.S. 477(1960), at 485-86 and 487: "[C]riticism of the Board's application of the 'good faith' test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice...Since the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into S.8(d) of the [Taft-Hartley] Act. ...The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended....But it remains clear that S.8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements."

\textsuperscript{119} Eg., see the criticism by Fleming, supra, note. 2. Semble, it is significant that the leading Supreme Court decisions under the National Labor Relations Act record slender majority opinions.

\textsuperscript{120} The criticisms are noted, supra, notes 2, 16 and 118. Contrast the Board's dicta in Noranda Metal Industries Ltd. and Pulp and Paper Bureau, supra, corresponding to notes 92 and 93, emphasising economic sanction as the expedient for effecting mutual agreement in contested negotiations.

\textsuperscript{121} Infra, part (g) The ramifications of substituting the bargaining result.
this scenario arising on the basis of a dispute between the United Automobile Workers and Ford Motor Company in 1961. The U.A.W.'s complaint was that while Ford insisted on the need for wage restraints, the Company nonetheless felt justified in issuing to its executives extensive bonus increases. In this instance, few would challenge the justification of the U.A.W.'s demand that in consideration for the wage restraint demanded of workers, the Company refrain for the duration of the contract from issuing bonus increases. Yet, under the majority rule in Borg-Warner for the U.A.W. to insist upon and achieve this bargaining demand - on what is clearly, of course, a non-statutory bargaining subject - would be per se an unfair labour practice. Suppose, then, the Union were to succeed at the bargaining table. What would there be to prevent the Company seeking N.L.R.B. assistance so as to reverse that bargaining result, achieved pursuant to a lawful and reasonable demand? Indeed, could not the Company seek N.L.R.B. assistance at a stage earlier so as to prevent the Union from utilising its superior bargaining strength? That assistance rendered, asks one commentator: "Would labor people be pleased with it?" 

---

122 Discussed by Fleming, supra, note 2, at 996-97.
123 Ibid.
Above, the Board acknowledged that it would be the sole arbiter of the status of bargaining subjects were it to adopt the \textit{Borg-Warner} classification. This points to the Board's instinctive awareness of the difficulties encountered in the United States from the time the N.L.R.B. chose the path that led toward the Taft-Hartley amendment and the legal regulation of bargaining subjects. Indeed, its knowledge that it would likely suffer in the same way as the N.L.R.B. were it required to "draw the line" might reasonably be inferred from its preference for the Harlan dissent - laying bare unworkable standards of "voluntary bargaining" and "forbidden insistence".

(g) \textit{The ramifications of substituting the bargaining result}

A further consequence of interfering with the bargaining result carries similar implications, affecting the efficacy of the labour relations system extending far beyond the substantive scope of the duty to bargain. This has the effect of undermining the moral and psychological commitment of parties to a collective agreement to abide by its provisions for the duration of its term without disruption of work.

(i) \textit{The parties' commitment} As in previous decisions, the Board in \textit{Pulp and Paper Bureau} emphasised the work stoppage to be the Code's expedient

\begin{footnotesize}
\begin{enumerate}
\item[124] \textit{Supra}, corresponding to note 117.
\item[125] See \textit{supra}, corresponding to note 117. Cf., the decisions, \textit{supra}, note 189, attesting to the fact that the Board's objective as from 1974 has been to develop practices and procedures that satisfy the "reasonable expectations of the labour relations community" (quoting from \textit{Metal Industries Association et al.}, \textit{supra}, note 104).
\end{enumerate}
\end{footnotesize}
for breaking impasse in the negotiation of contracts. In contrast, rights disputes - involving differences over the interpretation and application of existing contracts - are subject to the principle implemented under the grievance and arbitration provisions of the collective agreement. Universal to labour legislation in North America, these provisions are reinforced by the compulsory "no-strike/lockout" clause prohibiting the work stoppage in substitution for the arbitration of rights disputes.

The public interest underlying the prohibition is obvious; hence, to minimise the obstruction of basic amenities and services to the community North American legislation requires the "no-strike/lockout" clause to be a term of every collective agreement. But despite this legal obligation imposed, the binding force underlying the prohibition is essentially

---


127 See the Code, Part VI. For the mandatory inclusion of an arbitration and grievance clause, containing also the model form of the clause, see s.93.

128 See the Code, s. 79.

129 Cf., the Essential Services Disputes Act, S.B.C.1977, c.83, s.6(1), granting unions organised in public service industries (viz., fire-fighters' policemen's, or health care unions) the right to elect binding arbitration as an antidote to strikes potentially most harmful to the public. Contrast the Board's discussion in London Drugs Ltd. et al., supra, note 126, at 142, distinguishing this type of interest arbitration from that provided by s.70 of the Code, the purpose of the latter having no basis in "the 'public interest' character of the dispute" underlying "this typical kind of interest-dispute arbitration".

130 See the Code, s. 79.

131 See the Code, s.65, specifically enjoining parties to a collective agreement to abide by its terms, failure or refusal to do so being a contravention of the Act.
a moral one acceded to in consideration for the freedom in contract negotiations to force the concessions necessary for a favourable agreement: each party is free to use its economic strength to achieve the bargaining demands in its best interest, and to force concessions with respect to the opposition's demands, but on reaching agreement each side is morally bound to live with what it could extract from the other without disruption of work. 132 This is one reason why North American jurisdictions discourage compulsory arbitration of interest disputes. 133 To substitute unilaterally imposed agreements for those bi-laterally concluded cannot sustain the moral obligation to abide by the principle of uninterrupted operations pending arbitration of mid-term disputes. In other words settlements over which parties exert little or no control cannot sustain the commitment demanded of parties 134 to abide by perceptibly unfavourable terms. Recently, the Ontario Labour Relations Board affirmed the public interest underlying the freely-negotiated agreement:


134 E.g., see the Code, ss 65, 79 and 93.
"The legislature has recognized that in a free society it is imperative that individual workers be permitted to join together and freely negotiate their terms and conditions of employment. Concomitantly, however, the legislature has had to balance the exercise of individual and collective rights and freedom against the need for stability and the maintenance of industrial peace. The balance has been struck in the 'no-strike/lockout' provisions of the Act. Once having freely entered into a collective agreement the statute requires the parties to abide by its terms for the period of its duration...and to submit any dispute to binding arbitration...Whereas the parties are free to resort to economic sanction as a means of compelling agreement the statutory quid pro quo is a prohibition of the resort to economic sanction as a means of enforcing the agreement".135

In this case the Ontario Board held that an Anti-Inflation Board roll-back pursuant to the federal Anti-Inflation Act destroyed the 'ad idem' element vital to the collective agreement. Alluding to the moral force sustaining the "no strike/lockout" clause, the Board added that it will not compel parties to abide by the terms of a document that does not reflect their consensus: "It [the existing contract] no longer embodies the freely negotiated 'agreement' of the parties from which flows the rights arbitration and strike prohibition sections of the Act...[i]t is this new agreement, yet to be negotiated, which will breathe life into the statutory strike/lockout prohibition as it relates to the parties before us".136


136 Ibid, at 400 (emphasis added). See also, at 399, per the O.L.R.B.: "A compensation package found to be illegal cannot be severed from a collective agreement without destroying the basis upon which the agreement was concluded, and without undermining the statutory quid pro quo upon which is based the mid-term strike prohibition" (emphasis added).
The British Columbia Board endorsed this reasoning in Board of School Trustees of School District No. 39 (Vancouver) and C.U.P.E., Local 407.

Also evidencing acceptance of the Ontario policy are those cases in which it has emphasised free collective bargaining and the economic sanction as the avenue by which contesting parties move into the contract zone.

Hence, in Joint Council of Newspaper Unions and Pacific Press Ltd. the Board declined to order compliance with the "no strike/lockout" clause in the Union's collective agreement owing to an Anti-Inflation Board roll-back on the existing contract rates. Further, the Board has stipulated the need for restraint in determining applications under section 70 of the Code for a first collective agreement. Bi-laterally concluded terms, over which parties exert control relative to their respective bargaining strengths, explained the Board, "are more likely to prove workable...than those...imposed from the outside":

"The immediate parties are much better able than an outside arbitrator to appreciate what is a fair and politic settlement of the dispute in their own particular circumstances. We must ensure that our administration of s.70 does not distort their responsible search for that point..."


138 In addition to Pulp and Paper Bureau and Noranda Metal Industries Ltd., see the cases, supra, note 126.


140 See London Drugs Ltd et al., supra, note 126; Vancouver Island Publishing Co. Ltd. et al., supra, note 126. And see, British Columbia Institute of Technology and British Columbia Government Employees Union [1976] 2 Can. L.R.B.R. 129, at 134 per B.C.L.R.B., stipulating that "one cannot invoke s.6 as an added string in the bow to bring about early settlement".

141 London Drugs Ltd. et al., ibid., at 146. At 141, the Board stated, "[t]he fundamental assumption of the legislation is that the terms and conditions of employment should be settled by mutual agreement of the parties concerned, not imposed from the outside under legal authority".

142 Ibid., at 143.
(ii) **Contra Borg-Warner** Consider now the sequence of events in the Borg-Warner dispute and its ultimate resolution pursuant to the Supreme Court's decision. If not tantamount to compulsory arbitration of interest disputes, Borg-Warner demonstrates the capacity of the N.L.R.B. (or the courts) to reverse the bargaining result in policing the content of bargaining demands. The ballot procedure respecting future contract negotiations, as a matter of difference in fact between the union and the company, was a subject of dispute and negotiation. At this stage, the determinant of settlement was sheer bargaining power. The union invoked a month-and-a-half strike to secure its bargaining objective - to extinguish the company's demand for the ballot clause - but the company weathered the strike and forced the union to capitulate. On these facts, the company had the power to achieve its demand without stepping beyond the parameters of good faith bargaining. Therefore, in upholding the N.L.R.B.'s cease and desist order the Supreme Court effectively reversed the bargaining result. In answer to the question, "what labour relations interest did the decision serve?", settlement had been reached on the matter without the need for state intervention.


144 See Fleming, *supra*, note 2, at 996.

145 *I.e.*, in the absence of the Borg-Warner, "per se" rule governing insistence on a non-statutory bargaining subject. See the trial examiner's findings: that neither party was guilty of bad faith, that both parties were sincere in their attempts to conclude an agreement. Justice Burton for the majority accepted this (*supra*, note 143, at 347), but was not deterred from finding a *per se* violation on the part of the company.
In answer to the second question, "what public interest did the decision serve?", it compromised both the moral force of the "no-strike/lockout" clause and the psychological commitment otherwise adhering to terms bilaterally secured according to the parties' bargaining strengths.

In British Columbia these questions do not arise. Unlike the Borg-Warner dispute bilateral settlement had not been reached in Pulp and Paper Bureau prior to the union seeking the Board's intervention. Nonetheless, by refusing to attribute legal incidents to specific bargaining demands the British Columbia Board avoided any prospect of producing a 'bargaining' result contrary to that envisaged by the parties' industrial relationship. In contrast to Borg-Warner it is a coherent formula for mid-term industrial stability that the Board positively encouraged parties to resolve in the bargaining exchange all matters sufficiently pressing to warrant the losses of the work stoppage:

"[I]t is precisely at this stage that one can find a true index of the sincerity of the active employees' interest in that issue. If a majority of these employees vote to strike for that reason, and are willing to sacrifice their earnings to secure that kind of concession, then it hardly lies with either the employer or the Board to say that this item is not something which the active employees consider to be an essential 'condition of their employment'."

---

146 See e.g., the dicta, supra, corresponding to notes 141 and 142.
148 Ibid., at 76.
(h) The evolution of bargaining subjects

Further to the American jurisprudence the Board anticipated that it would be required to treat bargaining subjects categorised as mandatory or permissive in one industry uniformly with respect to all bargaining relationships, "irrespective of the peculiar needs, patterns and traditions in particular industries". It is exactly for this reason that Justice Harlan, dissenting in Borg-Warner, predicted that the court's decision would lead to the premature crystallisation of collective arguments into the one pattern of contract provisions, and would impede the evolutionary process by which "the changing concepts of the responsibilities of labor and management" are accommodated within the framework of the Wagner legislation. On "[t]he most cursory appraisal" of N.L.R.B. and court decisions, observed Justice Harlan, "[p]rovisions which two decades ago might have been thought to be the exclusive concern of labor of management are today commonplace in...[collective] agreements." [151]

These views attest to the evolving character of employment relations and the need to accommodate change from within the bargaining relationship. The criticism of Borg-Warner, at this "macro"-level, is that to classify matters which may be proposed, but not 'bargained', and matters which must

149 Ibid, at 78.
150 Supra, note 143, at 358-59.
151 Ibid, at 358, citing at 353, N.L.R.B. v J.H. Allison & Co., 165 F.2d 766, (6th Cir.), 3 A.L.R. 2d 990 (re merit increases). See also, the authorities supra, note 19. Cf., the Supreme Court's first decision under the Wagner Act, in which it was stated: "The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act itself does not attempt to compel": N.L.R.B. v Jones & Laughlin Steel Corp., 301 U.S. 1, at 45 (emphasis added).
be bargained establishes precedents which inhibit the evolution of contract terms. The criticism at this level does not pay regard to the specific requirements of individual industry or enterprise. It is "macro" in the sense that the categorisation of mandatory and voluntary subjects determining the applicable "per se" rule under the National Labor Relations Act applies uniformly to all industry, irrespective of the particular requirements of any one industry.

Admittedly, additional inflexibility results from a labour statute's reliance upon judicial procedures. Under the National Labor Relations Act, most - if not all - of the precedents established with each classification of bargaining subject are buttressed by judicial decision; thus requiring a court of at least the same or higher authority to overcome the inertia.

152 The date of the Borg-Warner decision is pertinent for this reason. By 1958, the traditional employment patterns of the 1930s and 1940s were rapidly giving way to new methods of industrial organisation and production that sought the advantage of post-war technology. As from the mid-50s, the automation and concentration of industry that accompanied post-war technology brought new demands to the bargaining table - particularly as regards closure or partial closure of a business, plant relocation and employee attempts to guard against job displacement resulting from each of these management decisions. Arguably, the fact that the status of the demands aimed at regulating these decisions has not been satisfactorily resolved by the N.L.R.B. or the courts is attributable to the precedents establishing that management decisions at the core of entrepreneurial power are excluded from the area of mandatory negotiation: for post Borg-Warner authority affirming this position, see Fibreboard v N.L.R.B. 379 U.S. 203 (1964), at 218 and 220 per Justice Stewart. For the unsettled state of the authorities grappling with technological changes in the post-war era, see Manson, Technological Change and the Collective Bargaining Process (1973) 12 West. Ont. Law Rev. 173, at 175-87. Quaere, whether the concept of "management prerogative" is capable of assisting the designation of statutory and voluntary bargaining subjects dealing with employee displacement resulting from technological change?
of an existing classification.\textsuperscript{153} Contrast the special relationship of the labour board to the courts examined in Chapter II, however: the binding force of judicial precedent would not disable the British Columbia Board from revoking at will any status it had earlier assigned to particular bargaining subjects. This notwithstanding, the Board believed that simply to premise good faith bargaining on the American classification would detract from the parties' personal commitment to reach agreement on the matters before them. Quoting the American commentator, Archibald Cox:\textsuperscript{154}

"There is...danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiators' skill and attention. To divert them from the main task of putting a value on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful".

\textsuperscript{153} Technically the N.L.R.B. is not bound by judicial precedent but, as Manson (ibid., at 180) explains, is strongly influenced by it; the immediate pragmatic reason is that Board orders often depend on the results of judicial review. Hence see the attempts of the N.L.R.B. in Westinghouse Electric Corporation, 150 N.L.R.B. 1574 (1965) to limit the types of subcontracting decisions which would not be subject to bargaining. Manson (ibid., at 181) comments that the onerous five-fold test devised by the N.L.R.B. for that purpose (i.e., if satisfied, would relieve the employer of the duty to bargain) was aimed at limiting the effect of the Supreme Court's pronouncements in Fibreboard v N.L.R.B. ibid. But cf., N.L.R.B. v Adams Dairy, 350 F.2d 108 (1965) in which Justice Stewart's pronouncements in Fibreboard (ibid.) were preferred, holding the subcontracting in issue not to be a mandatory bargaining subject owing to the prevailing interest in management's freedom to manage. See also, District 50, United Mine Workers of America, Local 13942 v N.L.R.B. 358 F.2d 234 (1966), affirming the need to preserve management's freedom in matters of subcontracting.

\textsuperscript{154} Supra, note 147, at 79.
For these reasons, "[t]he wrong method is to rely on rigid controls, administered by an external tribunal, with the risk this poses that the ebb and flow of the collective bargaining regime might be frozen into the currently conventional pattern". 155

Those reasons for so holding pertain equally to the criticism of Borg-Warner at the "micro"-level. Again, it is helpful to quote Archibald Cox (the terms "joint responsibility" and "respective prerogatives of management and union" epitomising the distinction under the National Labor Relations Act between mandatory and voluntary subjects respectively):

"The demarcation lines between the sphere of joint responsibility and the respective prerogatives of management and union should be drawn at different points in different industries. An appropriate subject for collective bargaining in one industry may be highly inappropriate in another. The determination depends upon the industry's customs and history, the previous employer-employee relationships, technological problems and demands, and other factors. A government determination, especially one cast as an interpretation of a statutory phrase, subjects everyone to the same rule".156

In Pulp and Paper Bureau, the Board indicated its agreement by noting that each mandatory-voluntary classification of bargaining subjects would require uniform application throughout the Province "irrespective of the peculiar needs, patterns and traditions in particular industries". 157

Consider the matter in issue in Pulp and Paper Bureau. In a seasonal industry with a traditionally transient labour force, the Board accepted that the administrative difficulties and cost involved in maintaining a retiree pension scheme may render the entire matter of pensions a "highly inappropriate subject" for inclusion in a collective agreement.158

---

155 Ibid., at 80.
157 Supra, note 147, at 78.
158 Cf., Cox, supra, corresponding to note 156.
Contrast the example it then gave of "a typical town in which the major industry is a pulp mill, a sawmill, or a smelter".\textsuperscript{159} In this environment, many of the retired workers will have worked alongside the still active employees, may be neighbours and even relatives of their fellow workers, and will probably remain in the same dwelling they occupied during their active life for the period of their retirement. In this environment, the Board believed not only the matter of retiree pensions but retiree pension levels to be an "appropriate subject" for collective bargaining.\textsuperscript{160}

The Board's rejection of Borg-Warner at the "micro"-level, then, is that bargaining demands within any specified industry are a response to the needs and concerns of the parties to each bargaining relationship, such that "the evolution of the subjects of collective bargaining should be the result of pragmatic accommodations worked out by unions and employers in their individual relationships, responding to the nuances of their own situations."\textsuperscript{161}

This analysis of Pulp and Paper Bureau effectively disposes of the voluntary-mandatory dichotomy of bargaining subjects. However it should be observed that the Board in this case did not positively disclaim constraints upon the substance of bargaining for reasons other than those based on the Borg-Warner doctrine. The following examines four situations in which the Board might possibly uphold constraints notwithstanding its stated position that, in overseeing the Code's requirements, it will not assess contract proposals \textit{qua} proposals.\textsuperscript{162}

\textsuperscript{159} Supra, note 147, at 71
\textsuperscript{160} Ibid. Cf., Cox, supra, corresponding to note 156.
\textsuperscript{161} Ibid., at 79.
\textsuperscript{162} Noranda Metal Industries Ltd and CAIMAW [1975], 1 Can. L.R.B.R. 145.
C. THE POSSIBILITY OF SUBSTANTIVE LIMITATIONS

In two situations the Board has expressly reserved the possibility of bargaining demands contravening the Code irrespective of the parties' circumstances or actions taken in furtherance of the demands. In a further two, the possibility arises consequentially as a result of the Board's policy in applying other parts of the Code. With respect to each, it is proposed to examine the Board's reasoning for what it conveys on its face rather than concentrate on the broader policy considerations ("What practical labour relations purpose would this decision serve?") that impelled the Board to unequivocally reject the Borg-Warner doctrine. Obviously, depending upon how sharply an actual dispute brings into focus the practical labour relations purpose, the possibility of the Board according precedence to these considerations over earlier pronouncements indicating substantive limitations cannot be discounted.

(a) Unlawful subjects

However one situation where these considerations could not be expected to prevail is where the bargaining advantage sought is itself unlawful. In United Steelworkers of America, Local 6536 and Cassiar Asbestos Corporation, 163 decided in 1974, the contract term in question purported to exclude probationary employees from the mid-term grievance procedure under the collective agreement. Holding this to be an attempt to contract out of the Code - namely section 93 which imposes a mandatory

procedure for the settlement "of all disputes between the persons bound by the agreement..." - the Board declared the term to be illegal and unenforceable. So too in MacDonalds Consolidated Ltd. et al. and Retail, Wholesale and Department Store Union, Local 580\textsuperscript{164} the Board declared illegal and unenforceable a contract provision authorising strikes and lockouts over "non economic issues" during the currency of the agreement. This was held to be in contravention of section 79, expressly prohibiting mid-term strikes and lockouts, and section 93, requiring the standard grievance procedure for settling mid-term disputes to be invoked "without stoppage of work".

"If the provisions in the agreement between the local and the companies are illegal", explained the Board in that case, "they are no less so if the companies agree to them at the negotiating table".\textsuperscript{165} Where parties at the bargaining table reach a settlement incorporating such terms it is difficult to envisage allegations of unfair labour practices ever arising under section 6. Certainly the party pressing for inclusion of an illegal provision could assert no legal wrong done to it, and presumably agreement as to its inclusion (possibly as a trade-off on some further bargaining subject) would estop the other. Moreover, the question arises whether the language of section 6 can sensibly be applied to bargaining where the parties themselves are in willing agreement; neither party being more culpable than the other, each would be


\textsuperscript{165} Ibid., at 296.
in breach to the extent of the other (if at all, for failure to satisfy the objective limb, to make "every reasonable effort" to conclude an agreement). However, as any dispute over such agreed terms will arise invariably during the currency of the collective agreement it suffices that the Board simply declare such terms illegal and unenforceable.

But not always will this suffice. In particular, the Board will not hesitate to uphold an unfair labour practice allegation under section 6 where, in the course of negotiations, one party insists the other agree to a term requiring the latter to do something known to be illegal. In Board of School Trustees of School District No. 39 (Vancouver) and C.U.P.E., Local 407, 166 "this Hobson's choice" is how the Board described the bargaining position into which the latter party is forced. The issue surfaced here with reference to the federal Anti-Inflation Act imposing arithmetic guidelines for maximum percentage increases in compensation. In the event of union pressure on the employer to disregard the statutory maxima the employer's 'choice' was "between absorbing the losses of production and revenues from strike action or facing recoveries and penalties from the Administrator under the Anti-Inflation Act." 167 For unions to pursue this course of action, the Board affirmed, would not be to bargain in good faith: "And if the bargaining which precedes a strike is in contravention of s. 6 of the Labour Code, this in turn places a legal taint on the strike action itself". 168 Further, to insist on something

167 Ibid.
168 Ibid.
known to be unlawful (or which parties know may well be unlawful) as the price of agreement would also be in breach of the second element of the duty "...to make every reasonable effort to conclude a collective agreement" - for it can scarcely be an objectively reasonable bargaining tactic to demand defiance of the law.

(b) "A legitimate subject for bargaining".

This was how the Board in Pulp and Paper Bureau described the issue of retiree pension benefits. Can it therefore be inferred that certain matters, as yet undefined, are not legitimate subjects for bargaining within the Code's regime? Had the Board chose to use neutral language - for instance, "there being nothing illegal about retiree pension benefits the Code does not mandate the Board to pass judgment on the proposal" - the question would not arise. But "legitimate" is not a neutral word. Synonyms the Oxford Dictionary lists are "lawful, proper, regular"; "conforming to standard type". Since the Board in Pulp and Paper Bureau repeated many times the above description it cannot be assumed that it simply did not intend the word "legitimate" to carry its ordinary meaning and intent. Its usage thus implies that in addition to unlawful demands, contract proposals that are improper or irregular, or not "conforming to standard type", may well fall outside the Code's bargaining regime. In other words, that to insist on such proposals to impasse will

169 [1978] 1 Can. L.R.B.R. 60, eg. at 66 (italicised moreover by the Board), 75 and at 76 (albeit not specifically with reference to the disputed matter at hand).
be in contravention of the duty to bargain collectively "in good faith... and to make every reasonable effort to conclude a collective agreement".

In support, consider the Board's explanation for holding the matter in issue to be a legitimate bargaining subject. Having devoted a good portion of its decision to "the soft spots" in the Bureau's argument, the Board concluded: "[T]he fact of the matter is that the active work force has a distinctive, tangible interest in the fate of retiree pensions;... that is the reason why the CPU demand in this case fits quite comfortably within the collective bargaining regime of the Labour Code". The Board seemed at pains to point out that although the active employees' concern about retiree pensions was, "to some extent", altruistic in character (...they share a definite community of interest with the retirees" instancing "a typical town" dominated by a single major industry), compassion or altruism was not the union's principal reason for pursuing the issue. "There is a definite self-interest of the active work force", repeated the Board, "in successfully negotiating improved pensions for retiring workers".

Employees forego current earnings in order to ensure an adequate income following retirement. Contributions being made over a number of years, the obvious concern of the active employee is to protect his equity

170 Ibid., at 64-71.
171 Ibid., at 71.
172 Ibid., at 71-72.
against the dissipating effect of inflation. This, the Board observed, rendered it a matter of "definite self-interest" to active employees that increases in pension levels be periodically negotiated in order to be passed on in whole or in part to those already retired.\textsuperscript{173} To index pension plans to current inflation levels was an alternative mechanism by which these employees could have sought to protect their equity, the Board added.\textsuperscript{174} But if they chose to bargain over the issue:

"The bargaining objective is an essential feature of a union program to preserve the integrity of the pension that the active worker will ultimately enjoy. For that reason, we conclude that the issue pursued by the CPU in its negotiations with the Bureau is, indeed, a legitimate subject for collective bargaining within the legal regime of the Labour Code".\textsuperscript{175}

The principle this supports is that for contract demands to fall within the Code's collective bargaining regime, the subject of the demand must in some way or other be capable of protecting or furthering the interests of, as the case may be, the employer or the employees comprising the bargaining unit. In \textit{Pulp and Paper Bureau} the thrust of the Board's reasoning was that the union's motivation was direct self-interest, not simply altruism or compassion. Admittedly, given the actual decision in this case the benefit or advantage sought need not accrue immediately, or indeed directly, to the employees \textit{qua} employees or the employer \textit{qua} employer; nevertheless it was solely by reference to this nexus between the

\begin{itemize}
\item \textsuperscript{173} Ibid., at 72.
\item \textsuperscript{174} Ibid., at 72-73.
\item \textsuperscript{175} Ibid., at 75.
\end{itemize}
proposal and the party's self-interest that the Board was able to resolve the question whether the disputed issue was, to use its own description, "a legitimate subject for bargaining".\textsuperscript{176}

For most bargaining subjects, the question can be simplified thus: "[Is] there any economic justification for the proposal so that it [can] be described as \textit{bona fide}?" This is the mode of inquiry the Board established in \textit{Dominion Directory Company Ltd},\textsuperscript{177} which it explained would enable the Board to focus on proposals without passing judgment as to their reasonableness. Citing \textit{Noranda},\textsuperscript{178} the Board in this case reiterated that proposals will not be assessed \textit{qua} proposals, but added that a particular proposal, viewed in the context of the negotiations, may be evidence of subjective bad faith warranting the Board's intervention under section 6. On the other hand, it is not surprising that the Board, with its stated dislike of the American jurisprudence and the \textit{per se} rules attaching to bargaining subjects, should finally resolve in \textit{Pulp and Paper Bureau} that it is not a \textit{per se} violation of the Code to insist to impasse that a particular issue be placed on the bargaining table: or for that matter to refuse to discuss an issue in the face of such insistence.\textsuperscript{179} Consequently, the question seemingly narrows down to this: was it the Board's intention in \textit{Pulp and Paper Bureau} to confine this rejection of the \textit{per se} rule to bargaining subjects deemed "legitimate"?

\textsuperscript{176} \textit{Supra, note 169.}


\textsuperscript{179} \textit{Supra, note 169, at 80.}
The point has been made that this description implies the existence of a class of "illegitimate" subjects - ostensibly beyond what the Code contemplates, subjects which are "improper", "irregular", "not conforming to standard". In other words, that simply to insist that such a subject be placed on the bargaining table would, in and of itself, fall beyond the Code's legal regime and, as an obstacle impeding agreement on those subjects within its regime, be in violation of it. Indeed, supposing it were the Board's intent to exclude the per se doctrine in its entirety, the question remains when will a party's proposal which lacks any economic justification vis a vis that party, when insisted upon as the price of agreement, not be declared to violate the Code's duty to bargain collectively? Consider the Board's reference in Pulp and Paper Bureau to welfare recipients:

"Clearly, pensioners are not strangers to the operation of the bargaining unit. They cannot be compared, for example, to welfare recipients who are an indeterminate, unconnected group for which no employee could be expected to shoulder a responsibility".

But suppose a 'well intentioned' employer were to demand this of his employees, for instance by stipulating that the renewal of the existing agreement be conditional upon employees agreeing to donate a percentage of their wage package to this "indeterminate, unconnected group". Clearly,


181 Cf., Dominion Directory Company, supra, note 177.

182 Supra, note 169 at 67-68.
the Board would reply that even if the employer sincerely desired throughout to reach agreement he contravened the further requirement "to use every reasonable effort to conclude a collective agreement". Irrespective of a party's subjective motivation, this imposes an objective limitation on the bargaining tactics a party may legitimately employ in contract negotiations. So while the Board might reiterate that it will not assess contract proposals qua proposals, it would not hesitate in this instance to ask whether "...a tactic has [not] been adopted which, when looked at not in isolation but against the background of the bargaining postures to date, unreasonably inhibits the conclusion of a collective agreement?" A proposal incapable of conferring a benefit on the party pressing it, yet aimed at taxing the other, must itself be viewed as a bargaining tactic commanding the Board's scrutiny. And the Board would almost certainly respond by holding such a proposal to be calculated to frustrate the expectations of the latter, thereby "unreasonably inhibit[ing] the conclusion of a collective agreement". Furthermore, this would be in addition to the fact that a bargaining demand of this type would, in and of itself, ordinarily justify a finding of subjective bad faith - thereby amounting also to a breach of the first limb.

Thus, whether the Board's exclusion of the per se rule extends to all bargaining subjects, "legitimate" or otherwise, the potential for "altruistic" demands to breach the Code is such as to create a substantive limitation on matters rendered subject to its compulsion.

183 Established in Noranda, supra, note 178.

184 Eg., see Kidd Brothers Produce Ltd. and Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers' Union, Local 351 [1976] 2 Can. L.R.B.R. 304, at 316 (citing Noranda, ibid.).

185 Ibid.
Also, there is sufficient Board dicta indicating that "political" demands are likewise beyond the Code's compulsion. This is scarcely surprising in view of the statutory language constituting the Province's collective bargaining system. The positive requirement is imposed by section 63, which reads "Where notice to commence collective bargaining has been given...the parties...shall, within ten days after the date of notice, commence to bargain collectively in good faith, and shall make every reasonable effort to conclude a collective agreement or renewal thereof". Section 6, rendering it an unfair labour practice to fail or refuse to comply with section 63, provides the Code's compulsion.

What do these provisions require? That parties "bargain collectively" for the purpose of concluding "a collective agreement". By virtue of section 1(1):

"'collective bargaining' means negotiating...with a view to the conclusion of a collective agreement or the renewal or revision thereof,..."

"'collective agreement' means an agreement in writing between an employer,...and a trade-union, containing provisions as to rates of pay, hours of work, or other conditions of employment, which may include..."

It is to "rates of pay, hours of work, or other conditions of employment" that the Code's compulsion applies. Obviously, the term "or other conditions of employment" embraces considerably more than what the preceding phrases, "rates of pay" and "hours of work", contemplate. Although still paramount to management-union relations, these latter matters are historically bedded in the origins of organised labour. In contrast, as employment expectations change so too does the meaning of the statutory term
"conditions of employment" so as to sanction bargaining subjects once unheard of in contract negotiations. Employment pension schemes are but one example, formerly unprecedented but today commonplace in contract settlements.

Notwithstanding, the fact remains that the phrase "or other conditions of employment" only sanctions subjects for bargaining that are employment related. Only by reference to the objectives and responses of employees qua employees and employers qua employers can this be determined. Hence the question posed above, "Is there any economic justification for the proposal so that it can be described as bona fide?"\textsuperscript{186} Hence also the Board's observation in Otis Elevator Co. Ltd. and Int'l Union of Elevator Constructors, Local 82, that "[i]t is only activity which is calculated to bring an economic response from the employer which can be said to have been done 'for the purpose of compelling an employer to agree to terms and conditions of employment'."\textsuperscript{187}

The Board approved that statement the following year in determining whether a work stoppage constituted a strike within the meaning of section 1(1) of the Code.\textsuperscript{188} Having resolved there was a refusal to work by employees acting in concert, the Board addressed the subjective element of the definition which, the Board said, "requires that the purpose of the work stoppage be to compel their employer...to [agree to] terms and conditions of

\textsuperscript{186} Supra, text, corresponding to note 177.
\textsuperscript{188} See Canadian Pittsburgh Industries Ltd. and Glaziers and Glassworkers Union Local 1527 et al., Decision No. 23/77 (unreported).
of employment". "It is in looking at this subjective element", it added, "that the Board must be astute to limit the definition to its context". Thus, in 1976 the Board determined that as the work stoppages planned for the C.L.C.'s "National Day of Protest" were not aimed at compelling the employer to agree to terms and conditions of employment, the stoppages did not constitute strikes within the meaning of the Code. It was accepted that the C.L.C.'s objective was directed at the federal Government to change or terminate its anti-inflation programme: "the work stoppages of October 14 had a political rather than a collective bargaining purpose".

In neither of these cases was the Board specifically concerned with the meaning of "[terms and] conditions of employment" as used in the definition of the term "strike"; nor pro tanto was it concerned with the meaning of those words as used in the definition of "collective agreement". In both cases the Board's focus was more on the subjective motivation of the parties: at whom was the action directed? Yet it is the answer to this same question that ultimately distinguishes employment-related matters from matters that are not "legitimate" bargaining subjects. Suppose the unions that participated in the "National Day of Protest" stoppages resolved to carry their protests into the negotiating room by demanding a contract term whereby employers agree to put pressure on the federal government to repeal its anti-inflation legislation, or

189 Ibid.
190 Ibid.
192 Ibid., at 413 (the emphasis is the Board's).
whereby they agree to oppose the government at the forthcoming elections in protest against the legislation. In answer to the question, at whom would the action (i.e. demand) be directed, it would be no more the employer in this instance than was the case involving the "National Day of Protest" stoppages: as with the 1976 action, the unions' demands would have "a political rather than a collective bargaining purpose".\textsuperscript{193}

Consider the parties' responses confirming this. While the employees might argue that their motivation was, in the long term, economic self-interest, "...only [a demand] which is calculated to bring an economic response from the employer can be said to [be] 'for the purpose of compelling an employer to agree to terms and conditions of employment'".\textsuperscript{194} But a demand of the type in question, aimed at achieving a political objective, is not one to which the employer can respond in economic terms. The employer, of course, might seek by way of exchange a trade-off on some further bargaining subject which consequentially requires an economic response from the union; but this does not itself alter the nature of the initial demand.

Contract proposals, then, that are altruistic, social, or political in nature will lack the economic correlatives underlying the parties' motivations that distinguish "legitimate subjects for bargaining". This is not to suggest that legitimate bargaining subjects cannot have an impact

\textsuperscript{193} Ibid.

\textsuperscript{194} Cf., Otis Elevator Co. Ltd. and Int'l Union of Elevator Constructors, Local 82, supra, note 187.
on persons other than the employer or the employees comprising the bargaining unit. Retired pensioners, owner-operators, potential employees, and applicants for lower management vacancies, none of whom is an "employee" within the meaning of the Code nor member of the bargaining unit, have each been the subject of contract regulation which the Board has not hesitated to enforce:

"There are a wide variety of provisions in existing collective agreements which deal directly with persons or positions outside the bargaining unit but which are agreed upon because they are seen as a sensible or not unreasonable means for either protecting the positions of persons within the unit or giving them opportunities for advancement". 196

The one feature which the Board has emphasised is common to these provisions is the employees' ultimate economic self-interest in securing agreement extending to these non-unit persons. This motivation prompting the demand will not itself be sufficient, it seems, if the response which the demand naturally engenders is not also economic in nature. For instance, contract demands made upon employers at the time of the anti-inflation legislation (for example, that they agree to vote against the government at the federal elections in protest against the legislation) could, quite conceivably, be claimed to be in the long-term economic interests of employees generally (certainly no less so than the active employee's long-term interest in renegotiating retiree pension benefits).


196 Ibid.
Yet, independently incapable of eliciting anything in the nature of an economic response from employers, this demand falls outside a collective bargaining law aimed at facilitating "...agreement...as to rates of pay, hours of work, or other conditions of employment". Whether the Board would be prepared thereupon to declare insistence upon such a term a \textit{per se} violation of the Code is, for the most part, academic; for economic self-interest is the fulcrum of management-union relations such that it can scarcely be an objectively reasonable bargaining tactic to insist that parties do more than their economic relationship contemplates.

(c) \textbf{Certification and the "employee" concept}

"The Board's finding about whether a group of individuals are 'employees' will determine whether they may use the facilities, and must be subject to the controls, afforded by the Code for collective bargaining".  

The need to establish "employee" status is the precondition of certification of bargaining units possessing exclusive authority to bargain on behalf of persons designated within the scope of the unit's authority. It therefore constitutes a limitation not on the institution of bargaining itself under the Code but rather on the collective right of access to it. However, it bears commenting on since it is principally by reference to the Code's collective bargaining objectives that the Board has had to determine what the Code contemplates by its cryptic definition: "'employee' means a person employed by an employer,..."  

---

197 Cf., the definition of "collective agreement (the Code, s.1(1)), the conclusion of which the duty to bargain collectively is aimed at.


199 See s.1(1).
Recently in Cominco Pensioners Union, sub-local of the United Steelworkers of America, Local 651 and Cominco Ltd. the Board reviewed its decisions dealing with the issue of "employee" status and noted that of recent years it had been mooted whether such disparate groups as tenants, welfare recipients, prison inmates and students ought to be extended bargaining rights under the Code. In the instant case the group seeking certification was comprised of retired workers of Cominco Ltd. enjoying pension, medical and assurance benefits accruing from their former employment. "Are retired workers exposed to the abuses and evils which labour relations statutes were designed to eradicate?" asked the Board. To which it replied:

"The overall purpose of the Labour Code, in common with the labour legislation of other jurisdictions, is to remedy inequality of bargaining power in discussions over wages, hours of work, and other conditions of employment. This underlying legislative rationale provides a sound basis for the refusal by modern labour boards to be absolutely controlled by the old common law tests of 'employee'; but it simply isn't pertinent to the situation of the typical retired worker".

Reiterating that the "employee" concept is a "fairly elastic notion" for purposes of the Code, the Board explained that it could not be stretched beyond such key provisions as the definition of "collective

200 Decision No. 49/79.
201 Ibid., at 9, quoting Hospital Employees Union, Local 180 and Cranbrook and District Hospital and Selkirk College [1975] 1 Can L.R.B.R.42 at 49.
202 Ibid., at 14.
203 Ibid., at 14-15.
204 Ibid., at 17.
agreement" which "speaks in terms of rates of pay, hours of work, and the like". 205 "[But] those things are ghosts of the past as far as the average retiree is concerned", observed the Board: 206

"The definitions of 'lockout' and 'strike' seem equally inapplicable. They speak of refusals to continue to employ, and refusals to continue to work, in order to compel the other party to agree to terms of employment. For the reasons expressed...those notions simply are not germane to the relationship under consideration here". 207

It is thus clear that the Board will not certify a group where, by virtue of the circumstances of those comprising it, the type of demands likely to be made will not fit within the Code's conception of "conditions of employment". However, it bears repeating that as the need to establish "employee" status logically precedes the acquisition of bargaining rights the restrictions surviving with respect to this status cannot strictly be viewed as limitations upon those rights.

(d) "Unusual terms"

As with the matter just examined, the bargaining constraint suggested under this head also arises consequentially in the course of the Board's administration of the Code; and indeed is similarly concerned with the Board's perception of "typical employment terms".

205 Ibid., at 15 and 17.
206 Ibid., at 15.
207 Ibid., (emphasis added).
Section 34(1)(g) of the Code gives the Board "exclusive jurisdiction to decide...any question as to whether...(g) a collective agreement is in full force and effect; ...". In Ladner Private Hospital Ltd. et al. and Hospital Employees' Union the Board interrupted its discussion of the complex jurisdictional issue there to explain the nature of a section 34(1)(g) determination. Normally a number of questions of law and fact will be involved: inter alia, "does the content of the bargain qualify it as a 'collective agreement' as that term is defined in section 1(1) of the Code". Notwithstanding the appearance of good faith bargaining, implicit is that the Board will not enforce a document that in content simply masquerades as a collective agreement. To that extent, the section 34(1)(g) determination can be viewed as a post-bargaining mechanism by which the Board can retain some measure of control over issues parties might wish to bring within the scope of the section 6 duty.

Further, it appears section 34(1)(g) is not confined solely to the question whether a particular document is or is not a collective agreement, in respect of which the Board is specifically empowered independently of para (g). In particular, it extends to the question whether a collective agreement "is in full force and effect", which raises the issue of severence for purposes of enforcement proceedings. If the Board can decline recognition to an entire document on the ground that

209 Ibid., at 187.
210 See s.34(1)(c), empowering the Board to determine whether "a collective agreement has been entered into".
it does not qualify by reason of content, presumably it can also decline recognition under section 34(1)(g) to any part thereof on the ground that it alone does not qualify within the meaning of section 1(1) for inclusion in a collective agreement. The Board has always insisted that it will not order a party to comply with a particular contract term which requires (or which may well require) that party to do something unlawful. As "legitimate" bargaining subjects do not simply imply lawful bargaining subjects, the question therefore arises whether the Board would not also be prepared to declare a contract provision unenforceable other than for want of legality.

However, policy considerations militate against such a move. The Board's position is that it is for parties themselves to work out their own boundary lines between the area of mutual agreement and the area of unilateral action. Having forced - and made - the concessions necessary to conclude a settlement, a party should be legally entitled to rely upon it for the duration of its term without fear of Board intervention: "The wrong method is to rely on rigid controls, administered by an external tribunal, with the risk this poses that the ebb and flow of the collective bargaining regime might be frozen into the currently conventional pattern". Hence the Board's reluctance to rewrite, and thereby upset the balance of, agreements bi-laterally concluded. Certainly, in those instances where the Board had to consider the effect of Anti-Inflation

211 See e.g., United Steelworkers of America, Local 6536 and Cassiar Asbestos Corporation, supra, note 163; MacDonaldis Consolidated Ltd. et al. and Retail, Wholesale and Department Store Union, Local 580, supra, note 164; Board of School Trustees of School District No. 39 (Vancouver) and C.U.P.E. Local 407, supra, note 166; Joint Council of Newspaper Unions and Pacific Press Ltd [1976] 2 Can. L.R.B.R. 342.

Board rollback rulings on the concluded settlement, it did not hesitate to declare the entire collective agreement null and void, rather than just the compensation package which was the subject of the AIB rollback. The principle is that where to release a party from a contract obligation would effectively destroy the ad idem element underlying the freely-negotiated agreement - from which flows the parties' obligation to abide by the mid-term strike/lockout prohibition - the object is to release parties from the entire existing arrangement in order that they may return forthwith to the bargaining table.

(e) Summary

To repeat, of the four situations discussed the latter two do not amount to per se limitations on the substance of bargaining. Yet they illustrate the mechanisms by which the Board confines the Code and its compulsion to those relationships for which collective bargaining is meaningful. With respect to the first situation, however, there can be no doubt that to insist a party agree to a term requiring something unlawful of that party amounts to a per se violation of the Code and pro tanto a prohibition of bargaining subject. On the other hand, the prospect of a category of otherwise lawful subjects constituting a bargaining prohibition is not so clear. Although it was unmistakeably the Board's implication in Pulp and Paper Bureau that such a category exists, it still awaits confirmation. This suggests that if there be a

213 See particularly Board of School Trustees of School District No. 39 (Vancouver) and C.U.P.E. Local 407, supra, note 166.
class of lawful but prohibited bargaining subject it is not the Board's policy to formally acknowledge it. On the contrary, rather than speak of forbidden insistence and per se violations of the duty to bargain collectively the Board would prefer to speak of "cogent circumstantial evidence" of a violation, thereby preserving the flexibility of the administrative approach to labour disputes.

D. SECTION 70 "FIRST-CONTRACT" ARBITRATION: THE EXCEPTION PROVING THE RULE

"The London Drugs decision in particular recognised that a s.70 agreement is antithetical to an underlying policy assumption of the Code - i.e. that the primary method of solving labour disputes is through strikes and lockouts rather than third party binding arbitration".

This new power conferred on the Board to impose a first collective agreement was, upon the Code's introduction, unique and controversial. Now it is neither of these things. On 1 February and 1 June 1978 (respectively) the Quebec and Canada labour statutes adopted provisions

214 See Pulp and Paper Bureau, supra, not 169, at 80.


216 Acknowledged ibid, at 228.

similar to section 70. In so doing the Quebec legislature and Canadian Parliament each endorsed the British Columbia Board's declared commitment to invoke the first contract procedure only in the very exceptional case - as a remedy to promote collective bargaining, not to substitute for it.

The Code's provisions read:

"70. (1) Where a trade-union certified as bargaining agent and an employer have been engaged in collective bargaining with a view to concluding their first collective agreement and have failed to conclude an agreement, the Minister may, at the request of either party and after such investigation as he considers necessary or advisable, direct the Board to inquire into the dispute and, if the board considers it advisable, to settle the terms and conditions for the first collective agreement.

(2) The Board shall proceed as directed by the Minister and, if the board settles the terms and conditions, those terms and conditions shall be deemed to constitute the collective agreement between the trade-union and the employer and binding on them and the employees,..." 

71. In settling the terms and conditions for a first collective agreement under section 70, the board shall give the parties an opportunity to present evidence and make representation and may take into account, among other things,

(a) the extent to which the parties have, or have not, bargained in good faith in an effort to conclude a first collective agreement; and,

(b) the terms and conditions of employment, if any, negotiated through collective bargaining for comparable employees performing the same or similar functions in the same or related circumstances".

72. In no event shall the collective agreement settled by the board under section 70 be for a period exceeding one year from the date the board settles the terms and conditions for a first collective agreement under that section".


Professor Hickling's criticism of the section 70(1) drafting is pertinent. Section 70(1) seems to make it a condition precedent to the exercise of the section 70 power that both parties "have been engaged in collective bargaining." But section 1(1) defines this as meaning "negotiating in good faith with a view to the conclusion of a collective agreement," which would seem to mean that if the employer or union or both have not bargained in good faith, or have failed or refused to bargain at all, then section 70 cannot be invoked. However, despite this apparent requirement of section 70 - that parties have engaged in good faith bargaining - the Board established at the outset that the object of section 70 "is to promote free collective bargaining, not to substitute for it"; "it is not intended as a standard response to the breakdown of bargaining, even in the case of first-contract negotiations"; that first-contract arbitration is not for parties who are "genuinely prepared" to negotiate:

"...if we were to impose upon these parties our own opinion as to a reasonable settlement, we would be acting on the assumption that the Code guarantees that a collective agreement must be reached, and by compulsory arbitration as a last resort. The Code makes no such promise, even in the case of first agreements. The primary method of resolving an impasse at the bargaining table remains the strike or lockout. This Board is not prepared to dilute the force of that...constituent of collective bargaining."224

220 Developments in Labour Law, supra, note 217, at 67-68.

221 Albeit "...unless the context otherwise requires", per the opening words of section 1(1).

222 In which event, not even the section 1(1) proviso (ibid.) could be relied upon.

223 Miscellaneous Workers etc. and Helpers Union, Local No.351 and London Drugs Ltd. Miscellaneous Workers etc. and Helpers Union, Local No. 351 and Grandview Industries Ltd. [1974] 1 Can. L.R.B.R. 140 at 143.

224 Ibid.
Thus, as far as the Board is concerned first-contract arbitration is inappropriate for parties who are genuinely prepared to bargain, have negotiated in good faith, but who have reached an impasse: 

"...it is not a sufficient condition for the use of s.70 that negotiations have broken down and a long strike has ensued". This is not to say that breach of section 6 is a condition precedent to the Board's jurisdiction; but as the Board acknowledged in London Drugs evidence of bad faith bargaining will be a weighty factor influencing its decision to invoke section 70.

For example, of the separate applications for first-contracts in that case the Board declined the Grandview Industries' application, holding that while the parties were not prepared to make the concessions necessary for agreement there was neither indication of anti-union animus nor evidence of bad faith bargaining, yet granted the London Drugs' application, holding an arbitrated first-contract to be appropriate in view of the unfair labour practices and economic conflict that marked the negotiations.

Is this approach at variance with the language of section 70? Clearly it is. The prerequisites of a Ministerial direction to the Board under section 70 ("...direct[ing] the board to inquire into the dispute and, if the board considers it advisable, to settle the terms and conditions for the

---

225 Eg., see Bond Brothers Sawmill Ltd. and I.W.A., Local 1-424 and C.L.A.C. Local 44 155/74 and also the Grandview Industries application, supra, note 223.

226 London Drugs Ltd., supra, note 223, at 142.

227 See the Grandview Industries application, ibid., at 144.

228 Ibid.
first collective agreement") is that the parties have engaged in good faith bargaining, are unable to conclude an agreement and one or both request the Minister to exercise his discretion accordingly. What this clearly envisages is that first-contract arbitration be invoked as an alternative to collective bargaining; such that only by departing from the language used has the Board been able to convert section 70 into an exception that indeed proves the rule. For the Board's explanation why it should remain faithful to the Code's basic objective:

"In enacting s.70...what the legislature had in mind was a positive remedy through which it was hoped that collective bargaining could put down roots that would enable it to survive. It was the expectation of the authors of the law that an enforced one-year trial marriage might erase enough of the bitterness and distrust between the parties so that meaningful collective bargaining directed at the real issues would be possible when the time for renewal arrived".229

Undoubtedly, it was this "expectation" that persuaded the authors of the equivalent Canada and Quebec provisions to find alternative wording by which to invest the requisite jurisdiction. To quote the Canada Labour Code:

"171.1(1) Where an employer or a bargaining agent is required, by notice given under section 146...to commence collective bargaining for the purpose of entering into the first collective agreement between the parties...

[the remainder of subs. 1 and subss. 2, 3 and 4 reproducing in essential respects sections 70-72 of the British Columbia statute]."

229 Kidd Brothers Produce Ltd. and Miscellaneous Workers etc. and Helpers Union, Local 351 [1976] 2 Can. L.R.B.R. 304, at 318. See also London Drugs Ltd., supra, note 223, at 143. But cf., Syndicat General de la Radio (CJMS)(CNTU), supra, note 218, at 380, where the Canada Labour Board believed that "transplant surgery" was a better image by which to characterise the section 70 arbitrated agreement - as distinct from "a trial marriage".

230 Ibid.
Finally, in 1975 the legal assistant to the Chairman of the British Columbia Board applauded British Columbia for doing what no other Canadian jurisdiction had attempted: "...British Columbia now has what all the Canadian jurisdictions lack: an effective remedy for intransigence and bad faith [in first-contract negotiations]".\(^{231}\) Significantly, he believed that the strength of section 70 lay simply in its potential to deter parties from allowing first-contract negotiations to degenerate into bad faith bargaining. "[T]he true test of the efficacy of the remedy", he proffered, "will be not in the number of times the Board actually imposes it, but rather in the number of occasions when the presence of the section in the statute makes its use unnecessary".\(^{232}\) For the record, fears that section 70 arbitration would become the norm rather than the exception in first-contract negotiations were early dispelled. In 1974 the Board received only 17 applications for section 70 agreements. Of these, 3 were dismissed, 2 were withdrawn and 7 were settled amicably in consequence of parties acting upon the Board's suggestions. In five cases only did the Board impose first-agreements. In 1975 the number of applications received totalled no more than 9.\(^{233}\) This paucity surprised many, observed the Canada Labour Board in hearing the first application for first-contract arbitration under the Canada Labour Code.\(^{234}\) The Canada Labour Board pointed to a number of factors which it believed had instilled in

\(^{231}\) Haladner, *Notes on the Code - Section 70*, 35 (No. 6) PERSPECTIVE 1 (1975).

\(^{232}\) Ibid.

\(^{233}\) Noted in *Syndicat General de la Radio (CJMS)(CNTU)*, supra, note 218, at 374.

\(^{234}\) Ibid.
management and labour in British Columbia a "healthy fear" of the section 70 agreement. It quoted a then recent media statement of the Chairman of the British Columbia Board, in which Mr. Paul Weiler disputed statements from Ontario questioning the value of the section 70 remedy:

"...generous agreements imposed by the Board where it found one or the other of the parties stonewalling on a first contract discouraged other employers or unions from taking a similar course...The labour and management community has got the message that the Board is serious about first-contract disputes...Mr. Weiler noted that of the three disputes settled most recently by the Board two were applications from employers...But if it (the Board) finds that one of the parties is not bargaining in good faith, it will impose a generous settlement in favour of the other party as a deterrent to other employers or unions". 236

These and the Board's assurances above confirm that although section 70 agreements contemplate terms and conditions of employment being imposed from the outside under legal authority, it is a far cry from compulsory conciliation and arbitration that has governed labour disputes in New Zealand since the first Industrial Conciliation and Arbitration statute of 1894. 237

235 Ibid.
237 See the Industrial Conciliation and Arbitration Act 1894, infra.
PART II
V. INDUSTRIAL CONCILIATION AND ARBITRATION

"The [Industrial Conciliation and Arbitration] Bill became law on the 31st August, 1894,...Its author had succeeded in persuading Parliament to pass it as an experiment, and if it proved a failure, it could be repealed. But Mr. Reeves perhaps did not then realise that it is usually easier to pass a law than it is to get one repealed."

Broadhead, State Regulation of Labour and Labour Disputes in New Zealand (1898), Ch. II, at 10.

A. INTRODUCTION

It is difficult to imagine that the author of that quotation¹ could have appreciated the extent to which the passage of time would sanction his prophecy. Broadhead's speculation about the ability of Industrial Conciliation and Arbitration to endure was made just four years from its introduction; a meagre period indeed when - some eight and a half decades

¹ Broadhead, State Regulation of Labour and Labour Disputes in New Zealand (1898), Ch. II, at 10.
onward - the system he then mused continues to flourish. However although never more than an experiment what is all the more remarkable about its endurance is this realisation, to quote a former Minister of Labour, "conditions now and conditions when our legislation was first enacted are completely different making the legislation in many respects inappropriate". This is not an isolated thought: how many papers on New Zealand's industrial system begin today with the observation (to quote a 1971 article) "[d]issatisfaction with the present state of industrial law has been steadily increasing in the last few years"? And then observe what many have observed, "...the [present] Industrial Conciliation and Arbitration [legislation] [is] merely a somewhat updated variation of the original 1894 statute, and despite numerous amendments its philosophy is still anchored in the 19th Century".

In this light it is not surprising that many papers on New Zealand's industrial system should be aimed at reform, invariably with the stated ideal of achieving "better" or "more improved" procedures for accommodating and even minimising industrial conflict. The goal - to prevent the prolonged and costly strike or lockout which tends to occur when collective bargaining breaks down. The object - to enhance collective bargaining within the framework of the Industrial Conciliation and Arbitration system. However, what this fails to appreciate is what the Webbs long ago foresaw:

---

2 In the words of its author, the Hon. William Pember Reeves, the 1894 statute was "absolutely experimental, and in New Zealand absolutely novel"; see Broadhead, ibid, at 9.


4 A. Szakats, Recent Changes in Industrial Law (1971), Industrial Relations Centre, Victoria University of Wellington, Occasional Papers in Industrial Relations No. 5, at 1.

5 Ibid.
compulsory arbitration as it exists in New Zealand tends not to supplement collective bargaining, it tends to replace it altogether.\textsuperscript{6} Underlying the British Columbia reforms was the realisation that compulsory arbitration of interest disputes provides little incentive for real bargaining when the ultimate result rests on the decision of some external tribunal created by the state.\textsuperscript{7} Consequently to propose changes within New Zealand's existing industrial framework in order to enhance or make more effective collective bargaining may well prove to be a well-intentioned, yet cosmetic and ultimately fruitless exercise.\textsuperscript{8} Nonetheless the point should also be made that even to abolish in its entirety New Zealand's system of state regulation of interest disputes may not remedy New Zealand's persisting industrial malaise; one must question whether even the most efficacious labour system would not capitulate, in times such as the present, to recession and economic hardship.\textsuperscript{9}

\textsuperscript{6} Sidney and Beatrice Webb, \textit{Industrial Democracy} (1892), at 244-5.
\textsuperscript{7} See Part I, \textit{supra}.
\textsuperscript{8} There is no better illustration than the acclaimed institutional reforms effected by the Industrial Relations Act 1973, all of which were discarded within three and a half years. See the original Part III of the statute, establishing the Industrial Commission and conferring upon it exclusive jurisdiction for the settlement of interest disputes by arbitration, and Part IV, establishing the Industrial Court and conferring upon it exclusive jurisdiction over rights disputes. In 1977 these bodies were abolished in favour of a single institution exercising both arbitral and judicial functions; see the Industrial Relations Amendment Act 1977, re-establishing the Arbitration Court.
\textsuperscript{9} See infra D. The Omnipresent State, particularly part (b) \textit{Farewell to free wage-bargaining?}
B. THE INSTITUTIONS OF CONCILIATION AND ARBITRATION

The Act's machinery for interest-dispute settlement revolves around two bodies, one of which is permanently constituted with a fixed membership, the other of temporary existence and changing membership.

(a) The Arbitration Court

Section 32 of the present Industrial Relations Act 1973 designates the Arbitration Court a Court of record and, in addition to the jurisdiction and powers specifically conferred on it by that or any other Act, bequeaths it all the powers inherent in such a court. On the persuasive authority of *re Forbes, ex parte Bevan*, however, the Court's inherent jurisdiction does not extend beyond protecting its function as a court constituted with its special jurisdiction afforded by the industrial statute. Thus, like its Australian counterpart, the Arbitration Court has no jurisdiction to administer equitable remedies, such as the remedy of injunction, nor has it any inherent power to commit for contempt or to make an order for the preservation of the status quo pending some further hearing. However it does enjoy the power expressly conferred by section 48(1)(d) of the Act.

---

10 References hereinafter to just section numbers are references to this Act.
12 See also ss. 145 and 146 of the Industrial Relations Act 1973, conferring on the Arbitration Court express powers to punish for (respectively) contempt in the face of the Court and obstructing or interfering prejudicially with any matter before the Court.
13 The Commonwealth and States of Australia had adopted Industrial Conciliation and Arbitration within ten years of its introduction in New Zealand. For the history of the Australian statutes, see *Australian Tramway Employees Association v Prahran and Malvern Tramway Trust* (1913) 17 C.L.R. 680 (H.C.A.), per Isaacs and Rich JJ.
to "[o]rder compliance with any award, order, or collective agreement proved to the satisfaction of the Court to have been broken or not observed".

By virtue of section 33 the Court consists of a Chief Judge (presently Chief Judge Horn), not less than two other judges (presently Judge Castle and Judge Williamson) and two or more lay members appointed on the nomination of the central organisation of employers (the New Zealand Employers' Association) and the central association of workers (the New Zealand Federation of Labour) respectively. All appointments are made by the Governor-General; by virtue of sections 40 and 42 temporary Judges and acting nominated members may be appointed in like manner.

A Judge must be a barrister and solicitor of the High Court of New Zealand of not less than seven years standing, and as with the security of tenure provisions governing High Court Judges in New Zealand may only be removed from office by Her Majesty upon the address of the New Zealand House of Representatives.

Barristers and Solicitors holding practising certificates may not represent parties in arbitration proceedings except with the consent of all parties to those proceedings. Seldom is consent so given. In all proceedings the Court may accept, admit and call for such evidence as in

14 Sections 37 and 41.
15 Section 37(2).
16 See the Judicature Act 1908 (N.Z.), particularly ss. 7 and 8.
17 Section 37(5).
18 Section 54(4).
equity and good conscience it thinks fit, whether or not such evidence would be otherwise admissible in judicial proceedings. Nonetheless section 57(2) does expressly empower the Court to take evidence on oath.

For all other purposes relating to appearances of witnesses and obtaining of evidence, the Court is endowed with the usual powers and functions of a Magistrate; section 57(2)(g). Paragraphs (e) and (f) provide further that persons summoned and required to give evidence who, without sufficient cause, fail or refuse to appear or give evidence are liable on conviction by the Arbitration Court to a fine not exceeding $100.

A further 'machinery' provision warranting mention is section 223. This bequeaths the Court, or any member or officer of the Court, wide powers of entry upon any building or place in which work is carried on that is made the subject of a reference to the Court; or to inspect any work, machine, material or thing in any such building or place; and to interrogate any person(s) in or upon any such building or place with respect to any such work or thing. Refusal to grant such entry or to obstruct or hinder the Court in the exercise of the powers so conferred is an offence punishable on conviction by the Court to a fine not exceeding $100.

Hearings are ordinarily held in public, but by virtue of section 224(2) the Court may, in its discretion, either of its own motion or on the application of any of the parties before it, direct proceedings to be held in private. The presence of a Judge and at least one other

19 Section 57(1).
20 Section 224(1).
member is necessary to constitute the Court; section 53(1). Subsection 2 expressly provides for decision by way of majority, but if the members are equally divided the decision of the Judge is deemed to be the decision of the Court. Section 52A specifically concerns arbitration hearings. This empowers any party to a dispute of interest to have the Court sit as a full Court comprising the Chief Judge (or another Judge nominated by him) plus four further members nominated by the Chief Judge; two nominations being made upon the recommendation of the central organisation of employers and two upon the recommendation of the central organisation of workers.

"Arbitration", reflected one early Australian judge, connotes "a process for the settlement of disputes by submitting them to the decision of a tribunal". It simply involves "the laying down of rules", said another judge, "for future conduct". However before the Arbitration Court can acquire jurisdiction in matters of arbitration the dispute must first be referred to a conciliation council:

67. Dispute of interest to be referred in first instance to conciliation council - No dispute of interest that is not the subject of a voluntary settlement under section 65 or section 66 of this Act shall be referred to the Court unless it has been first referred to a conciliation council.

Further to this jurisdictional prerequisite, section 77(1) stipulates:

77. Powers and duties of conciliation council with respect to dispute - (1) It shall be the duty of a conciliation council to endeavour to bring about a fair and amicable settlement of the dispute, and to this end the council shall, in such manner as it thinks fit, expeditiously and carefully inquire into the dispute and all matters affecting the merits and their proper settlement.

21 Australian Boot Trade Employees Federation v Whybrow & Co., (1910) 11 C.L.R. 266 (H.C.A.), at 293.
22 R.v Gallagher, ex parte Aberdare Collieries Pty Ltd. (1963) 37 A.L.J.R. 40 (H.C.A.), at 43 per Kitto J.
(b) Conciliation councils

Kahn-Freund has said that "to conciliate means to bring the parties together and to induce them to bargain". In this sense conciliation, as a statutory precondition of arbitration, may be thought of as a separate prevailing mechanism for collective bargaining. Appearances aside, however, it is clearly subordinate to arbitration for the reasons below. Moreover conciliation as it is understood under the Industrial Conciliation and Arbitration statute implies a form of institutionalised and standardised 'collective bargaining' which distinguishes it from the more untrammelled phenomenon of contract negotiation in North America and the United Kingdom.

Application to refer a dispute to a conciliation council is made to the Arbitration Court under section 68 of the Act. Effectively, any union, association or employer, being a party to the dispute, may apply to convene a conciliation council. For the uninitiated the question of who will then rank as parties to the proceedings so as to be bound by the ensuing settlement will likely appear as confounding as it is complicated. Nonetheless, the following explanation is of necessity brief.

As explained in the chapter following, the term "dispute" is a legal concept of statutory definition. It departs from its ordinary colloquial meaning in that a "dispute" can only be created by following a certain

---

24 Section 68(1).
25 See section 2, reproducing the definition that has appeared in the successive Acts.
procedure that consequentially sets the legal limits of the dispute. Contrary also to disputes as they might occur in fact, a dispute within the meaning of the Act must be confined to a specified industry or related industries and, more often than not, to a single industrial district.

It should be mentioned that the legislation empowers the Governor-General, by Order-in-Council, to divide New Zealand into industrial districts (there being eight such districts presently); and that whilst there is provision for a union of workers engaged in a specified industry or related industries to register in more than one industrial district (and thus represent the workers engaged in that industry or related industries

26 See particularly The Cromwell and Bannockburn Colliery Co Ltd v Otago Conciliation Board (1906) 25 N.Z.L.R. 986 per Cooper J, emphasising the artificial nature of a "dispute", holding "actual or probable strife" not to be one of its essentials (see at 988-89). See generally, infra, Ch. VI.


28 As required by s.163 of the Act; known as the industrial union's "statutory objects clause" and specifying the general purpose or purposes for which unions might register - and thus exist - under the Act. It reads:

163. What societies may be registered - (1) Subject to the provisions of this Act, any society of persons lawfully associated for the purpose of protecting or furthering the interests of employers or, as the case may be, of workers, engaged in any specified industry or related industries in New Zealand may be registered as an industrial union... under this Act in respect of any area of jurisdiction applicable to the proposed union..."

For the definitions of "industry" and "related industries", see respectively ss. 2 and 162.

29 Section 7. For the present eight industrial districts, see the Industrial Districts Notice 1954 (SR 1954/221), as amended by SR 1970/196.
in those districts)\textsuperscript{30} the legislation has traditionally tended to encourage single-district unionism (the last-mentioned fact accounting for the remarkable proliferation of workers' unions in New Zealand).\textsuperscript{31} It may further be noted that employers, like workers, may also seek registration under the Act as an industrial union.\textsuperscript{32}

Consequently, if there exists an employers' union registered in an industrial district in respect of a particular industry, either the respective employers' or workers' union may apply under section 68 to convene conciliation, both unions being parties to the dispute in question. However one important difference reflecting the lesser need historically on the part of employers to organise is that whereas on the worker's side only a registered union or association has standing under the Act—"[n]on-associated workmen have...no status in the Court or Arbitration"\textsuperscript{33}—it is otherwise for individual employers. Of course where there exists a union of employers duly registered in the industry in the district in question, the question of individual employers being or becoming party to the dispute assumes little importance— if not the applicant to convene conciliation, the employers' union will almost certainly be cited as respondent to the proceedings and every individual employer will be bound

\textsuperscript{30} See particularly ss. 170 and 171 (entitled "Registration of multi-district union..." and "Effect of registration of multi-district union..."). See also s.173 (entitled "Extension of scope of union by amendment of rules") and s.192 (entitled "Provisions to facilitate amalgamations of unions").


\textsuperscript{32} See s.163, quoted supra, note 28.

\textsuperscript{33} Taylor and Oakley v Edwards J. (1900) 18 N.Z.L.R. 876 (C.A.), at 884 per Stout C.J.
by the terms of settlement simply by reason of membership of the union.34

However, where there is no such organisation, or if there is one where it
does not represent all the employers concerned, each individual employer will
be bound by the conciliation settlement simply by reason of being engaged
in the industry to which the dispute relates. Section 83, entitled
"Subsequent parties to agreement", stipulates that:

"...every collective agreement registered by the Court
under section 82 of this Act shall by force of this
Act extend to and bind as a subsequent party thereto
every union, association or employer who, not being an
original party, is, when the agreement comes into force,
connected with or engaged in the industry to which the
agreement applies within the area to which the agreement
relates".

(Observe that by virtue of section 89(2) this provision applies
equally to awards of the Arbitration Court "as if it [an award] were a
collective agreement registered by the Court..."). Thus, for example, a law
practitioner will automatically be bound by the settlement of a dispute in
the law practitioners' industry notwithstanding that he himself was not named
as a party. Further, although an employer may be clear in himself as to the
particular industry in which he is engaged by virtue of the type of his
business or undertaking he may nevertheless find he is engaged in a number of
industries depending upon how many of his employees are engaged in worker-
vocational industries (that is, depending upon how many of his employees are

34 Section 82(4) reads: "A collective agreement so registered shall be binding
on the parties to it, and also on every member of any union or association
that is a party to or bound by it". For exactly the same stipulation
applying to awards, see s.89.
members of unions whose respective membership rules are drawn on the basis of the particular worker's vocation). Section 2(2) is prefaced "[i]n order to remove any doubt as to the application of the foregoing definitions of the terms 'employer', 'industry', and 'worker'":

"...it is hereby declared that for all the purposes of this Act an employer shall be deemed to be engaged in an industry when he employs workers who by reason of being so employed are themselves engaged in that industry, whether he employs them in the course of his trade or business or not."

Thus, a law practitioner is deemed to be engaged in the clerical workers' industry by reason of employing clerical workers - whether or not he employs them in the course of his own business qua law practitioner - so as to be a subsequent party within the meaning of section 82 to every clerical workers' instrument.

Finally on the question of parties, where there is no registered employers' union it suffices that the workers' union simply cite a number of individual employers as respondents who will then be representative of all employers in the industry in the industrial district to which the dispute relates. Subsection 5 of section 68 makes this explicit:

---

35 See s. 2 for the two limbs of the definition of "industry" pertaining either to the employer's business or undertaking (e.g. law practitioners) or to the vocation workers share in common (e.g. clerical workers transcending many different employer industries). For discussion, see in re Otago Clerical Workers' Award [1937] N.Z.L.R. 578 (C.A.) (which decision Parliament reversed by statute and thereto introduced the present definition of "industry"; see the Industrial Conciliation and Arbitration Amendment Act 1937); Attorney-General v Smith [1950] N.Z.L.R. 680 (S.Ct.); See also Mazengarb and Smith's Industrial Law (1975, 4th ed., Smith, Szakats, Schellevis eds.), notes on ss. 2 and 162.
68. Application to refer dispute to conciliation council - ...

(5) Where in respect of any application under this section any union or association of employers is in existence in respect of the industrial district or districts in any industry to which the dispute relates it shall be named as a respondent, and all employers who are engaged in the industrial district or districts in any industry to which the dispute relates shall also be deemed to be respondents. Where a union or association of employers does not exist, it shall be sufficient compliance with this subsection if a number of representative employers...is named in the application; and in any such case the employers so named and all other employers who are engaged in the industrial district or districts in any industry to which the dispute relates shall be deemed to be respondents.

In the case of a single-district dispute, a section 68 application to convene conciliation cannot be made earlier than three months before the date of expiry of the current industrial award; where the dispute affects two or more industrial districts, that period is extended to six months. Section 68 further provides that the applicant(s) is to nominate up to four persons (seven persons in the case of a dispute extending beyond one industrial district) to act as assessors on behalf of the applicant(s), to sit with the conciliator in the hearing of the dispute. (A conciliator is a full-time position, appointments being made by the Governor-General on the recommendation of the Minister of Labour.) The Act then prescribes a timetable for the completion of the various steps necessary to convene the council; most notably specifying the period within which the respondents must lodge a statement of counter-proposals which will subsequently set the limits of the dispute together with a list of persons nominated to act as assessors, being equal in number to those
nominated by the applicant(s).\footnote{Section 70.} By virtue of section 72(4), the conciliation council is constituted and in existence upon the conciliator duly appointing the assessors so nominated.

Being in law a separate entity from the parties to the dispute,\footnote{In re New Zealand Meat Processors' etc. I.U.W. (1964) 64 Bk of Awards 2076.} a conciliation council cannot impose an agreement upon the parties; as the authorities hold it is not a judicial tribunal capable of arbitrating differences irrespective of the wishes of the parties.\footnote{E.g., see Inspector of Awards v R. & W. Hellaby Ltd [1933] N.Z.L.R. 938, at 994 per Kennedy J. For discussion, see D.L. Mathieson, Industrial Law in New Zealand (1970), at 277-81.} Thus, to quote Myers C.J. in Inspector of Awards v R. & W. Hellaby Ltd:

"A settlement of an industrial dispute before the Council requires the agreement of the parties themselves. Where the parties themselves fail to agree, they are not bound thereby by a consensus of the assessors".\footnote{Ibid, at 969. Cf., Herdman J. at 977-8.}

That, at least, is the theory - that assessors are not simply the agents of the parties who nominated them.\footnote{In re Wellington Performing Musicians' Award (1912) 13 Bk of Awards 374, at 378; Inspector of Awards v R. & W. Hellaby Ltd, ibid, at 958 per Myers C.J.} The reality, however, is otherwise. Although technically their only function is to do "all such things as [may be] right and proper for inducing the parties to come to a fair and amicable settlement...",\footnote{Section 77.} the legislation expressly contemplates
the nomination and appointment of avowedly partisan assessors. A union assessor is accountable to his union, an employer assessor is accountable to the employers. In short, if a particular nominee is not prepared to bargain in a representative capacity why nominate him? Although the old Court of Arbitration sought on one occasion to renounce this reality, it had itself earlier referred to assessors as "representatives". In practice, then, agreement of the assessors means agreement of the parties to be recorded in writing and signed by the conciliator and one or more assessors from either side and forwarded to the Arbitration Court for registration. Though more resembling a collective agreement and referred to as such by the Act, a conciliated settlement nonetheless enjoys the same blanket coverage as an award of the Arbitration Court, and indeed is deemed to be and shall be known as an award of that Court by virtue of section 82(9) of the Act.

42 See ss. 68 and 70 calling upon the applicants and respondents respectively to nominate their assessors, and s. 72 requiring the conciliator to be "satisfied" that the persons so nominated "are adequately representative of the parties of the dispute and have authority on behalf of the parties to negotiate a settlement...".

43 Cf., the title of the present body, "the Arbitration Court", commonly referred to incorrectly as "The Court of Arbitration"; see the Industrial Relations Amendment Act 1977.

44 In re New Zealand Meat Processors etc. I.U.W., supra, note 37.

45 Anderson v Robertson [1948] G.L.R. 230. And see the express terms of s.72, quoted supra, note. 42.

46 See s. 82.

47 E.g., in s. 82 itself, which provision nonetheless deems a collective agreement to be "an award"; s. 82(9).
A conciliation council is at liberty to determine its own procedure; "...it shall not be bound to proceed with the inquiry in any formal manner, or formally sit as a tribunal,...". However for purposes of summoning witnesses, taking evidence on oath, and requiring production of books and papers, the conciliator is equipped with the usual enforcement powers of a Magistrate.

Should a dispute of interest before a conciliation council not be settled, by virtue of section 84(1), it is encumbent on the conciliator to refer the dispute to the Arbitration Court for settlement. He shall deliver to the Court a record of the proceedings of the council together with a memorandum of any partial settlement reached. Although the Court in performing its arbitral function is not bound by any such partial settlement, the legislation does invite the Court "if it thinks fit" to incorporate all or any of the terms of the memorandum into the final award.

C. THE PRE-EMINENCE OF ARBITRATION

The Hon. William Pember Reeves, Minister of Labour in the first Liberal Government elected in 1890, was the architect and political patron

48 Section 77(3).
49 Section 77 (10).
50 Section 84(2).
51 Section 84(3).
of the first Industrial Conciliation and Arbitration statute. He was of the view that whilst conciliation by itself would prove futile because of employer recalcitrance, the great majority of disputes would be settled by the early Boards of Conciliation (each industrial district was given a permanently constituted Board under the initial 1894 Act and that only the most serious disputes "threatening to arrest the processes of industry" would come before the Court. In the parliamentary debates of 1894 he said:

"I do not think that the Arbitration Court will be very often called into requisition; on the contrary, I think that in 99 cases in 100 in which labour disputes arise they will be settled by the Conciliation Boards; but unless you have in the background an Arbitration Court the Conciliation Boards will not be respected, and they will be virtually useless".

---

52 See generally, Reeves, State Experiments in Australia and New Zealand (1902) Vol. II; H. Broadhead, State Regulation of Labour and Labour Disputes in New Zealand (1898); J.E. le Rossignol and W. Downie Stewart, State Socialism in New Zealand, Chs. XIII-XVI (curiously the date of publication is omitted, but it appears to have been completed around the end of the first decade of this Century); N.S. Woods, Industrial Conciliation and Arbitration in New Zealand (1963); K. Sinclair, William Pember Reeves (1965); H. Roth, Trade Unions in New Zealand (1973); J.Holt, The Political Origins of Compulsory Arbitration in New Zealand, N.Z.J. of Hist., Vol. 10 (October, 1976).

53 See particularly Woods, ibid., at 42. See also Broadhead, ibid., at 10; le Rossignol and Downie Stewart, ibid., at 227 (quoting Reeves).

54 Industrial Conciliation and Arbitration Act 1894.

55 See Broadhead and le Rossignol and Downie Stewart respectively, supra, note 53.

56 Ibid.
Apart from what some have interpreted as a satisfactory record on the part of the Boards during the initial months of the Act, the Minister was soon to be proved wrong. Being the first stage agency, the Conciliation Board was first to encounter the general hostility of employers towards the Industrial Conciliation and Arbitration Act 1894, which they elected to express by refusing to cooperate. Consequently more and more disputes were referred to the Court. Ironically workers too saw advantages in treating conciliation as simply a formality to be satisfied in order to approach the Court. The arbitral function being of a legislative nature, the Court was required to arbitrate for the average rather than for the weak or the strong (traditionally the Court has tended to follow rather than precipitate wage movements); and whilst this was later to become a source of dissatisfaction for the stronger unions, it meant for the weaker unions higher wage rates through arbitration than they could hope to have secured through conciliation. So for a good portion of the workforce

57 See Woods, supra, note 52, at 51 et seq.
58 Ibid, at 50.
59 "An industrial award is in form a judicial decree, but in substance it is an act of legislative authority...The making of an industrial award is as much an act of delegated and subordinate legislative authority as the making of by-laws by a municipal authority..."; New Zealand Waterside Workers' Federation I.A.W. v Frazer [1924] N.Z.L.R. 689, at 708-9 per Salmond J. See also Baillie & Co. v Reese (1907) 26 N.Z.L.R. 451, at 463 per Chapman J.; Chapman v Rendezvous Ltd [1923] N.Z.L.R. 174.
60 See Woods, supra, note 52 at 49 and 55. See also le Rossignol and Downie Stewart, supra, note 52, Ch. XIV for the acclaimed theory of wage fixing through the Court – based on the "doctrine of the living wage".
61 Woods, ibid.
which had then only recently managed to organise, arbitration was the preference. But even the strong unions early gleaned the advantage of the arbitrated award over the conciliation settlement. Having accepted the strictures of conciliation and arbitration - it was, commented one trade unionist in 1900, "part of our religion" the trade union movement perceived much of its immediate growth lay in extending award rates to cover compulsorily those workers in the industry to whom those rates had so far not been granted voluntarily. The problem was that the conciliated settlement, termed an "industrial agreement", was until recently a bilateral instrument binding only those who were party to it. Eventually this was countered by the practice which developed whereby application was made to have the conciliated agreement converted into an award of the Court in order that the agreement should acquire blanket coverage throughout the industry. But at the outset unions were ready to allow conciliation to fail in order to avail themselves of the Court's wider powers to extend the settlement beyond the immediate parties to it.

62 F. Challaye, L'Arbitrage Obligatoire en Nouvelle-Zelande (1903), at 20 (quoted by H. Roth, Trade Unions in New Zealand (1973), at 21).

63 Woods, supra, note 52, at 50.

64 E.g., see the predecessor of the Industrial Relations Act 1973, the Industrial Conciliation and Arbitration Act 1954, ss. 103-108 (particularly s. 105 stipulating the bi-lateral force of the industrial agreement). Cf. now the "s. 65 agreement".

65 By the time of the Industrial Conciliation and Arbitration Act 1954, any conciliated industrial agreement could be converted into an award without the need for a Court hearing; see s. 130 of the repealed statute.
There was also the allegation that produced considerable public consternation at the time, that some members of Conciliation Boards were deliberately fomenting disputes in order to receive the princely fee of one pound one shilling per day the Colony had allocated members engaged in the hearing of disputes. Apparently the belief was not without justification, at least with respect to the Wellington Board which alone accounted for well over one half of all public monies expended upon the conciliation service. Yet it is generally accepted that this was but a relatively minor cause of the acute and widespread dissatisfaction with the conciliation process by 1901. That year Parliament responded not by any constructive amendment to the conciliation machinery but by a measure which one historian recalls all but destroyed it: the Industrial Conciliation and Arbitration Amendment Act 1901 authorised either party to an industrial dispute henceforth to bypass conciliation proceedings and take the dispute directly to the Court. This tended to affirm what some opponents of the system maintained, that the Boards were not true boards of conciliation but rather arbitration courts of first instance in which parties simply prepared their case for hearing in the higher tribunal, the Arbitration Court itself.

67 Notably Woods, ibid, at 54-55.
68 See the Industrial Conciliation and Arbitration Amendment Act 1901, s. 21, (later known as the "Willis Blot" clause).
69 See le Rossignol and Downie Stewart, supra, note 52, at 227-28.
Today, however, Reeves would be gratified. For it is estimated that 90 per cent of all interest disputes in the private sector in New Zealand are now settled in conciliation. Yet this cannot be taken to mean that free collective bargaining is alive and flourishing under New Zealand's Industrial Conciliation and Arbitration system; five factors combine to assure the pre-eminence of arbitration over conciliation. First, possibly the most telling influence on the activities of conciliation councils today is the thought of what the Arbitration Court is likely to do if the dispute is taken to the Court - a thought assisted by knowledge of what the Court has awarded in similar cases. Consider the recent test-case on the introduction of computer technology in New Zealand. In New Zealand Federated Clerical and Office Staff Employees I.A.W. v Wellington Law Practitioners I.U.E. the Arbitration Court gave a carefully considered decision explaining that it could not sanction the Clerical Workers' demand for the right to bargain over the introduction of word processing machines. As an acknowledged test-case in which organisations and persons beyond the immediate parties were heard, it justified the Court's departure from its practice of not providing reasons for its decisions on purely arbitral matters in interest disputes. In essence the Union's demand was for the inclusion of an award clause granting the Union the right to "full discussions and consultations" with the employer prior to any decision being made to introduce new computer technology. The reasons for decision and the particular clause ultimately

70 See Mathieson, supra, note 38, at 276.


72 Notably the two central organisations, the New Zealand Federation of Labour and the New Zealand Employers' Federation.
fixed by the Court do not concern us here, except to add that the clause so fixed now appears - verbatim in most cases - in virtually every post-1980 instrument to define the respective rights of all unions and employers in New Zealand whenever the question of computer technology in the workplace arises. In this light it is curious the Arbitration Court should have been careful to caution that it is not bound by any factual precedent in matters of arbitration (expressed also in the Memorandum to the Award), particularly knowing as it did that its reasons for rejecting the Union's claim extinguished the very freedom it reserved to modify its approach in future proceedings.

Secondly, allied to this first factor is the influence of established wage relativities between the different types of workers in New Zealand. Established over the years by the minima the Court has written into awards, these relativities have successfully conditioned those involved in management-union negotiations rendering the most contentious employment term, the wage package, for the most part a formality. Assuming the absence of Government wage restraints, the only variable from year to year is the total percentage increase to be passed on to existing award rates. But this seldom affects established relativities since the percentage increase gained in the early award negotiations each year invariably sets the annual increase for all awards, subject perhaps to whatever minor variations may be required to preserve traditional wage differentials. Thus, through the

73 See infra, Chapter VI.
74 But cf., infra, Part D. THE OMNIPRESENT STATE.
establishment of wage relativities in New Zealand one can appreciate the extent to which arbitration has standardised the process of management-union negotiation and subjugated the conciliation process.

Thirdly, discussed in the following chapter is the jurisdictional concept of "dispute". This explains the ground for decision in the Law Practitioners case, the actual content of the Union's demand falling beyond what might legitimately constitute an industrial dispute necessary to confer jurisdiction for the making of an award. Reached solely on the Arbitration Court's interpretation of the industrial statute, this decision amounts to an adjudication upon a question of law. It thus establishes a precedent beyond which the Court in future proceedings cannot go. Further, since the conciliation process is constrained by the same jurisdictional requirement neither is a conciliation council at liberty as a result of the Law Practitioners decision to delve beyond the limited terms of the technology clause permitted in that case. It remains to add that collective bargaining of the type British Columbia has developed does not contemplate an environment of judicially imposed embargoes on (otherwise) lawful bargaining subjects.

Fourthly, since 1973 conciliated settlements have enjoyed the same status and blanket coverage as an award of the Court. Thus binding on

75 For the definition of "dispute" see the Industrial Relations Act 1973, s.2.
76 Supra, note 71.
77 See the Industrial Relations Amendment Act (No.2) 1976, s.10(2), inserting a new s.82(9) declaring that every conciliated collective agreement "shall be deemed to be and known as an award made by the Court".
78 See the Industrial Relations Act 1973, s. 83.
all subsequent parties in the industry to which the agreement applies, it
accentuates the already marked bias of Industrial Conciliation and
Arbitration towards externally imposed terms and conditions. There does
remain the freedom to contract out of the industry-wide instrument, but
only to the extent that bi-laterally secured terms improve on the award
from the employee's standpoint\(^79\) (clearly a freedom that is more notional
than real in times of economic downturn). The reflections of Sir Robert
Stout, Chief Justice at the turn of the century, are no less apposite
today. In 1900 His Honour said:

"All contracts regarding labour are controlled... The Court [of Arbitration] can make the contract
or agreement that is to exist between the workman
and the employer. It abrogates the right of workmen
and employers to make their own contracts. It in
effect abolishes contract and restores status. The
only way the Act can be rendered inoperative is by
the workmen not associating...No doubt the statute,
by abolishing contract and restoring status, may be
a reversal to a state of things that existed before
our industrial era, as Maine and other jurists have
pointed out. The power of the legislature is sufficient
to cause a reversion to this prior state, although
jurists may say that from status to contract marks the
path of progress".\(^80\)

Six years hence the Chief Justice further instructed: "The right of free
contract is taken away from the worker, and he has been placed in a condition
of servitude or status, and the employer must conform to that condition".\(^81\)

Reese (1906) 26 N.Z.L.R. 451, for contractual terms less favourable to
the worker than the award provisions.

\(^80\) Taylor and Oakley v Edwards J. (1900) 18 N.Z.L.R. 876, at 885.

\(^81\) Baillie & Co. Ltd. v Reese, supra, note 79, at 454 (Stout C.J. giving
judgment in the Supreme Court).
However, whilst the conciliated agreement has today industry-wide application the Industrial Relations Act 1973 now makes provision for voluntary settlement of interest disputes arising during the currency of an existing award or conciliated agreement. Section 65 sets out an informal procedure for the conclusion of a voluntary collective agreement which binds only the parties to it and, by amendment to the Act in 1975, expressly prevails over any existing award or collective agreement so far as there is any inconsistency. 82 Undoubtedly bargaining as contemplated by this provision would be the closest the Industrial Conciliation and Arbitration system comes to free collective bargaining, albeit it is still constrained by the jurisdictional concept of "dispute" and Government wage-controls respectively. 83

Lastly, the British Columbia Labour Relations Board has seized every opportunity presented under the Code to explain that the economic sanction is a fundamental component of free collective bargaining: the freedom to invoke the strike or lockout is the means for breaking impasse and moving parties into the contract zone. 84 Contrast the limitations governing interest-dispute procedures in New Zealand, the most specific of which reads:

82 Industrial Relations Amendment Act 1975, s.2(1), inserting a new s.65(8).
83 See infra, Part D, THE OMNIPRESENT STATE, for discussion of the latter.
84 Supra, Part I.
81. **Until dispute disposed of relationship of employer and employed to continue** - In every case where a dispute is before a conciliation council the following special provisions shall apply:

(a) Until the dispute has been finally disposed of by the council or the Court neither the parties to the dispute nor the workers affected by it shall, on account of the dispute, do or be concerned in doing, directly or indirectly, anything in the nature of a strike or lockout, or of a suspension or discontinuance of employment or work; but the relationship of employer and employed shall continue uninterrupted by the dispute, or anything arising out of the dispute, or anything preliminary to the reference of the dispute and connected with it:

(b) If default is made in faithfully observing any of the foregoing..., every union, association, employer, worker, or other person committing or concerned in committing the default shall be liable to a penalty not exceeding $100:

(c) The dismissal or suspension of any worker, or the discontinuance of work by any worker, pending the final disposition of the dispute shall be deemed to be a default under this section, unless the party alleged to be in default satisfies the Court that the dismissal, suspension, or discontinuance was not on account of the dispute.

As the legality of strikes and lockouts under the Industrial Conciliation and Arbitration legislation will be examined in a separate chapter, the discussion at this point will be confined to section 81. First, it is to be noted that it is operative only when a dispute is before a conciliation council. Section 75 deems a dispute of interest to have been referred to a conciliation council as soon as the council is fully constituted in accordance with the Act.⁸⁵ Ostensibly, therefore, there is nothing to prevent parties to a dispute resorting to economic action in order

---

⁸⁵ See ss. 67-74.
to extract assurances before invoking the Act's machinery. Consider, however, the usual industrial tactic which prevents this. Rather than succumb to the strike or lockout which might reasonably be anticipated, the other side will be careful immediately within the permitted three or six months prior to the expiry of the current instrument (whichever the case depending on the number of industrial districts involved) to set the conciliation machinery in motion by lodging the requisite section 68(1) application. This will then activate the section 81 embargo. The possibility of a section 68 application being made solely as a ploy to take advantage of this protection is strengthened by section 76, which enables only the applicant, not the respondent, to withdraw the dispute from conciliation at any time prior to settlement. Thus, provided the party seeking the immunity is first to lodge the application under section 68(1) he is assured that section 81 will remain active until the dispute is finally disposed of. Even so, should he fail to avail himself of this protection from the outset he will not be deprived of it in the event of the other side, the applicant, withdrawing from conciliation in accordance with section 76 in order to invoke industrial action. The reason is that in law the dispute is still extant thereby enabling a further application to reconvene conciliation to be made at any time by either party; in other words, the respondent to conciliation proceedings can become the applicant immediately the other party withdraws. Since this then subjects that party desiring to invoke the action subject to the section 76 disability, section 81 operates foremost as a mechanism to distort the true balance of power in the industrial relationship contrary to what collective bargaining dictates.

87 Contrast British Columbia labour policy, supra, Part I.
D. THE OMNIPRESENT STATE

(a) A "strategy of domination"?

The intervention of the state (an historic euphemism in these matters for the Government) in industrial relations and collective bargaining is arguably becoming a permanent and indispensible feature of all developed economies. 88 Stagflation - the "contradiction of no growth amid rampaging inflation" 89 - has prompted many in the 1970s to see the Government's mandate to preserve the economy as justifying direct legal controls on wage bargaining in particular. For example, Canada and the United States have each experimented with restrictive wage-price measures in the 1970s. 90 But owing to the administrative and theoretical difficulties encountered these proved to be no more than temporary and short-lived incursions into the arena of wage bargaining. 91 Both countries apparently accepted the need to look further than mere expedients to correct the high inflation-no growth equation. However, whilst New Zealand too has indulged itself over the past

90 See e.g., the Canadian Anti-Inflation Act S.C. 1974-75-76, c.75 preambled: "WHEREAS...inflation in Canada at current levels is contrary to the interests of all Canadians and...the containment and reduction of inflation has become a matter of serious national concern...".
decade with similar measures - and indeed continues to indulge itself, the imposed presence of the state in New Zealand's industrial relations has a considerably longer and more extensive history, deriving from the elaborate rules and institutions that lie at the heart of the arbitration system. So prominent and, at times, foreboding is this presence that it has prompted one observer to conclude that these rules and institutions constitute a "strategy of domination" through which the state in New Zealand pursues its own interests in industrial matters. This may risk overstating the state's position, but at least that writer is correct when he says that the essence of New Zealand's arbitration system is that it is a state institution, "...created by a swiftly expanding and precocious Department of Labour, designed to serve state interests, and modified several times to take account of changes in those interests".

Historically the state's role in New Zealand's industrial relations can be traced through the decisions taken (particularly the fluctuations of the Arbitration Court in response to economic conditions), institutions created (mainly ad hoc wage-fixing tribunals charged with controlling wage-settlements), and government strategies for handling the economy pursued over the course of this century; all of which can be dealt with

92 For a summary of the New Zealand controls, see [1978] N.Z. Recent Law 246. See also Farmer, supra, note 88.


95 Ibid.

96 See particularly the nil general wage order granted by the Court (per Judge Blair) in 1968, the Court having regard foremost to the general purpose of the empowering Act (the Economic Stabilisation Act 1948) and the economic conditions of the time. Generally the Court in discharging its economic functions has followed rather than precipitated movements in the economy. See infra.

97 See infra.
only by way of generalisation here. But clearly the single most profound effect this has had is to have made relatively predictable and controllable the actions of the major groups involved in New Zealand's industrial relations system.

Coupled with the aura of legalism encompassing the system, the key to this development lies in the stable, carefully defined procedures compulsory conciliation and arbitration creates for fixing wages and employment conditions. Even within a relatively short time this system had induced in its participants a psychology of acceptance. In 1900 a French observer attended a Wellington Trades Council meeting to be told "arbitration was part of our religion" and that unionists rejected the "old and barbarous system of strikes". In 1906 the British Labour leader Ramsay Macdonald visited New Zealand to study the arbitration system. He wrote:

"A trades union in New Zealand exists mainly to get an award out of the Arbitration Court. The awards are given as a rule for two years, consequently there is no incentive for the workmen in that particular trade to do anything for at least two years. They cannot strike; it is no good their grumbling; they simply pay their dues into the union funds because they are legally bound to do it, and they take little interest in trade unionism as an industrial and political factor. One of the leading trade unionists of Wellington told me, 'Our laws have increased our size, but they have taken all the steel out of us'".

98 F. Challaye, L'Arbitrage Obligatoire en Nouvelle-Zelande (1903) at 20, (noted supra, corresponding to note 62).

An American observer the following year confirmed these views, that New Zealand labour unions were "litigious rather than militant organisations, the creatures and instruments of state regulations". This marriage of New Zealand labour to the arbitration system may have been happy and wholesome at this early stage, but it was soon to show signs of tension and discontent. Henceforth at approximately twenty year intervals, New Zealand was to witness its more aggressive labour unions lead a revolt against the system, but only to have their power broken by the state in bitter industrial struggles. The last of these occurred three decades ago in 1951 with the National Government of the day invoking the extreme powers of the Public Safety Conservation Act 1932 (itself introduced in the aftermath of bitter industrial confrontation) to break the power of the waterside workers' union. Nonetheless, undisturbed by these periodic altercations the bulk of New Zealand labour unions remained relatively quiescent towards the role Industrial Conciliation and Arbitration reserved to the state, even if this amounted potentially to a blueprint for state control over the wage-bargaining system.

100 V.S. Clark, The Labour Movement in Australasia (1907), at 64.

101 Notably, the more powerful unions in transport, mining and the freezing industries; see Woods, supra, note 52, Ch. II.

102 See the Waterfront Strike Emergency Regulations 1951, S.R. 1951/24, promulgated pursuant to the Governor-General issuing a Proclamation of a state of emergency under The Public Safety Conservation Act 1932 (s.2(1)) on 21 February 1951. In the rhetoric of the Prime Minister on 22 February when the Regulations were proclaimed, New Zealand was "actually at war", M.E.R. Bassett, Confrontation '51, at 92.
The 1970s heralded a new era however. Since 1971 successive New Zealand Governments have responded to worsening economic conditions by asserting more dramatically the state's claimed responsibility in industrial matters; marked by a transition in the state's role from overseeing to virtually dictating industrial relations. 103 Severe anti-strike legislation 104 and an ill-fated attempt to undermine the unqualified preference clause granting closed-shop unionism 105 instance the state's increased visibility and aggression. But most prominent among government measures to stifle collective bargaining are the wage controls that have plagued New Zealand since the beginning of the 1970s. That these unpopular measures are justified as being invariably of only temporary duration but in the long term national interest provides little cause for optimism - at least at the present time New Zealand is learning to live with them.

(b) Farewell to free wage-bargaining?

In 1971 the National Government introduced legislation establishing a system of wage control restricting the increases which could be given to

103 See generally, Farmer, supra, note 88; Walsh, supra, note 94.

104 See in particular the Commerce Amendment Act 1976, containing extensive procedures to deal with strikes "contrary to the public interest" and outlawing strikes over "non-industrial matters" and strikes designed "to coerce the New Zealand Government". In addition to imposing criminal liability, the latter offences also impose civil liability at the suit of any person suffering loss or damage "as if the strike... were a tort independently of this section"; s.119B(3). See infra, Chapter VIII.

award minima and individual employees under contracts of service. A central tribunal, the Stabilisation of Remuneration Authority, was established from which approval was required before any wage increase could be given. In accordance with its terms this legislation automatically expired twelve months later, but this did not clear the way for a return to free wage bargaining. Immediately the Act expired further controls were invoked by way of statutory regulation promulgated under the broad empowering authority conferred by the Economic Stabilisation Act 1948. These were only the first of a number of restrictive measures to be invoked in the 1970s under this 1948 statute; section 3 of which declares in a single salutory phrase the general purpose of the Act, "...to promote the economic stability of New Zealand". No doubt the sheer difficulty of the task dissuaded Parliament from attempting to define this central concept "economic stability".

This statute has its genesis in New Zealand War Emergency Regulations of 1942. Immediate post-war conditions in New Zealand proved to be little better than those under the war-time economy and in 1948 the "economic stabilisation" provisions of 1942 were promoted into the statute book to form the Economic Stabilisation Act 1948. The post-war Labour Government was

107 Section 1(4).
108 Stabilisation of Remuneration Regulations 1972, S.R. 1972/59, which came into force 1 April 1972 (reg. 1(2)).
heavily criticised by the National Opposition of the day for the excessive and even arbitrary powers this statute gave the Government, but its provisions have remained essentially unchanged despite numerous subsequent National Governments. Section 11, entitled "Stabilisation regulations", is the significant provision for which the Act is renowned. Although subsections 2-4 authorise the making of regulations for specific defined purposes, subsection 1 is the general empowering provision:

(1) The Governor-General may from time to time, by Order-in-Council, make such regulations...as appear to him to be necessary or expedient for the general purpose of this Act...

In other words, the Governor-General (stripped of his constitutional garb, the Government) is empowered to make whatever regulations may be thought expedient or necessary in order to promote economic stability. So wide and untrammelled is this delegated authority that it is difficult to envisage any regulation of an economic nature, which cites the 1948 statute as its constitutional warrant, as being beyond the Governor-General's authority so delegated - it is appropriate to note that of the many such regulations promulgated during the past thirty five years, to the writer's knowledge not one has been successfully challenged in a Court of Law.\[^{111}\]

The Stabilisation of Remuneration Regulations 1972 made under this Act which succeeded the Stabilisation of Remuneration Act 1971 remained in force until the end of 1972 when the National Government lost the elections and was removed from office. The incoming Labour Government honoured its commitment

\[^{111}\] For comment on two recent Court of Appeal decisions upholding economic stabilisation Regulations, see *ibid.*
by immediately revoking these Regulations and for a period New Zealand free-wheeled without any direct controls over wage bargaining. Unions made haste to recoup what they maintained had been unjustifiably held from them during the preceding period of wage-controls. Large increases were demanded and won, inflation rose rapidly, and eventually the Labour Government was forced to renege on its election commitment by invoking its own form of wage controls.\textsuperscript{112} These endeavoured to be more palatable by allowing wage increases in certain exceptional cases where approval was obtained from a central tribunal, viz. the Industrial Commission.\textsuperscript{113} Aside from the selective functioning the Industrial Commission was seen to have in the treatment of applications for exemption from the Regulations, this measure did little to arrest inflation and the decline in the New Zealand economy. This predictably saw the return of a National Government at the 1975 General Election and, not surprisingly, a continuation (with some modifications) of the wage freeze regulations then in force. Not until the latter part of 1977 did the Prime Minister and Minister of Finance, the Rt. Hon. R.D. Muldoon, deem it ready to relax these controls.

Notwithstanding, appended to this was the threat that if a return to free wage bargaining did not see "socially responsible" bargaining with

\textsuperscript{112} Wage Adjustment Regulations 1974, S.R. 1974/143 (and amendments).

\textsuperscript{113} Constituted under the Industrial Relations Act 1973, Part III (repealed by the Industrial Relations Amendment Act 1977, s.2(1)(2)).
"moderate" wage claims, stricter controls would be reapplied. This, in
fact, was to transpire with the enactment of the Remuneration Act 1979, but
even in this interregnum period observers saw the mere threat of further
restrictions as a visible extra-legal control on union activity. In
September 1978, one commentator observed:

"Rising unemployment in New Zealand in the last two
years, together perhaps with the public statements
of the Government, has in fact ensured that recent
wage claims by the majority of unions have been
comparatively restrained...The situation at the
moment therefore is that direct legal controls in
recent years have severely curtailed wage bargaining.
The current economic depression and the threat of
further legal control has in effect led to the demise
of traditional union activity in this area".115

Nonetheless, by July 1979 the Government believed that wage settlements
being concluded through the conciliation and arbitration process were
excessive for an already hurting economy, and on 27 July introduced into
Parliament the Remuneration Act 1979. Becoming law on 10 August 1979, this
instrument represents the high water-mark of state intervention in interest
disputes in New Zealand.116 The statute was comprised of two wage-fixing
components. The first was provision for the establishment of general
increases to all wage rates by regulation.117

114 Terms commonplace to Government media releases. E.g. "During the last
year, [the Minister of Labour] Mr. Bolger has several times indicated
that he sought to keep wage-fixing to 'the reasonable middle ground'...", Christchurch Press, 3 March 1980, Comment from the Capital. See further
7 N.Z.J.I.R. 1, at e.g. 3.

115 Farmer, supra, note 88, at 100.

116 See generally, Roper, supra, note 114.

117 Section 5.
General wage orders are customary in New Zealand to compensate for the undermining effect of inflation on wage rates. Granted for many years under the authority of the Economic Stabilisation Regulations 1953 (promulgated under the 1948 empowering Act), applications for general increases were made to the Court of Arbitration. In 1969 a General Wage Orders Act was enacted to remove any possibility of a recurrence of the unpopular nil general wage order of 1968, but still left the function of determining applications with the Court.

For most of its life, however, this latter Act remained suspended by express provision inserted in the successive wage-control regulations of the 1970s; albeit statutory regulations made under the 1948 Act provided general wage increases in August 1973 and February 1974, as did Wage Adjustment Regulations from 1974 to 1977. Upon the lifting of the wage freeze regulations in 1977, in force since 1974, Parliament enacted a new General Wage Orders Act 1977. Although this too was to prove a short-lived measure, its provisions showed a marked strengthening of the Government's control over the wage order system from that of its predecessor. Of course, even prior to 1971 when that statute was operative, there were ways in which governments would pressure the Court of Arbitration to take account of government policy or the country's general economic situation in determining wage order applications. But the Government was not as of right formally able to appear before the Court to present its case for wage restraint; the Court was simply required to adjudicate between employers and unions, with the Government, though an interested party, lacking standing. The 1977 successor to the earlier Act strengthened the Government's position in two ways. First, it expressly bequeathed the Minister of Finance the right to be
heard in any such proceedings, and secondly, it instructed the Court to "give paramount importance to the promotion of the economic stability of New Zealand". The Government thus recanted on what it sought to effect by the 1969 statute in subjugating the interest in protecting against the erosion of wage and salary earners.

However, it seems that not even this statutory direction - that the wage-fixing tribunal have regard to the Government's case for economic stability - was sufficient in view of the Remuneration Act 1979, which duly repealed the General Wage Orders Act 1977. It is noticeable that in transferring to itself the power under this Act to grant general wage orders the Government was careful not to oblige itself in any way through the inclusion of criteria determining the timing or levels of any increases. Section 5, the empowering provision, simply read: "Remuneration regulations may effect or provide for a general increase in rates of remuneration...". Thus, what was formerly within the auspices of the Arbitration Court to grant at the behest of the trade union movement henceforth was the prerogative of government to unilaterally dispense at its own behest.

---

118 General Wage Orders Act 1977, s. 7.
119 Sections 3 (specifying this to be the general purpose of the Act) and 6(1) (enjoining the Court by way of express stipulation).
120 See s.6(2)(a)(c). Cf. the Wage Adjustment Regulations 1977, S.R.1977/264, which provisions were carried over into the General Wage Orders Act 1977.
121 Remuneration Act 1979, s.9(1).
122 Two Remuneration (General Increase) Regulations were issued under the Act; the first providing for a 4.5 per cent general increase effective from 3 September 1979, the second, a 4 per cent increase effective from 1 August 1980. See respectively S.R. 1979/170; S.R. 1980/144.
Given the second wage-fixing component comprising the Remuneration Act 1979, it is little wonder that the union movement was so hostile to it. This made explicit a policy of selective intervention in wage-fixing. By this stage selective intervention on the part of the Government was not without precedent. In 1978 and 1979 (prior to the Remuneration Act 1979) the Government typically availed itself of the *carte blanche* powers conferred by the 1948 statute to pass two sets of regulations altering specific award settlements.\(^\text{123}\) This may suggest that this specific regulation-making power contained in the Remuneration Act 1979 was superfluous but the advice at least one Minister received in 1979 was that the 1948 Act was directed at stabilisation over a "broad economic front" and could not properly be invoked to take action on a specific award settlement.\(^\text{124}\) Hence section 4(2)(c) of the Remuneration Act 1979 which read:

\[\text{(2) Without limiting the general power conferred by subsection 1 of this section, it is hereby declared that regulations may be made under this section for all or any of the following purposes:}
\]

\[\ldots\]

\[\text{(c) Nullifying or amending, or providing for the nullification or amendment of, in whole or in part, any instrument, whether or not it is filed, registered or approved under any Act.}\]

Yet the object of this provision was not to displace the entire wage-fixing function of Industrial Conciliation and Arbitration but rather only

---


\(^{124}\) Per the Hon. L. Adams-Schneider, quoted by Roper, *supra*, note 114, at 4.
that part of the system which reserved to the industrial parties a degree
of freedom in wage-setting. Thus, the power to intervene in specific
cases under section 4(2)(c) was expressed not to extend to arbitrated wage
settlements, that is, to wage rates "...decided on the merits by...(a) The
Arbitration Court,..."125 Apparently the Court could be trusted to limit
award settlements to what the Government considered "reasonable"; thus
endorsing the fact that arbitration is foremost a state institution mindful
of government policy and the country's overall economic situation;126 but not
so the conciliation council. Consider this press release following the repeal
of the Remuneration Act 1979 in which the Prime Minister expressed the
Government's fear of the "soft wage deal". Said the Prime Minister:

"There are some employers who are only too happy to
keep the peace by making soft wage deals which they
can pass on to the long suffering public".127

(So much for competition, the life-blood of the market economy.128) The
Prime Minister continued:

"We don't act on behalf of the unions or the employers.
...We, the Government, are the advocates of the public.
We want to keep wage deals reasonable. We don't want
soft wage deals because they simply add to the rate of
inflation. ...It may make sense to an employer to say,
'We don't want wage control because we'll make a deal
with the unions and pass it on in our prices', but that
doesn't make sense to the Government".129

125 See s.6.
126 Cf., Walsh, supra, note 94.
127 Christchurch Press, 4 June 1981 in an article entitled, "Govt.'acts for
the people' on wages".
128 Cf., Joseph, supra, note 89.
129 Supra, note 127.
On one occasion Remuneration Regulations were threatened, the parties agreed with the Minister to refer the conciliated settlement - to which the Government objected - to the Court for arbitration, only to have the Court award the union virtually what the employers had earlier conceded. Nevertheless the Government restated its view in support of the Remuneration Act 1979 that it was the conciliated wage settlement secured through the use or threat of strike action that was potentially most damaging to established relativities and likely to result in a flow-on effect. Hence one of the manifest inconsistencies in the Government's application of the Remuneration Act 1979 as a wages-policy mechanism: whereas a number of wage settlements were deemed to be excessive where strike action had been used, others securing noticeably higher increases in the absence of strike action were not. Witness the Government's intervention in the Kinleith dispute which was the last occasion Remuneration Regulations were used to alter a wage settlement. "It should be remembered", said the Minister of Labour, "that the proposed settlement has been reached after a prolonged period of industrial action". "A seven-week strike is not in the Government's interpretation of free wage bargaining, but rather a settlement reached under extreme pressure." Of the higher percentage increase previously gained by the Pulp and Paper Workers at the Tasman plant, Mr. Bolger "sought to make it clear that the...Pulp and Paper Workers...had accepted a wage offer without

industrial action...". If the Remuneration Act 1979 was an essential part of a broader economic strategy to combat inflation, as the Government had maintained from the Act's inception, then to concentrate on the method rather than result of wage negotiations was a non sequitur. Nonetheless the Prime Minister saw fit to compound the confusion:

"While the Forest Products' unions claim merely to be catching up with Tasman, it is quite unacceptable for them to use costly strike action to do so. The settlement at Tasman involved no stoppage of work".

Yet loss of productivity incurred through "costly strike action" has nothing to do with high wage settlements and has, at most, only a tangential bearing on the country's overall inflation levels.

However, that was only one of the reasons why the Remuneration Act 1979 was doomed to failure. "The Government was naive to expect a wages policy to work", comments one writer, "which was so alien to the philosophy and mood of the union movement, yet depended so much on the co-operation of the movement". The assumption of the legislation was that it is justifiable and necessary for the Government to establish wage guidelines within which unions and employers must negotiate irrespective of industrial muscle or the ability of industry to pay. Yet these are the two fundamental components of wage-bargaining. Nor could selective intervention, simply as a wages-control mechanism, hope to succeed.

134 Ibid.
135 Ibid.
136 Roper, supra, note 114, at 4.
The Prime Minister publicised the figure of 9.5 per cent as the maximum acceptable increase for the 1979-80 award negotiations. Not only did the Arbitration Court exceed that ceiling on the one occasion noted above, but also numerous unions were securing through agreement in conciliation increases upwards of 11 and 12 per cent on their existing awards. For the Act to have succeeded as a general wages-control the Government would have had to reduce every such settlement which exceeded the guideline. Whilst this was not feasible, it was nonetheless imperative for the Government's credibility that the Act be seen to be invoked, which the Government did on four occasions. But having invoked it, the Act was immediately cast as an instrument to be used arbitrarily and unfairly to deny a particular union. It was too visibly seen as a punitive device, and, destined to eventually embarrass the Government, was repealed on 4 November 1980.

This did not usher in a change of attitude towards wage bargaining however. "[I]nherent in a return to collective bargaining", warned the Prime Minister, "was the danger of soft wage deals":

"That does not mean to say it [sic] will happen but it could happen. Whatever we do we would be watching that very, very closely".

In the following round of award settlements a year hence, the amalgamated drivers' unions filed an application to convene conciliation proceedings claiming a 30 per cent increase in remuneration; dates in August

137 Ibid, at 1-2.
138 See supra, note 130.
139 Summarised by Roper, supra, note 114, at 1-2.
140 Christchurch Press, 4 June 1981.
were set down for the hearing but, on 22 June 1982, within a week of the drivers' application being lodged, a new set of wage-price freeze regulations came into force. Promulgated under the 1948 empowering statute, these are specified to remain in force until 22 June 1983 when they shall automatically expire.

(c) **Conclusion**

When one considers for the period beginning 1970 how many years New Zealand has laboured under wage controls of one form or another, it does not auger well for a return to free wage bargaining upon the expiry of the present controls. In fact, the Prime Minister has already warned that it is "unlikely" the present controls will be removed in their entirety upon the expiry of the Wage Freeze Regulations 1982. Within a week of announcing the freeze Mr. Muldoon revealed, "[t]here is no way that it would be possible simply to move from a state of total control to total freedom". "We are not going to go back to a situation where we simply let everything go". Though not forgotten, it thus seems that the lessons of the 1970s must give way to more urgent concerns: between the years 1971 and 1980 wage controls had visibly compressed margins for skill in New Zealand, distorted relativities, hardened attitudes between employers and workers, induced the highest level of industrial activity for over two decades, and in any event did not prevent

---

142 Reg. 2(2).
144 Ibid.
record inflation levels during those years. Yet, all this cannot simply be attributed to the personality or philosophy of the party that has dominated office during this period, given that not even the single Labour Government with its short tenure (1972-1975) could resist the expedient of wage controls.

The ease with which governments in New Zealand can intervene in wage bargaining is considerable. Although wage freeze regulations are notoriously difficult to police, it is ultimately through the stable well-defined procedures of Industrial Conciliation and Arbitration that New Zealand governments are able to enforce wage controls as effectively as they do. Remove this elaborate, highly co-ordinated system on which managements and unions have come to rely and governments would be forced to deal with a fragmented labour movement comprised of numerous shop-floor bargaining units negotiating directly with employers at local level. Observe the protest against the nil general wage order the Court of Arbitration awarded in 1968 (Judge Blair having regard to the creeping inflation rate of the time and the general purpose of the Economic Stabilisation Act 1948 under which general wage orders were then awarded). Many unions boycotted the formal conciliation and arbitration procedures and, for a number of years, bargained directly with employers. Significantly these unions were able to extract considerably higher increases than could their counterparts through conciliation and arbitration; it is estimated that annual increases of 20 per cent and higher were not uncommon.\textsuperscript{145} It is further significant

\textsuperscript{145} Christchurch Press, 7 October 1982.
that the changes effected by the Industrial Relations Act 1973 included
the introduction of the "section 65 agreement", which is of bi-lateral
effect as between the parties and which prevails over any award otherwise
applying. As Mazengarb and Smith's Industrial Law (1975, 4th ed.) observes:

"This section is important in the overall scheme of the
Act in two ways:
(i) it recognises the prevalence of informal
bargaining and attempts to bring it back
within the system;
(ii) it introduces the new concept of the
'collective agreement'.

... This Act aims to stop this circumvention of the
consiliation and arbitration system by recognising
the role of informal bargaining (and by helping it
to run smoothly, particularly through industrial
mediators: s.64, ante), and by making the resulting
agreement a 'collective agreement' to be registered
with the Court,...".146

Government policy was that industrial disputes and demands should be dealt with
totally within the industrial framework provided by law and that uncontrolled
direct bargaining, and accompanying industrial action, should be restricted as
far as possible. The objective was to restore state control over wage
bargaining decisions in the private sector to the extent that these comply
with the Government's broader economic objectives - no New Zealand Government
has ever contemplated increases of 20 per cent or higher secured through
industrial power as an "acceptable" wage settlement. Hence the term
"tripartism" popular with the Minister of Labour at present. "Tripartism", he
says, "is the most desirable way of reconciling the interests of the Government,

146 Notes on s.65.
the employers, and the unions. Curiously, this renders the paradox "responsible free wage bargaining" more apparent than real for New Zealand.


148 Referred to frequently by the Minister; e.g. noted by Roper, supra, note 114, at 3.
VI. THE JURISDICTIONAL CONCEPT OF "DISPUTE"

"The employer and not the employed must prevail in matters...affecting the successful conduct of his enterprise;...the decision what to do with his own property and therefore the conduct of it, belongs to the employer who takes the risks of the enterprise".

Union Badge Case (1913) 17 C.L.R., 680, at 689 per Barton A.C.J.

A. INTRODUCTION

This simple perception of industrial enterprise enjoining Barton A.C.J.'s conclusion bears little relevance to today's industrial economy, yet it survives through the judicial procedures of Industrial Conciliation and Arbitration to delimit the institutional scope of New Zealand's industrial system. Through the jurisdictional concept of "dispute" (with which Barton A.C.J. was concerned in the dictum quoted) the state extends its

---

2 Industrial Relations Act 1973, s.2.
3 Chapter headnote.
control over the bargaining relationship beyond the central issue of remuneration. The attitude traditional to New Zealand and its governments is that certain union demands ought not to be allowed to be pursued through the industrial procedures the state made available to labour in 1894. This is perhaps one of the inevitable costs of state regulation of labour disputes. One attempt was made in 1936 to redress the balance in labour's favour but the established institutional constraints of Industrial Conciliation and Arbitration prevailed notwithstanding. The Industrial Conciliation and Arbitration Amendment Act 1936, promoted by the first New Zealand Labour Government, sought to make its intent absolutely clear by inserting this recital to the amending provision:

"Whereas it has been judicially decided that the definition in general terms of the expression 'industrial matters' contained in section two of the principal Act is in some respects restricted by the specification in paragraphs (a) to (f) of the said definition of certain matters as industrial matters: and whereas it is desirable that all such restrictions of the general definition be removed, and the definition be further extended...

[ paras. (a) to (f) were substituted by words of more general meaning and application, which presently are reproduced in the 1973 Act, section 2 ]."5

It is material that the recital is not in the form of a preamble which, in the proper case, may assist a court in the interpretation of a statute's substantive provisions contained in the body of the statute; these were

5 See the Industrial Conciliation and Arbitration Amendment Act 1936, s.2.
themselves words of enactment in the body of the amending Act to which meaning and effect were to be given. Yet no New Zealand court even hesitated to consider them, preferring instead to defer to judicial precedent and the market ideal of Barton A.C.J.'s perception of industrial enterprise above.6

In consequence, the judicial construction of the Act's jurisdictional concept has served to entrench the early a priori prerogatives the common law secured for the employer in his relations with labour.7 The difficulty experienced by courts this century has been in maintaining that construction despite Parliament's diction. The writer has observed elsewhere that this construction "is comprised of elements foreign to Parliament's diction resulting in a judicial principle that is arbitrary in design, intuitive in application, and unpredictable in result";8 yet "[t]his result is to be expected for the reason that there is nothing distinctive about managerial matters perceived by the courts stricto sensu as against those held appropriate to the parties conjointly as industrial matters".9 A

6 See the Chapter headnote.

7 Cf., the adaptation of sovereign authority from the master-servant model in the development of a contractual theory of employment relations. For the desideratum of control as the primary means of identifying the contract of service, see Yewens v Noaks (1880) 6 Q.B. 530, at 532-33; Performing Right Society v Mitchell and Booker (Palais de Danse) Ltd [1924] 1 K.B. 762, at 767. Hence further, the right of summary dismissal at common law attendant upon an employee's refusal or failure to obey: see e.g., Turner v Mason (1845) 14 M. & W. 112, 153 E.R. 411.

8 The Judicial Perspective of Industrial Conciliation and Arbitration in New Zealand, Legal Research Foundation (N.Z.), Publication No. 17, 1980. (examining generally the Act's jurisdictional requirement) at 8.

9 Ibid.
series of Australian cases examined below illustrates this,\textsuperscript{10} and the manifest absurdity that can result when courts are invested under statute with the function of resolving industrial disputes.

The leading case in New Zealand on the jurisdictional requirement is \textit{New Zealand Bank Officers' I.U.W. v ANZ Banking Group Ltd}, decided in 1977\textsuperscript{11} and followed in the \textit{Law Practitioners} case\textsuperscript{12} noted in the previous chapter. Though Industrial Conciliation and Arbitration was a peculiarly New Zealand invention, the former decision was reached solely on the strength of the Australian authorities decided under the equivalent industrial legislation adopted by the States and Commonwealth of Australia from the turn of the century. Much of the following examination is therefore devoted to these authorities, commencing with the hallmark decision of the High Court of Australia in \textit{Clancy v Butchers Shop Employees' Union} (1904).\textsuperscript{13}

\textbf{B. THE SIGNIFICANCE OF "DISPUTE" IN RELATION TO "INDUSTRIAL MATTERS"}

Section 2 of the Industrial Relations Act 1973 defines the concept of "industrial matters" thus:

\begin{enumerate}
  \item See the four Melbourne and the Metropolitan Tramway cases, cited infra, note 34.
  \item I.C. 71/77, reported [1979] Ind. Ct. 219, per Jamieson J., then Chief Judge of the Industrial Court, now designated the Arbitration Court. See the reconstruction effected by the Industrial Relations Amendment Act 1977, which was not proclaimed in force until the following year.
  \item [1980] A.C.J. 267, per Chief Judge Horn.
  \item (1904) 1 C.L.R. 181.
\end{enumerate}
"Industrial matters' means all matters affecting or relating to work done or to be done by workers, or the privileges, rights, and duties of employers or workers in any industry...".

Paragraphs (a) to (c) of the definition specify by way of extension further subjects of industrial matters, but it is on the primary definition quoted that courts principally focus in delineating the Act's operation. It takes its effect through the definition of "dispute" as:

"...any dispute arising between one or more employers or unions or associations of workers and one or more unions or associations of workers in relation to industrial matters".14

From the initial statute of 1894, the Act has been structured so as to render the creation of a dispute a jurisdictional requirement which must be satisfied as a condition precedent to invoking the Act's procedures for its settlement.15 (The term "dispute" is not used in its ordinary colloquial sense as denoting actual disruption of the work process;16 hence it is technically correct to talk of the "creation" of a dispute in accordance with the formal steps that must be taken to satisfy the jurisdictional

---

14 Industrial Relations Act 1973, s. 2 (emphasis added). Most of the analysis following in this section is summarised in the writer's article, Is Technology a Bargaining Issue? (1981) 1 Canta L.R. 123, at 125-128.

15 See the authorities cited in Mazengarb and Smith's Industrial Law (4th ed., 1975; Smith, Szakats and Schelleris eds.), notes on s. 2, at 11.

16 See Cromwell and Bannockburn Colliery Co. Ltd v Otago Board of Conciliation (1906) 25 N.Z.L.R. 986, at 988-89, Cooper J. explaining that the legislation has its genesis in the "desire to devise some means to prevent strikes, and the evils resulting therefrom...".
requirement.\textsuperscript{17} Formerly, the significance of this requirement was confined to the activities of conciliation councils for the making of bi-lateral industrial agreements and the Court of Arbitration for the making of industry-wide awards.\textsuperscript{18} Even so, this preserved to the Court of Arbitration (and ultimately the High Court pursuant to its supervisory jurisdiction over the former) a potent instrument of control over employment relations; it has long been held that jurisdiction to regulate non-industrial matters cannot be given or extended by consent, and that any provision in a collective agreement or award of this character will be struck down as an excess of jurisdiction.\textsuperscript{19}

Since the passage of the Industrial Conciliation and Arbitration Amendment Act 1970, the jurisdicitional requirement has been enhanced by the division of disputes that has long existed under North American labour law, into disputes of interest (created to procure industry-wide awards) and disputes of right (involving any dispute that is not a dispute of interest, including \textit{inter alia} disputes over the interpretation and application of

\textsuperscript{17} Cooper, J., \textit{ibid.}, explained that the essence of a "dispute" lies in an expressed disagreement, evidenced as a matter of fact by a demand (or series of demands) and a refusal (or series of refusals) together with any counter-claims made. See further for the types of communication that will suffice, Re Canterbury A. & P. Labourers' Industrial Dispute (1907) 9 G.L.R. 653; Re Canterbury A. & P. Labourers' I.U.W. and Canterbury Sheepowners' I.U.E. (1911) 14 G.L.R. 342; R v Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow (1910) 11 C.L.R. 1; R v Graziers Association of N.S.W., ex parte A.W.U. (1956) 96 C.L.R. 317.

\textsuperscript{18} See now ss. 82 and 83 of the Industrial Relations Act 1973, granting industry-wide coverage formerly reserved only for awards to collective agreements reached in conciliation. See also Chapter V, \textit{supra}.

\textsuperscript{19} See New Zealand Waterside Workers' Federation I.A.W. v Frazer [1924] N.Z.L.R. 689, particularly at 710-711.
existing awards). The 1970 amendment also introduced separate procedures for the settlement of rights disputes, invoked by convening a disputes committee which had power to bind parties subject to a right of appeal to the Court of Arbitration or the dispute being referred to the Court by the chairman of the committee for a final and binding settlement. The present Act reproduces these procedures in substantially unaltered form, and being available only in respect of "disputes" they are similarly circumscribed by the concept of "industrial matters". This means that in addition to the traditional prohibition on non-industrial award clauses, the Arbitration Court (or at first instance a disputes committee) is now also denied jurisdiction to bind or regulate parties in respect of non-industrial matters during the currency of the award.

By virtue of this embargo either party to the industrial relationship can, with impunity, seek refuge under the Act and claim immunity from the other's demands. Although issues arising within the general spectrum of employment relations may be of pressing concern to one party, they cannot be pursued if beyond the statutory definition of "dispute". In the exercise of their functions, courts have held fast to the definition in insisting that the character of a demand is unaffected by and, for determining whether there exists a "dispute", assessed independently of industrial action taken

---

20 See the Industrial Relations Act 1973, s. 2 for the respective definitions.


22 Hence the decision in the ANZ Bank case, supra, note 11 (examined infra.)
in support of the demand: "...a disagreement may cause a strike, a lock-out, and disturbance and dislocation of industry: but these are the consequences of the industrial dispute itself, which lies in the disagreement".23

The expressed premise running throughout the judgments is that there is a generic difference between matters properly designated industrial and matters properly designated managerial, distinguishable by qualities intrinsic to industrial and managerial matters respectively. This is a facade in search of a legal justification for the protection of management's reserved rights, which the cases show. Yet it received the legislature's endorsement recently with the enactment of the Commerce Amendment Act 1976 which made it an offence to strike "concerning a matter [w]hich is not an industrial matter",24 for this purpose the term "industrial matter" being expressed to have the same meaning assigned by section 2 of the Industrial Relations Act 1973.25 As this effectively removes whatever freedom remained to go outside the Industrial Relations Act 1973 to force agreement on matters beyond the Act's established jurisdictional limits, it transforms the jurisdictional concept of "dispute" into a double-edged constraint on union activity.

23 Caledonian Collieries Ltd v Australasian Coal & Shale Employees Federation (No. 1)(1930) 42 C.L.R. 527. See also Cromwell and Bannockburn Colliery Co. Ltd v Otago Board of Conciliation (1906) 25 N.Z.L.R. 986; Australian Federation of Air Pilots v Flight Crew Officers Industrial Tribunal (1969-70) 119 C.L.R. 16, at 39 per Taylor J.

24 Section 119B.

25 Section 119A.
Viewed thus, an Arbitration Court ruling that a matter is "non-industrial" preserves only the legal freedom to negotiate informally outside the Act via request without coercion. Whilst this is not to imply that informal "house-agreements" are never reached in this way, it scarcely constitutes bargaining as that term is ordinarily understood. In the absence of bargaining power how often will a reluctant party concede to, or even consider, the other's request? Also, in the event of a party's refusal to consider the other's demand how realistic is it to insist the latter simply accept that refusal - and invoke none of the forms of direct industrial action traditional to the management-union relationship - on the strength of an external ruling of the Arbitration Court that a particular matter is "non-industrial"? Observe the leading case on industrial matters in New Zealand, discussed presently. No sooner had the Industrial Court ruled the ANZ Bank's staff loan policy to be non-negotiable by the union than strike action secured the very compromise which that ruling precluded. Through the formal disputes procedure. It mattered not that the strike itself, having secured its desired effect, was unlawful by virtue of The Commerce Amendment Act 1976, or indeed that any agreement obtained in such

26 E.g., see the New Zealand Oil Industry Redundancy agreement (operative as from 2 December 1980 for a period of 12 months certain, and thereafter subject to either party wishing to review the agreement), containing relocation, retraining, and redundancy compensation clauses applying in the event of new computer technologies affecting workers by status or loss of job. See also the agreement dated 10 April 1981, between the Hawkes Bay Farmers' Meat Co. and the N.Z. Freezing and Related Industries Clerical Officers' I.U.W., noted Mazengarb's Industrial Law Bulletin, Vol. 1, Issue No. 1, July 1981, at 9-10.

27 The ANZ Bank case, supra, note 11.
circumstances was legally unenforceable at the suit of either party if an unlawful strike can secure a settlement, it can also enforce it.

As a matter of practicality and law, therefore, one would expect the judicial construction of "industrial matters" to embrace all bargaining subjects common to employment relations - no less, subjects peculiar to particular employment relations. If the object of a labour system is to institutionalise - not outlaw - industrial conflict, then there is much to be said for one early New Zealand judge who refused to limit the legislation: "'Industrial matters' as defined", said Stout C.J., "include every kind of dispute that can arise between an employer and his workmen". Yet this is not the benchmark courts have adopted.

C. THE JUDICIAL PERSPECTIVE

(a) Introduction

Not until the case of Magner v Gohns in 1916 was the broad principle first established in New Zealand that matters pertaining to the management of an enterprise fall outside the ambit of "industrial matters" and beyond the jurisdiction of Industrial Conciliation and Arbitration.


29 Taylor and Oakley v Mr. Justice Edwards (1900) 18 N.Z.L.R. 876 (C.A.), at 885.

However, as this and the early decisions that followed were all concerned with the vagaries of preferential employment for unionists they did not endeavour to embark on any detailed discussion of the legal basis for excluding managerial concerns from consideration.31 There followed two reported Court of Appeal decisions in 192432 and 195133 (respectively) which, not being of such narrow focus, invited a jurisprudence capable of laying down a prescription for the future; yet both benches elected to dispense with the issues on relatively narrow grounds. During this time across the Tasman, on the other hand, the Australian courts were building a solid caselaw foundation on which to assert their superintendent jurisdiction over the Commonwealth and state industrial tribunals.34 There


may be found in the early New Zealand decisions on preferential employment some isolated and equivocal support for these authorities, but not until New Zealand Bank Officers' I.U.W. v ANZ Banking Group Ltd did New Zealand elect to unreservedly adopt them.

(b) The ANZ Bank case

This decision was a ruling on the jurisdiction of a disputes committee. The question was whether there existed a dispute of right between the Bank Officers' Union and the ANZ Banking Group Ltd so as to confer jurisdiction on a disputes committee to resolve the matter over which the parties were disputing. The Bank's policy had been for a considerable time to grant mortgages to its staff on favourable rates of interest. Owing to an increasing disparity, the Bank said, between these and market rates generally, the Bank proposed unilaterally to increase interest rates on all existing staff mortgages. The employees objected and the Union sought to invoke the disputes procedure under its award to negotiate with the Bank in respect of the new policy. However the Bank refused to regard the Union as having any standing in the matter: it regarded the matter as a domestic one between itself and its own staff, and refused to accede to the jurisdiction of a disputes committee.

The Industrial Court (since reconstituted the Arbitration Court) held for the Bank. It concluded that the contested matter was not an

37 Industrial Relations Amendment Act 1977.
"industrial matter" within the meaning of the Industrial Relations Act 1973, and that therefore there was not in existence a "dispute" capable of conferring jurisdiction. "The matter of staff loans", said Judge Jamieson, "is not one which relates to the relationship of master and servant, but to be at best peripheral or collateral to that relationship...that once the employee seeks a loan from the Bank, the relationship then arising is that of lender and borrower or mortgagor and mortgagee".38

Two features of the decision merit attention. First, the Court offered no analysis, in either an historical or a contemporary context, of what the legislation signifies by the term "industrial matters". This is surprising given the dearth of New Zealand authority on the jurisdictional requirement and the readily apparent consequences of a restrictive interpretation. Secondly, the Court noted the similarities of language between the relevant New Zealand and Australian legislation39 and, in disregard of any local consideration that may have had a bearing on the matter, adopted a perspective of Industrial Conciliation and Arbitration established initially by the Australian courts in Clancy v Butchers Shop Employees' Union (1904).40 Judge Jamieson observed, "...the Australian cases are of strong persuasive authority in this country", although no New Zealand authority was cited in support of this proposition; that "[w]e start with Clancy's case".42

38 Cf., R v Portus, ex parte ANZ Banking Group Ltd (1972) C.L.R. 353 (H.C.A.), where a union's demand was held to relate to a similar relationship as between employer and employee; noted infra.

39 Despite minor variations, the key concepts of the New Zealand definition are duplicated in the Australian equivalent legislation. For an historical account of these similarities, see The Australian Tramway Employees' Association v Prahan and Malvern Tramway Trust (1913) 17 C.L.R. 680, at 697-99 per Isaacs and Rich JJ.

40 (1904) 1 C.L.R. 181
41 Supra, note 36.
42 Supra, note 36.
(c) **Clancy v Butchers Shop Employees' Union**

In this case the High Court of Australia held that an award provision purporting to regulate the shop trading hours of butchers' shops did not so proximately affect the employment relationship as to qualify as an industrial matter. The provision was declared invalid and of no legal effect.  

The Court focussed on the words, contained also in the New Zealand definition, "work done or to be done by workers". This was construed to mean actual and not hypothetical work. It meant "work actually done by the employee or actually provided by the employer to be done", and then only to the extent that the employer "thinks fit to provide". For this reason it was held that a provision regulating the hours during which an employer will operate his business, and thus provide work for the employee, was the exercise of a power not contemplated by the legislation.

To the writer's knowledge, these and the supporting comments of O'Connor J. are the first judicial dicta to legally protect the managerial rights of the employer against encroachment through the Industrial Conciliation and Arbitration system. It is the writer's view that the economic functions of the common law, with which these judges were more familiar than any system of state regulation of labour disputes, explains

---

43 See also *R v Kelly, ex parte The State of Victoria* (1950) 81 C.L.R. 64 (H.C.A.), affirming *Clancy*, concerning the identical issue; see *infra*. But see now in New Zealand *The Shop Trading Hours Act 1977*.

44 *Supra*, note 40, at 203-204, per Griffiths CJ.


why they sought to limit the legislation for the express purpose of preserving employer prerogatives\(^47\) (see further, below). To effect this result, the Court in the dicta quoted\(^48\) placed emphasis on the word "actually"; unfortunately the word does not appear in the statute. Nor is there any statutory direction that "work to be done by workers" means "work...actually provided by the employer to be done",\(^49\) or indeed that this extends only to work which he, the employer, "thinks fit to provide".\(^50\) The writer elsewhere has observed, "[n]o doubt a worker engaged solely on piece rates would be surprised to learn that industrial matters has 'nothing to do with prescribing what work (if any, according to the same judge) shall be provided by the employer'".\(^51\) Was not the concession made by the Chief Justice inevitable? Griffiths C.J. conceded that "in one sense", yet without articulating in which sense, the regulation of shop trading hours did fall within the definition; to which his Honour simply added without explanation "[e]vidently some limitation of the meaning [of 'industrial matters'] is necessary".\(^52\)


\(^{48}\) Supra, text, corresponding to notes 44 and 45.

\(^{49}\) Ibid.

\(^{50}\) Ibid

\(^{51}\) The Judicial Perspective of Industrial Conciliation and Arbitration in New Zealand, supra, note 8, at 14.

\(^{52}\) Supra, note 40, at 202.
Their Honours also addressed the second limb of the definition relating to "the privileges, rights and duties of employers or employees in any industry", and construed it to "imply *ex vi termini* that there are two parties, one of whom owes a duty or possesses a right against the other" - that they "clearly refer to matters of mutual obligation". However, it is submitted that this construction does not account for the distinct jural relations contemplated by this latter limb.

In the *Union Badge* case (one of two early Australian decisions, examined below, that adopted a more liberal approach to the construction of "industrial matters"), Isaacs and Rich JJ. commented that the word "rights" in the definition presented little difficulty: that "[w]hatever he, as employee, is entitled to at any given moment, as between himself and his employer as such...is a right". In contrast:

"[T]he word [privileges] signifies some advantage relative to others who would, but for that privilege be on an equal footing with the person having it. 'Privilege' is defined, *inter alia*, in the Oxford Dictionary thus:

'A right, advantage or immunity granted to or enjoyed by a class of persons beyond the common advantages of others'."

Whilst the term "rights" is used frequently by lawyer and layman alike to include any legally recognised interest, it is to be noted that Clancy

---

53 Ibid, at 201 per Griffiths CJ. This dictum was approved by Judge Jamieson in the *ANZ Bank* case.

54 (1913) 17 C.L.R. 680 (H.C.A.).

55 Ibid, at 692.

56 Ibid, at 693.
construed it in this context **stricto sensu** as denoting a correlative duty in another. But in so confining the term "right" to its proper Hohfeldian correlative, the High Court effectively excised from the definition the word "privilege" - for this connotes a correlative "no-right", which is the jural **opposite** of right.

Thus reading the jural relationship which the word "privilege" signifies back into the definition, the scope of "industrial matters" broadens significantly to embrace any matter "affecting or relating to... [some 'advantage relatively to others'] of workers or employers in any industry". In this light, reconsider the **ANZ Bank** case. 57 Was not the provision of cheap interest loans to ANZ Bank employees an advantage granted to and enjoyed by a particular group of workers, arising by reason only of that employment, and beyond the common advantage of workers in other employment? It may be added that the arrangement with the Bank qualified employees not as of right to a loan but for eligibility for a loan; it would, of course, be highly imprudent for the Bank not to retain a discretion in the allocation of its loan finance. Yet the point remains that the condition of loan eligibility was the fact of employment with this particular Bank. However, following **Clancy** Judge Jamieson held that because "[t]he award contains nothing to create any rights or duties in relation to the availability of staff loans" there was no "dispute" within the meaning of the Act.

---

57 **Supra**, note 36.
In Clancy the High Court made two further observations of general interest: first, that the disputed matter of shop trading hours affected the relationship between employer and the general public rather than the relationship between employer and worker. That it must be the relationship of employer and worker directly affected by a party's demand has been emphasised many times since. Secondly, the Court reflected that an employer is a priori free to do with his own spare time as he chooses, which means that he may, if he so pleases, remain open for business outside of normal employee hours. This meant, said the Court, that the jurisdiction of Industrial Conciliation and Arbitration to regulate the employee-employer relationship must end immediately upon the parties' relationship ceasing at the conclusion of the employees' working day.

The principle this latter finding establishes may seem innocuous enough in the context of the decision in Clancy, but applied beyond that context it precludes award regulation of all post-employment entitlements. Specifically, employee pension schemes, superannuation, and even redundancy provision are matters seeking to confer post-termination benefits upon the worker contrary to the principle established. Indeed Australian courts have expressly so held at least in respect of the first two subjects, employee pensions and superannuation.

58 See generally the Australian authorities, supra, note 34 (discussed infra).

(d) **After Clancy**

When one examines the many Australian authorities subsequent to Clancy, it is seen that these simply reiterate the construction upon which the judges in this early case seized. The only exceptions were forged under the influence of Isaacs and Rich JJ. in the years immediately following Clancy. In at least two reported High Court decisions, namely Australian Tramway Employees' Association v Prahan and Malvern Tramway Trust (1913) 60 and Federated Clothing Trades of the Commonwealth of Australia v Archer (1919), 61 these judges managed to prevail over the conservative wing of the High Court to uphold the right of unionists to force employers to conciliation and arbitration.

(i) **The liberal approach.** In the former decision (commonly cited the Union Badge case), Isaacs and Rich JJ. in a joint opinion openly renounced the views in Clancy as being "fallacious". 62 (This case was cited by counsel for the Union in the ANZ Bank case but drew no discussion from Judge Jamieson.) The High Court held, Barton A.C.J. dissenting, that the Union could validly demand of the employers that it be made a condition of employment that non-union employees wear the Union's badge signifying non-membership. In support, Isaacs and Rich JJ. explained that to tie the words of the definition directly to the work done or to be done to the exclusion of all else is not merely unworkable legally but overlooks the paramount object of every industrial dispute:

---

60 (1913) 17 C.L.R. 680.
61 (1919) 27 C.L.R. 207.
62 Supra, note 60, at 702.
"...to maintain or improve the condition of the person making the demands in opposition to the resistance of the opposite party. That may directly affect the work done - as where the particular method...of manufacture is required or objected to. On the other hand it may not - as where it is desired to change from a weekly payment to a daily or monthly payment".63

It is worth noting that these views were not without support in New Zealand prior to the ANZ Bank case and the adoption of Clancy. In Wilson and Horton Ltd v Hurle the New Zealand Court of Appeal upheld the validity of a 'suburban work clause' that made provision for payment of travelling time spent by the worker each day travelling to and from his place of work.64 The Court of Appeal made no attempt, nor indeed could it, to tie the matter directly to the work done or to be done. Callan J. thought it sufficient that it was a matter "incidental to working"65 while Stanton J. thought it a matter "that arose out of, and was closely connected with, the terms and conditions of employment".66 However, it is true that apart from these general dicta the Court of Appeal declined to establish any broad principle to which later courts could look for guidance on the jurisdictional issue.

In the Union Badge case, Isaacs and Rich JJ. renounced Clancy also on the basis that "...it regards the man himself as a mere instrument, a living but mechanical contrivance...simply as an adjunct of the work he does...it

63 Ibid, at 702-703.
65 Ibid, at 370.
66 Ibid, at 373.
entirely obliterates the considerations which make for the improved status of the men themselves...". These views synthesise the 'factory floor' mentality of Clancy with the occupational coverage of Industrial Conciliation and Arbitration at the turn of the century, and demonstrate the structural inertia of a restrictive judicial interpretation of the concept of "industrial matters".

Only societies of workers engaged in any "specified industry or related industries" are qualified to register under the Act as an industrial union. Initially the term "industry" was confined to mean "any business, trade, manufacture...calling of an industrial character". This was construed in the early decisions to include workers of a productive, industrial character only - grocers' assistants, tramway employees, drivers and wharf labourers were each held to be outside the scope of Industrial Conciliation and Arbitration. An amendment to the definition of "industry" in 1900 extended the occupational coverage of the Act, but only to the extent of including workers engaged in manual labour, whether or not of a productive character. In other words, the subject-matter of disputes during the early

67 Supra, note 60, at 703.

68 See the Industrial Relations Act 1973, ss. 162 and 163, preserving the original requirements for registration.

69 Industrial Conciliation and Arbitration Act 1894 (emphasis added).

70 See e.g., Amalgamated Grocers' Assistants I.U.W. v Wardell (1899) 1 B.A. 275; Christchurch United Tramway etc. I.U.W. v Christchurch Tramway Co Ltd (1900) 2 G.L.R. 104.

71 Hairdressers and Tobacconists' I.U.W. v Eslick Brothers (1901) 3 G.L.R. 267. "Worker" was defined as, inter alia, "any skilled or unskilled manual [worker]..."; Industrial Conciliation and Arbitration Act 1900, s.2.
life of Industrial Conciliation and Arbitration was necessarily circumscribed by the manual, non-professional character of the worker's employment. This, in turn, conditioned the legal meaning of "industrial matters": the judiciary could not have been expected to anticipate the future occupational diversity of New Zealand unionism in forging its early interpretation of this concept.

Contrast unions' membership rules today, transcending the factory precinct to cover workers of semi-professional and professional status. Provided the service relationship is intact and that section 17 of the Industrial Relations Amendment Act 1976 (No. 2) is not applicable (exempting from obligatory union membership an eclectic group of professionals: inter alia qualified lawyers, doctors, dentists, accountants and architects), there is no longer in the Act any inherent obstacle to the unqualified preference clause 72 applying to "[a]ny calling, service...or occupation". 73 The Minister of Transport in his address to the New Zealand Airline Pilots' Association in 1971 was naive not to recognise the occupational diversity of today's unions when he admitted, "I would hate to see the tag of trade union labelled on your association, and I would appeal to you to preserve the professional status and dignity of your association". To which the Pilot's President ruefully replied, "But we are a trade union". 74

---

72 For practical purposes, imposing compulsory unionism in New Zealand; see particularly the Industrial Relations Act 1973, ss. 98 and 98A.

73 From the definition of "industry"; Industrial Relations Act 1973.

74 Roth, Trade Unions in New Zealand (1973), at 134.
Of course the airline pilot's grievance over wages may be no different in kind from that of the early factory worker, but how similar - or different - is his claim for compensation for his relatively short occupational life in the industry? Indeed, how many workers at the time of Clancy would have had the temerity to claim redundancy pay, retirement benefits, long service and maternity leave, or any work-related benefit? Even as at 1913 Isaacs and Rich JJ. were able to observe:

"The conditions of industrial life and the mutual relations of employer and employed have undergone many and vital changes in recent years; they are perceptibly altering before our eyes today, and each stage of development brings with it its own problems and with them its own new subjects of dispute".⁷⁵

Their Honours then observed the identity of purpose of the Australian and New Zealand legislation and noted of New Zealand:

"...whose experience of industrial disputes differed in no respect from ours, and whose legislation was to remedy those disputes as they existed in fact and not for the purpose of setting up an artificial definition of something else".⁷⁶

To these judges, the definition of "industrial matters" "ought, in our opinion, therefore to receive the fullest interpretation that the natural meaning of its language will allow".⁷⁷

⁷⁵ Supra, note 60, at 702. See also Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association (1924-25) 35 C.L.R. 528, at 539 per Isaacs J.: "Industry itself is constantly changing: scientific, social and other causes bring about great transformations. Disputes will necessarily vary accordingly. Causes, forms of manifestation and subjects of difference will change;...[T]he fundamental concept of 'industrial dispute'...is intended by its generality to adapt itself to the growth of the nation".

⁷⁶ Supra, note 60, at 697.

⁷⁷ Ibid, at 701.
Referring also to the origins and purpose of the legislation, Powers J. was the third member to make up the liberal majority in the *Union Badge* case. As with Isaacs and Rich JJ., Powers J. recognised the social and political context in which the legislation was to be interpreted and applied.

The same majority echoed these views six years hence in *Archer*. The High Court held (Barton and Gavan Duffy dissenting) the jurisdictional requisite to be satisfied by the Union's attempt in this case to control 'out-work' in the clothing industry. The Union demanded (inter alia) that garments be labelled with the name of the particular manufacturer, that out-work be paid at above ordinary award rates, that no out-worker be permitted to employ labour, and that an officer of the Union be empowered to enter upon and inspect factories and have access to wages books where breaches of award were suspected. Isaacs and Rich JJ. reflected upon their position earlier adopted in the *Union Badge* case: "further consideration has confirmed the views we there expressed". Powers J. was equally confident that the matters in contention were industrial matters. His Honour resolved that so far as these were matters within the mutual control of the parties (denoting demands which the party on whom they are made has power to grant) and arising in connection with the industry, they were industrial matters for purposes of the Act. Powers J. added the salutory caution that the reasonableness of a particular demand is exclusively for the

78 *Supra*, note 61.

79 *Ibid*, at 212.

80 *Ibid*, at 218.
Arbitration Court to consider, not the High Court in the exercise of its supervisory jurisdiction. In the final majority opinion, Higgins J. concluded for the reasons Isaacs and Rich JJ. canvassed in the Union Badge case, that it is not merely impossible legally but indeed "undesirable to attempt to give a complete definition, applicable for all time to come, of the words 'industrial matters'."

Barton and Gavan Duffy JJ. dissenting, on the other hand, emphasised that "industrial matters" must refer to matters directly affecting employees in the performance of their work, and rejected the claims in question in Archer as being of a different genus.

(ii) The return to Clancy. R v Kelly, ex parte The State of Victoria presented the opportunity for a conservative bench to correct any excesses it perceived resulted from a liberal approach to the jurisdictional question. The second of the issues for the High Court was exactly that in Clancy: whether the shop trading hours of butchers' shops was a permissible subject of award regulation. Endorsing Clancy, Latham CJ., Dixon, McTiernan, Williams, Webb and Fullager JJ. described Archer as a "border-line case" albeit felt constrained to accept the Union Badge decision on its facts.

---

82 Text, supra, corresponding to note 75.
83 Supra, note 61, at 214-15.
84 Ibid, at 211-212, Barton J. citing his earlier views in Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation (1918-19) 26 C.L.R. 508.
85 (1950) 81 C.L.R. 64.
86 Ibid, at 85.
A matter does not become an "industrial matter" and the subject of a "dispute", said the High Court, simply because it is a matter over which persons who are employees and employers are disputing: it must refer to and affect "the relation of an employer as employer with an employee as employee". The ground for decision on the shop trading hours question was that a matter bearing only indirectly, remotely or even consequentially upon the relationship of employer qua employer and employee qua employee will not qualify. It was held that although not devoid of indirect or consequential affect upon the parties "[t]he time at which a shopkeeper (who may or may not employ anybody) may open and close his shop is not a 'matter' which belongs to or is within the sphere of the relation of that shopkeeper as employer with any person as employee".

In *R v Hamilton Knight, ex parte The Commonwealth Steamship Owners' Association*, virtually the same bench was asked to rule on whether a workers' organisation could legitimately demand award provision for pensions for employees who had served for a specified time and who had fulfilled certain other requirements. Dixon CJ., McTiernan, Williams and Fullagar JJ. held (Webb and Kitto JJ. dissenting) that the demand could not validly be pursued. Little assistance is to be had from the judgments of Dixon CJ. and Fullagar J. who preferred to rely on the express stipulation peculiar to Australian legislation confining the life of awards to a maximum

87 Ibid.
88 Ibid, at 84.
89 Ibid.
90 (1952) 86 C.L.R. 283.
of five years, employee pensions creating an obligation extending beyond this. McTiernan and Williams JJ., on the other hand, concluded that the obligation sought to be imposed did not concern an "industrial matter". Both judges reasoned that in order to constitute an "industrial matter" the demand must be one that "belongs to" or is "within the sphere of" the relations of employees and employers. And to quote Williams J.:

"The relationship of employer and employee can only exist during the employment. It cannot exist after the employment has ceased...The dispute must be concerned with and appropriate to the relationship that exists during the continuance of the employment". 91

An employee pension scheme would impose an obligation to pay only after the employment is terminated, and for this reason was held to transcend the relations which arise out of the contractual relationship of employer and employee.

The further disputed matter in this case involved the Union's claim for award provision for compensation to be paid to employees incurring personal injury arising out of or in the course of their employment. Dixon CJ., Webb and Kitto JJ. were prepared to uphold the subject of compensation as pertaining sufficiently to the employment relationship to qualify for award provision. McTiernan and Williams JJ. reasoned otherwise (Fullagar J. expressing no opinion on this particular matter). As the right to compensation demanded was expressed not to impose an obligation to pay until after the employment of the injured worker had been determined, their Honours held that compensation was a matter extending beyond the

91 Ibid, at 305-6. per Williams J. See at 301 per McTiernan J.
duration of the relations of employer and employee and could not be secured by award provision. Further, these judges thought that compensation of the type claimed to be "a form of social security", "...based upon considerations of social welfare which transcend the strict employer-employee relationship": it was the product not of employment but of statute law, observed McTiernan J.

Two cases went to the High Court in 1968. In R v Commonwealth Industrial Court, ex parte Cocks the Court reconsidered the issue of outwork addressed initially in Archer and held that an award attempting to control the allocation of work to independent contractors operating elsewhere than the employer's premises was invalid. "It is as well to remember", reminded the Court, "that...the subject matter of a dispute will not become an industrial matter simply because employers and employees are sufficiently interested in it to dispute about it". In a joint judgment, Barwick CJ., Taylor and Owen JJ. reiterated that the jurisdiction of Industrial Conciliation and Arbitration is confined to regulating the relationship of master and servant in the industry and only such matters which are "truely incidental" to that relationship. Their Honours said they were unable to discover in the earlier dicta of Isaacs and Rich JJ (from either Archer or

92 Ibid, at 300 per McTiernan J.
93 Ibid, at 299.
94 (1968) 121 C.L.R. 313.
95 Ibid, at 318.
96 Ibid.
the Union Badge case) any statement of principle for or reason in justification of finding in favour of the Union in this instance. And nor, they added, could they subscribe to the view of the other member of the majority, Higgins J., that the claim to forbid out-work came "easily" within the definition. Menzies J. in his concurring judgment was more forthright. His Honour repeated that the earlier dicta of these judges was inconsistent with later authority - referring to R v Kelly which affirmed Clancy - and should not be followed.

Australian Federation of Air Pilots v The Flight Crew Officers' Industrial Tribunal was the second case in 1968. This time Barwick CJ. joined McTiernan J. and dissented from the majority decision, Kitto, Taylor and Owen JJ. holding it to be a non-industrial matter the question whether it was safe to operate DC-9 aircraft with an operating crew of two or whether a crew of three was required.

Four years onward, R v Portus, ex parte ANZ Banking Group Ltd continued the restrictive approach by holding that a union's demand for checkoff (that is, that the employer make deductions from the salaries of employees to be paid directly to the union as payment for union fees) did not so proximately affect the relationship of employer and employee to qualify as an industrial matter. Menzies J., with whom Barwick CJ. and McTiernan J. agreed, urged

97 Ibid, at 319.
98 Ibid.
99 Ibid, at 328.
100 (1968) 119 C.L.R. 16.
101 (1972) 127 C.L.R. 353.
that this was a demand to create the "financial relationship of debtor and creditor arising from the earning of salary"; a demand to make the employer a "dues-collecting service", the "financial agent of the employee for the benefit of the union".\footnote{Ibid, at 360.} In holding the demand to be unrelated to industrial matters, it was simply deemed irrelevant the fact that checkoff was a common practice formalised by the majority of industrial awards: "the argument that consensual practices can expand the jurisdiction of the...Commission...is in my opinion unacceptable".\footnote{Ibid, at 357 per Barwick CJ.}

D. THE MELBOURNE AND METROPOLITAN TRAMWAYS CASES

Of the numerous authorities featuring Clancy, these enshrine the artificiality of the judges' perspective and the problems resulting in its application. Jurisprudentially, they make interesting reading.\footnote{R v Commonwealth Conciliation and Arbitration Commissioner, ex parte Melbourne and Metropolitan Tramways Board (1962) 108 C.L.R. 166; (1965) 113 C.L.R. 228; (1966) 115 C.L.R. 443; Melbourne and Metropolitan Tramways Board v Horan (1967) 117 C.L.R. 78.}

On four occasions the Tramways Drivers' Union went to arbitration with one aim in mind: to prevent redundancy on the implementation of a managerial decision to convert all two-man trams to one-man operations. On each occasion an interim award was made preventing the conversions, but on each occasion the matter was removed to the High Court on the issue of jurisdiction.

In the first two cases in 1962 and 1965 respectively,\footnote{Ibid.} the Court found for the Tramways Board on technical grounds without ruling on the
substantive issue whether the Union's demand was a subject-matter of industrial dispute. But in the third case in 1966 the High Court was unanimous in its ruling that, *inter alia*, "what is sought to be done...is to make a demand which directly concerns only the management of the transport system".  

The Chief Justice acknowledged all that is implicit in *Clancy*:

"Whilst it is a truism that both industrial disputes and awards made in their settlement may consequentially have an impact upon the management of an enterprise and upon otherwise unfettered managerial discretions, the management of the enterprise is not itself a subject-matter of an industrial dispute".  

With respect, for purposes of distinguishing between the subject matters which may and may not form the subject of industrial disputes this statement simply begs the question, albeit his Honour did instruct that:

"Demands which in themselves do not directly involve the relationship [of employer-employee] will not be industrial in the relevant sense, however much the relationship...may be indirectly affected by the result of acceptance or refusal of the demand".

The adverbs used here, "directly" and "indirectly", are separated in meaning by degree only. Thus it is instructive to ask, "what if the demand greatly, indirectly affects the relationship?" Would the matter then be industrial "in the relevant sense?"

---

106 Ibid, per Barwick CJ.
108 Ibid, at 450; approved in *R v Portus, ex parte ANZ Banking Group Ltd*, *supra*, note 34, per Walsh J.
109 See further O'Connor J.'s discussion of the labour-saving device in *Clancy*, *supra*, note 40, at 206-207 (discussed infra).
Barwick CJ. apparently thought so, but only by displaying a penchant for charades. The Chief Justice explained that the Union's demand in this case would have been valid had it sought to define the circumstances in which one-man trams might or might not be operated.\footnote{110} Accordingly, his Honour proclaimed that "there is a world of difference between a demand that no one-man buses shall be used" and a demand that a "driver shall, when working, be assisted by a conductor\footnote{111} - it would have been interesting indeed to observe the Union's reaction at this stage inasmuch as its declared intent, to prevent redundancy upon the conversion to one-man operations, was consistent throughout. However the Chief Justice was adamant that the latter demand was different in kind from the former, their identity of purpose and result notwithstanding.

The Union heeded the advice, reframed its demand, and returned to arbitration. This time the High Court held for the Union. But whereas the majority were persuaded by Barwick CJ.'s dicta in the previous case\footnote{112} to find against the employer in case four, holding that "it is the paper demand upon which attention must be concentrated",\footnote{113} ironically the Chief Justice dissented. In view of the history of the dispute and what the Union sought to achieve by its demand, the Chief Justice held that the demand must be examined not as a matter of mere verbal expression but in point of substance.

\footnote{110}{See also Taylor J. in case two; (1965) 113 C.L.R. 228.}
\footnote{111}{See case three; (1966) 115 C.L.R. 443. Contra Magner v Gohns [1916] N.Z.L.R. 529 (C.A.), at 560 per Hosking J., stipulating "[t]he test is more than one of words; it is one of substance". Semble this dictum must give way to the Australian authorities adopted.}
\footnote{112}{Ibid.}
\footnote{113}{See case four; (1967) 117 C.L.R. 78, per McTiernan and Menzies JJ.}
It is appropriate to recall the admission of Barton A.C.J. dissenting in the Union Badge case, "...as everyone must admit the difficulty of arriving at an exact definition of an industrial matter". 114 "But it is not so difficult in a particular instance", his Honour added, "to say whether a matter is industrial or not". 115 Clearly, whatever confidence Barton A.C.J. may have engendered, the above cases dispel. These demonstrate the complete absence of any generic quality separating managerial from industrial matters. Owen J., for example, holding for the Union in case four, accepted this in concluding that as a matter of construction the paper demand was clearly one affecting or relating to work done or to be done. This was notwithstanding, he said, that the result of the award may well have compelled the Tramways management to offer a service to the public different from that previously offered: of this, Owen J. simply said the same may be said of many award subjects. 116

The "difficulty" acknowledged by Barton A.C.J. above is not, as contended, "in arriving at an exact definition of an industrial matter". 117 - considering that has been supplied by Parliament - but in applying the constraints judicially imposed on Parliament's definition. Why, it should be asked, did the judiciary seek to complicate its task?

114 (1913) 17 C.L.R. 680, at 689.
115 Ibid.
116 (1967) 117 C.L.R. 78.
117 Supra, note 114.
E. THE CLASSICAL ECONOMICS AND THE COMMON LAW

In the ANZ Bank case Judge Jamieson approved this statement of Griffiths CJ in Clancy:

"In construing the [Industrial Conciliation and Arbitration Act] it should be borne in mind that it is an Act in restriction of the common law rights of the subject, and...it is a reason why the meaning should not be strained as against the liberty of the subject".119

The "subject" was, of course, the employer who, until the introduction of Industrial Conciliation and Arbitration, enjoyed unmitigated freedom of contract in employment relations. The mechanics of the market theory of the period reveal why it was imperative for the commercial courts to legally guarantee that freedom, even if it meant disavowing in part the statutory language of Industrial Conciliation and Arbitration.

(a) The common law background

One modern writer contends that "[i]f the common law played any role in accelerating economic growth, it must have been by making capital investment more profitable".120 As the origins of management's prerogatives, the common law developed economic incentives that would encourage entrepreneurship. Through the operation of the free market it was supposed that these incentives would maximise the efficient allocation of the community's resources.

118 I.C. 71/77, reported (1979) Ind. Ct. 219.
119 (1904) 1 C.L.R. 181, at 201.
This was the legacy of political economists of the earlier half of the nineteenth century, having converted political and economic thought to the belief that freedom of contract was the universal remedy for all social ills.\textsuperscript{121} By the time of the Ninth Report of the Royal Commission of Inquiry into the Organisation and Rules of Trade Unions, 1869 (U.K.), it was accepted that "[a]ll the law has to do...is secure a fair field for the unrestricted exercise of industrial enterprise".\textsuperscript{122} From the early common law decisions on employer-employee relations, it can be seen that the economic interest in the "unrestricted exercise of industrial enterprise"\textsuperscript{123} resulted in the employer enjoying not only a right to trade freely (and therefore to invoke the economic sanctions of competitive trade) but also a legal right to be free from the economic sanctions available to labour organisations in furtherance of the workers' interests.

Contrast two House of Lords decisions of the period. In Mogul Steamship Co. v McGregor Gow & Co. et al.,\textsuperscript{124} an action involving traders in competition, the defendant shipowners' association agreed through its members to reduce prices for the sole purpose of forcing the plaintiffs out of the market. Dismissing the action for conspiracy to injure, the House of Lords held that the defendant association had acted legitimately in the protection of the members' trade. The loss caused to the rival shipowners was rationalised as "one of the necessary results of competition":

\begin{itemize}
  \item \textsuperscript{121} See IV W. Holdsworth, History of English Law (1929), at 386.
  \item \textsuperscript{122} Ninth Report of the Royal Commission of Inquiry into the Organisation and Rules of Trade Unions (1869), para. 64.
  \item \textsuperscript{123} Ibid.
  \item \textsuperscript{124} [1892] A.C. 25.
\end{itemize}
"Everything that was done by the respondents was done in the course of their right to carry on their own trade, and was bona fide so done...All the acts complained of were in themselves lawful, and if they caused loss to the appellants, that was one of the necessary results of competition".125

But whereas this construct of "legitimate self-interest" could exempt employers' associations from liability, it could not be extended to trade unions acting in furtherance of their members' interests.126 Quinn v Leathem involved a dispute over the employment of non-union labour.127 When the employer refused to dismiss the men, the union officials induced a customer, under a threat of a withdrawal of labour from his shop, to cease dealings with the employer. In the conspiracy action instituted by the employer, the unionists argued they were pursuing their legitimate self-interests. Their submission was understandable in view of the Mogul case, yet their Lordships determined that the purpose of the unionists' combination was not the furtherance of legitimate objects and that it was an actionable combination to injure.128

In 1914 the English jurist A.V. Dicey wrote that the economists of the day believed workers' combinations could not be distinguished from combinations of employers to lower wages or of traders to raise (or lower) prices.129 In the speech of Lord Field in the Mogul case, it was stated that

125 Ibid, at 56-57 per Lord Field.
128 It was explained that the provisions of the Conspiracy and Protection of Property Act 1875 were confined to criminal actions and could provide no protection in an action for civil conspiracy.
129 A.V. Dicey, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century (2nd ed. 1914), at 190-201.
loss inflicted on trade rivals was done in the bona fide exercise of the right to trade provided that the acts complained of were themselves lawful.  

Subject to that, Lord Hannen in the same case stated that he knew of "no restriction imposed by law on competition by one trader with another, with the sole object of benefitting himself". But in Quinn v Leatham a workers' combination inflicting loss on a trader, in the absence of unlawful means, was actionable. It was held to be a violation of the employer's legal right to trade freely in competition.

That these two types of combinations, each resulting in the same type of loss, could not be distinguished by the classical economists depicts the economic - and social - value the common law attributed to entrepreneurial activity. In the Mogul case Lord Bramwell even took the opportunity to explain what was, and what was not, "good for the public" in commercial affairs. His Lordship was emphatic that supply in excess of demand was not

130 Supra, note 125.
131 Ibid, at 59.
132 For comment, see K. Wedderburn, The Worker and the Law (2nd ed., 1971), at 26-30. Contrast Allen v Flood et al. [1898] A.C.1, where a majority of the Law Lords held that a union official calling a strike to injure his employers was not liable in the civil courts, even if acting maliciously, as he had done no unlawful act in itself. Lord Halsbury L.C., leading the House in Quinn v Leatham, supra, note 127, at 506, made no attempt at distinguishing: "I entirely deny that it [an authority] can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all".

133 The workforce was not the only party affected. G. Gilmore, Products Liability: A Commentary (1970) 38 U. Chi. L. Rev. 103, contends that nineteenth century contract law consistently favoured the performing party, the producer, over the paying party, the consumer, to encourage entrepreneurship. Cf., Posner, supra, note 120, at 123-25.

134 Supra, note 124, at 45.
good for the public: "If the shipping in this case was sufficient for the
trade, a further supply would have been a waste. There are some people who
think that the public is not concerned with this...as though the wealth of
the community is not made up of the wealth of the individuals who compose
it".135

(b) The market conception

"Competition is the life of trade", remarked another judge of the
period, "I can see no limit to competition".136 As apparent from above this
was not simply a formula for economic efficiency, but rather the grundnorm
of a political economy. Assuming many traders in competition - each so small
that individual traders responded only to price movements determined by
supply and demand - price flexibility was the best guarantee the community's
resources would be put to their most socially desired uses. The theory
predicted that since increased demand is reflected in increased prices,
and therefore increased profits, resources would naturally be attracted to
those sectors of increased price. The common law adopted this assumption:
in the Mogul case, for example, Lord Morris thought it a truism that
"[w]henever a monopoly was likely to arise, with a consequent rise of
rates, competition would naturally arise".137 The market assumption was
that this movement of resources would continue until supply exceeded demand
at the increased price. At that point the theory predicted a downward
movement in price causing a drop in profits and, on the assumption of the

135 Ibid, at 45-46.
136 Mogul Steamship Co. v McGregor Gow & Co., ibid, at 50-51, per Lord
Morris.
137 Ibid, at 50.
employer's personal quest for profits, a movement of resources to other areas of greater utility. To predict this result it was vital for there to be perfect interaction of the market components. The political economy of the latter nineteenth century thus postulated the following conditions: an identifiable owner of the instruments of production (or facilities for trading) to whom the market could look for the movement of resources, an atomistic market comprised of numerous buyers and sellers each so small that no one buyer or seller could influence the market price, an absence of significant economies of scale, and an absence of entry or exit barriers for all resources - including labour.

Whilst in particular the economic advantage in labour mobility was not overlooked, it was principally to the employer, as entrepreneur, that the common law looked for economic efficiency. The attraction of the theory was its lack of complication. Since the employer, as entrepreneur, either owned or personally organised the capital, his self-interest, as owner or organiser of the capital, was the assurance that resources would in fact be distributed to areas of greatest social demand. To the classical economist, he responded only to movements in market price - his quest to maximise profits was the only interest that was consistent with the rule of the market. This was the theory of private enterprise that enjoined the employer's prerogatives (to quote Bevil and Means):

"[I]f the individual is protected in the right both to use his own property as he sees fit and to receive the full fruits of its use, his desire for personal gain, for profits, can be relied upon as an effective incentive to his efficient use of any industrial property he may possess".139

In order that he could respond freely and promptly to movements in market price, unimpeded resource mobility was vital (the most critical indeed of all the conditions postulated for the proper functioning of the model). Thus it was essential for the employer, the owner or organisers of productive capital, to be free from any restriction organised labour might seek to impose on his entrepreneurial pursuits. Not only therefore did the common law courts devise a service relationship personified in terms of total subordination to command140 (hence the desideratum of control as the primary means of identifying the contract of service141): they also recognised in the employer the exclusive right to the control of the enterprise and they extended him the legal protection of that right against all but rival traders in competition.142


140 The adaption of sovereign authority from the master-servant model was the latter's main contribution to the contractual theory: see generally P. Selznick, Law, Society, and Industrial Justice (1969), but particularly at 130-37. Hence the implied duty imposed on the employee to obey all reasonable lawful orders which might issue; failure or refusal to comply justifies summary dismissal at common law: see e.g., Turner v Mason (1845) 14 M & W 112, 153 E.R. 411.

141 See Yewens v Noaks (1880) 6 Q.B. 530, at 532-33; Performing Right Society v Mitchell and Booker Ltd [1924] 1 K.B. 762, at 767.

142 Cf., the Mogul decision, supra, note 124, and Quinn v Leatham, supra note 127.
(c) The market v state regulation

Historically what is most peculiar about Industrial Conciliation and Arbitration is that it was conceived amid this thinking, yet was anathema to it. As a system of state regulation of labour disputes, it sought to supplant the employer's common law (contractual) rights to conduct his business according to the market unimpeded by the restrictions organised labour sought to impose. Labour's struggle, of course, was to mitigate the inequalities of bargaining power which the employer's market freedoms and contractual rights sustained. To the early judges who received the initial legislation, Industrial Conciliation and Arbitration threatened to assist labour realise that goal at the expense of the common law and the economic efficiency it promised. Hence the protestation of Griffiths CJ. in Clancy, quoted above, that "it is an act in restriction of the common law rights of the subject,...it is a reason why the meaning should not be strained as against the liberty of the subject". 143 Another judge of the period expressed his preference thus: "I do not think the framers of the [Industrial Conciliation and Arbitration legislation] contemplated turning the settled relations of employers and employed topsyturvy". 144 Yet the framers of the initial statute believed the legislation to be not only "absolutely experimental, and in New Zealand absolutely novel", but one for which there was no precedent in the world. 145 "Frankly", admitted William Pember Reeves, "the bill is but an experiment, but it is an experiment well worth

143 Supra, note 119.
144 Union Badge case, supra, note 114, per Barton A.C.J. (diss.).
145 Quoted by H. Broadhead, State Regulation of Labour and Labour Disputes in New Zealand (1908), at 9.
the trying. Try it, and if it fail, repeal it". In this Reeves might have been better advised to have heeded Machiavelli's axiom, "Let no man who begins an innovation in a State expect that he shall stop it at his pleasure or regulate it according to his intention."

The courts, on the other hand, while not able to stop the experiment, were able to regulate it according to their intention. In the Union Badge case Barton A.C.J. reiterated the presumption of statutory interpretation that "the common law rights of citizens are to be regarded as unhampered except so far as Statute diminishes them expressly or by implication", and concluded:

"Certain rights then remain to an employer. He may, for instance, carry on his business in such...manner as seems best to him, and he may decline to give employment except on such conditions as he thinks conducive to the success of his enterprise,..."

The economic conception to which this and other judges addressed themselves was the lynchpin of the uncomplicated theory of economic efficiency summarised above. "The employer and not the employed", continued Barton A.C.J., "must prevail in matters...affecting the successful conduct of his enterprise;...the decision what to do with his [that is, the employer's] own property and therefore the conduct of it, belongs to the employer who takes the risks of the enterprise".

---

146 W.P. Reeves, State Experiments in Australia and New Zealand, Vol. 2, at 107. See also Le Rossignol and Stewart, State Socialism in New Zealand, at 216, et seq.

147 Supra, note 114, at 687.

148 Ibid.

149 Ibid, at 689.
No emphasis is required to identify the market postulates of the nineteenth century political economy. Driven by personal quest for profit, the employer was the instrument of resource (re)allocation: it was his property, and his use of it, that would prevent what Lord Bramwell in the Mogul case termed "a waste".\textsuperscript{150} To these judges the economic justification for the legal protection of the employer's prerogatives was never in doubt; despite the rule enjoining the courts' loyalty to the legislature Industrial Conciliation and Arbitration could not be allowed to impinge more than was absolutely necessary upon the market freedoms the common law guaranteed.

Today, of course, it is no longer necessary for judges to expressly address Barton A.C.J.'s perception of economic organisation and underlying theory\textsuperscript{151} to affirm the old assumptions: by serving the doctrine of precedent the judicial function serves the perception of judges removed in time from the present. Indeed, even subsequent to the ANZ Bank case the Arbitration Court has demonstrated the strength of the fossilized economic conception underpinning the judges' construction of "industrial matters" in denying unions the right to negotiate over the introduction of computer technology into the workplace.\textsuperscript{152} However, it first remains to summarise the results of three New Zealand studies demonstrating the vastly changed organisation of industrial enterprise in the modern economy. These evidence a reversal of the fundamental incentive that was supposed to guarantee the efficiency of last century's enterprise system.

\textsuperscript{150} Supra, text, corresponding to note 135.

\textsuperscript{151} Supra, text, corresponding to note 149.

\textsuperscript{152} See the Law Practitioners' case, infra, Part F. TECHNOLOGY AND "INDUSTRIAL MATTERS".
(d) The transformation of modern industry

(i) General At the basis of last century's political economy was the entrepreneur: "One who undertakes on his own account an industrial enterprise in which workmen are employed". Since it perceived the direct personal and financial commitment of the employer, "...the decision what to do with his own property and therefore the conduct of it belongs to the employer who takes the risks of the enterprise". The sole proprietor qua entrepreneur has not disappeared from the New Zealand economy, but no longer does he comprise today the larger part of the industrial economy. There is nothing new or of special interest in the little business pursuing the benefits of incorporation; it is the scale of operation of the larger public concern relative to the overall economy and its ability to attract the "passive investor" that have caused through the operation of the stock market the vast dispersion of ownership of today's productive capital. Matching this development has been the emergence of professional management to whom control over the shareholders' property is bequeathed as a condition of membership in the large company.

It is generally accepted today that basic changes in the securities market over the years have made the takeover a potent instrument of control displacement, which if nothing else has alerted modern management to the need to function "in a way consistent with maintaining a strong share price".

153 Websters Dictionary
154 Supra, note 114, at 689 per Barton A.C.J.
155 See the portrait painted by Posner, Economic Analysis of Law (2nd ed., 1977), at 301, quoted infra, text corresponding to note 161.
156 See W. Werner, Management, Stock Market and Corporate Reform: Berle and Means Reconsidered (1977) 77 Colum. L. Rev. 388, at 404 reviewing the increased efficiency of the stock market.
However this, the maintenance of securities in the market, is not the prescription for economy efficiency which formerly justified the legal protection of the employer's unilateral powers of decision. The motivation of corporate management cannot be identified with the personal property interest that explained the entrepreneur-owner's quest for profit. The continuing debate over the nature of corporate goals has resulted in a number of theories, one of which questions in fact whether corporate managements are any longer committed to the maximisation of profits. On the assumption that business decisions aimed at maximising revenue invite increased risk of loss, economists argue that it is a "highly rational" choice for senior management to aim at a secured, minimum level of return sufficient to guarantee its survival. As Galbraith notes, "struggles for control in large corporations occur all but exclusively in those that are suffering losses or have meager and irregular earnings". Hence:

"Even more important than a good price is protection against a price collapse. Even more important than a strong demand for the product is protection against a wholesale rejection".

157 Berle and Means, supra, note 139, at 301, probably initiated this preponderance: "When none of the profits are to be received by... [those in control], why should they exert themselves beyond the amount necessary to maintain a reasonably satisfied group of stockholders?" E. Rostow, To Whom and For What Ends Is Corporate Management Responsible? in The Corporation in Modern Society (1970), E. Mason (ed.), at 64, cites this view (i.e., rhetoric) as widely held, albeit arguing the benefits of business behaviour committed to profit maximisation.

158 The words in quotation are J.K. Galbraith's, The New Industrial State (1967), at 175.

159 Ibid, at 177 (citing economists supporting the theory).

160 Ibid, at 172.
Galbraith contends, then, that corporate managements seek only to realise a sufficient return on the investor's capital to prevent the likelihood of a takeover bid and to satisfy the expectations of the shareholders. Indeed the size of corporate holdings relative to the overall assets of the company has made "the typical shareholder" a singularly uneventful character. He is, as Posner observes:

"...not knowledgeable about the business of the firm, does not derive an important part of his livelihood from it, and neither expects nor has an incentive to participate in the management of the firm. He is a passive investor...".161

His expectations qua shareholder reveal a relationship to property that is bereft of all but a residual equitable interest in the capital he contributes. Measured only by the liquidity of his asset and the market quotation that assigns its value, these expectations are a reflection of the "essential alteration" in the incidence of ownership to which Berle and Means were committed in their pioneering study of the modern corporation: "[W]e have evolved a new wealth-holding and wealth-circulating system whose liquidity is maintained through the exchanges but is only psychologically connected with the capital gathering and capital application system on which productive industry and enterprise actually depend".162

In fact, recent changes in the patterns of share distribution resulting from increased institutional investment in the developed economies anticipate even further diminution of the role of the private investor from

161 Supra, note 155.
162 Supra, note 139, at xxii.
the passive function of securities investment to the virtual abdication of all proprietal function.\textsuperscript{163} Through membership in an investment institution, the supplier of capital effectively has no relationship with the company in which his capital is deployed. His only expectation is that the institution maximise the rate of return on that capital by investment decisions involving an acceptable degree of risk. And as with the "typical shareholder",\textsuperscript{164} rather than seek to influence the company's management - despite the ability of the institutions to do so in many instances - the investment institutions' first response to inefficient managements is through the stock market; experience indicates that only where wholesale disposal of large institutional holdings would precipitate further decrease in the share price are they prepared to assert influence over the company's direction. One recent United Kingdom study concluded that this reluctance of the institutions to perform any proprietal function over the capital they invest, coupled with the rapid growth in institutional holdings, is inducing a "proprietal gap" in the financial system.\textsuperscript{165} The evidence indicated that "the proprietal functions" once discharged "by the private entrepreneur and shareholder have not been fully assumed by today's professional manager and institutional shareholder".\textsuperscript{166}


\textsuperscript{164} Supra, text, corresponding to note 161.

\textsuperscript{165} Report of the Committee to Review the Functioning of Financial Institutions (U.K.), paras. 69-95, particularly para. 85.

\textsuperscript{166} Ibid, para. 85.
(ii) New Zealand - evidencing the trend. The following studies confirm that contrary to the economic conception on which the early judges premised their decisions on Industrial Conciliation and Arbitration, the larger part of the New Zealand economy is not comprised today of groups of owners, each supplying risk capital, organising and conducting commerce in an impersonal market.

Firstly, in 1971 the Department of Statistics (N.Z.) explained:

"Among the reasons for this decline in the proportions of employers and self-employed to wage earners in countries at a certain stage of industrial development is the tendency for the economy to become organised into larger units of production better able to provide (or obtain) the larger amounts of capital necessary to finance expansion and development. These larger units are better equipped to withstand the impact of economic cycles and keener competition. Small independent businesses... diminished, and owner-managers are replaced by salaried employees". 167

One explanation for this trend towards "larger units of production" in the developed industrial states is the influence of technological change. Particularly in the post-war era, it has greatly increased the burden of capital cost which can be more readily carried by the larger enterprise. Since this results in the increased concentration of industry, 168 there is little reason, in light of one study published in 1976, to doubt


168 See A. Shonfield, Modern Capitalism (1974), at 372-76, discussing the inter-dependence of technology and increased capital cost as a principal factor causing the concentration of industry in the post-war, Western European countries. See also Galbraith, supra, note 158, Ch. 2.
this influence in New Zealand. 169 This consisted of a survey of more than 350 of New Zealand's largest enterprises selected on an industry-based classification to determine the extent of monopoly control in New Zealand. The study defined "industrial concentration" as meaning the degree of market power exercised by the three largest enterprises in a single market. 170 Whilst pointing out that the concentration ratio of a particular industry was "not an infallible monopoly indicator", monopoly "almost by definition", the study explained, "entails a departure from the ideal resource allocation". 171

Significantly the study records an almost identical percentage of "highly concentrated" industries in New Zealand as in the United States. 172 Although both percentages fell markedly below that of the United Kingdom (this result was attributed to the method of calculation used in the United Kingdom 173), in fact New Zealand recorded a higher aggregate concentration ratio than the United States by reason of its significantly larger percentage of industry in the "medium" concentration range. 174

171 Ibid, at 3.
172 Ibid, at 27.
173 Ibid, at 26-27. The writer warns that international comparisons of concentration can be misleading, owing to differences in industry classifications, methods of calculation, and the time span under consideration. However, the writer concludes that the methods of calculation used in these countries are "not too dissimilar...for the purposes of a general comparison".
174 Allowing for the differences in methods of calculation, it was estimated that concentration in New Zealand industry was higher than in the United Kingdom also: ibid, at 27.
In light of the vast difference in absolute size of these economies, it is a fitting illustration of the relativities of scale that this result was interpolated according to the limited size of the New Zealand market and the subsequent paucity of enterprises in a relatively large number of industries. It was found that the market factors synthesising this degree of concentration were the economies of large scale, high capital requirements, and the degree of state regulation protecting domestic industry. The study concluded that "through merger activity" this typically resulted in "a few large companies surrounded by a large number of smaller (often subsidiary) companies dominating the market." The fact that some companies returned data relating to thirty or more subsidiaries may indicate a high degree of "pyramiding" in New Zealand as a device to gain "the control" of companies in related markets.

The breakdown of the highly concentrated industries recorded is of general instruction. Contrary to neoclassical economic theory, the high degree of public regulation of industry in New Zealand has not corrected the imbalance in the market where the traditional market controls have failed. Of the 102 industries listed, nine had concentration ratios

175 Ibid, at 25 and 27.
176 These influences are observed in most highly concentrated industries, ibid.
177 Ibid.
178 Cf. P. Samuelson, Economics (10th ed., 1976) at 532 advocating public regulation of utilities and formal and informal anti-trust devices to maintain competitive market conditions. But cf., Antitrust in a Rapidly Changing Economy:Large-Scale Investments and Competition (1975), discussing the costs of inhibiting large-scale investment having anti-competitive effects.
of ninety per cent or higher (that is, the three largest enterprises per industry accounting for ninety per cent or more of the market sales/gross output in nine per cent of New Zealand industries) and indeed, five had concentration ratios of one hundred per cent. In all, twenty-nine industries recorded ratios in this category. Fortytseven per cent of New Zealand's industries, as opposed to thirty per cent of the United States', had concentration ratios in the medium range.

The second study, A Portrait of the New Zealand Share Investor (1966), reveals that share investment in New Zealand is "a very widespread activity", "no longer the preserve of the traditional capitalist". The principal conclusion to emerge from this study is the importance of "the small investor". The sample surveyed showed that sixty-three per cent of the investors were ordinary wage or salary earners and that only "a comparatively few" relied upon share investment as their principal source of income. Although seventy-five per cent of the sample had annual savings of five hundred dollars or less, this group contributed in aggregate forty per cent of the total savings of the sample.

---

179 Supra, note 169, at 21. "High concentration" was designated between 67-100%, "medium" between 34-66% and "low" between 0-33%. These percentages were chosen in accordance with the classifications used in the United States and the United Kingdom.


181 Ibid, at 58.

182 Ibid, at 12 and 17.

183 Ibid, at 58.
accounted for the conclusion that the wage and salary earning group was by far the largest source of funds for shareholder investment. This study also confirmed the usual expectations of the shareholder:

"Although non-financial motives such as sheer interest in business affairs may be of some importance in explaining the widespread interest in the share market, it remains true that the basic motive is the desire to make a monetary gain on accumulated funds".185

This motive alternated between the expectation to receive dividends on the shares and a capital gain on share appreciation, seventy-three per cent of the sample indicating the latter to be more important.186 On this survey, then, the "typical shareholder" has a small portfolio, is a member of the group contributing the greatest portion of capital, and "neither expects nor has an incentive to participate in the management of the firm".187 His membership in the company is purely financial. If his expectations arising from membership in the company are frustrated as a result of inefficient management, it is to the public market - not the company - that he looks both for an appraisal of his ownership interest and for the chance to realise that interest.188

184 Ibid, at 76.
185 Ibid, at 21.
186 Ibid.
187 Cf, Posner, supra, text, corresponding to note 161.
188 The same is observed of the typical Canadian stockholder. See S. Peterson, Canadian Directorate Practices: A Critical Self-Examination (1977), at 7: "Concerned with the profitability of their investment in a company, they [the shareholders] typically sell their shares rather than attempt to influence the affairs of the corporation through the board of directors".
Finally, a study monitoring recent changes in the distribution of share ownership in New Zealand reveals a rapid growth in institutional investment, not simply in the number but also in the size of holdings of investment societies.\textsuperscript{189} Insurance companies were found to account for much of this. In the period 1962 to 1974 the number of insurance companies classified as "large investors" almost doubled\textsuperscript{190} and was matched by a proportionate increase in the number and size of holdings.\textsuperscript{191} It was observed that "[t]oday it is the corporate investors, particularly the insurance companies, who dominate; whereas in the 1960s, the large individual investors were still a significant force".\textsuperscript{192} This "massive increase" in corporate and institutional investment resulted in "proportionately more potential power...being concentrated disproportionately with a smaller number of [large investors]".\textsuperscript{193} This study concluded that directors of the large companies in New Zealand have a negligible ownership interest in the company;\textsuperscript{194} that with the increasing dispersion of share ownership shareholders as a group "cannot influence the direction of their

\textsuperscript{189} G. Fogelberg, \textit{Changing Patterns of Share-Ownership in New Zealand's Largest Companies}, Department of Business Administration, Victoria University of Wellington, Research Paper No. 15, 1978. The term "investment institutions" is used widely to include non-industrial companies undertaking extensive investment as the company's principal or subsidiary function.

\textsuperscript{190} \textit{Ibid}, at 12.

\textsuperscript{191} In 1974 insurance companies accounted for over 40% of the aggregated twenty largest holdings per company for the twelve largest New Zealand companies surveyed. This represents a seven-fold increase on insurance companies' aggregate holding in 1962: \textit{ibid}, at 10-12.

\textsuperscript{192} \textit{Ibid}, at 19.

\textsuperscript{193} \textit{Ibid}, at 6. This concentration of large holdings is countervailed by the incidents of institutional investment.

\textsuperscript{194} The aggregate capital held by board members in the companies surveyed was 1.2% (in 1974) of the companies' total capital: \textit{ibid}, at 16-18.
that only the large corporate or institutional investors, either individually or collectively, can exercise direction over the company's decisions; and that these developments are consistent with trends observed in other industrial economies.

It suffices to add that these studies do not support the economic model of last century's political economy which enjoined the legal protection of the employer's freedom to trade. But notwithstanding the anachronism today, the early judicial response to Industrial Conciliation and Arbitration survives through the role of precedent and the day-by-day functioning of courts.

F. TECHNOLOGY AND "INDUSTRIAL MATTERS"

(a) New Zealand Federated Clerical and Office Staff Employees' I.A.W. v Wellington Law Practitioners' I.U.W.

This decision is the most recent illustration of the legal straight-jacket that results from an inflexible judicial approach to "industrial matters".

This was an acknowledged test-case to determine how New Zealand's Industrial Conciliation and Arbitration system would respond to worker

196 Ibid.
197 Ibid.
demands for bi-lateral control over the introduction of new technology into the workplace. It arose pursuant to the clerical and office staff employees' demand to bargain over decisions contemplating the introduction of word processing machines in legal offices. Quoting verbatim almost the entire decision in the ANZ Bank case, notably that part approving the many statements from the Australian authorities, the Arbitration Court held that it could not sanction the Union's demand. This is notwithstanding the Court's observation (which justified its departure from the established practice of not providing reasons for its decisions on purely arbitral matters) that the new micro-electronic technology is "of great moment in industrial relations" affecting "many and varied fields". Perhaps, then, by denying the industrial party most directly affected access to the formal procedures to negotiate over the matter, the issue of job security and the new technologies will simply "go away", never to burden the industrial system again?

(b) General

Involved in the introduction of technology into the workplace may be changes in production methods, transfers of operations, new raw materials and power sources and permanent shifts in product markets. Yet from neither the worker's nor employer's standpoint does the question regarding

199 Acknowledged ibid, transcript at 2.

200 See generally, A. Manson, Technological Change and the Collective Bargaining Process (1973) 12 W. Ont. L. Rev. 173, reviewing the procedures in Canadian collective agreements regulating the introduction of technology.
its introduction present a new genus of industrial dispute. In essence, the conflict is between productivity and job security. In almost all cases, new technology serves not only to maximise marginal revenue but also to minimise marginal cost through a reduction of the labour input. Simplified thus, the legal question posed is as old as the industrial system itself: ought managerial decisions that enhance profitability but which result in redundancies to be matters over which a union has a right to bargain?

In respect of technology, only in degree does this issue impose new burdens on the industrial system. When the above question was judicially put for the first time in 1904, the judge's example of a labour-saving invention was an automatic fuel feeder for the working of locomotive furnaces. No doubt for workers ordinarily performing this function, its introduction caused no less concern than that expressed by clerical workers facing the introduction of word processors. But unlike today's computer technology, its impact on the demand for labour was confined in scope to that particular function in that particular industry. Also unlike today's technology, the development of mechanical labour-saving devices such as the railway's automatic fuel feeder kept more or less in tandem with the creation of job opportunities.

"Innovation speeded up" has changed this. This is how one economist describes the rate of post-war technological development. In contrast to the automatic fuel feeder of 1904, today's technological advances benefit

201 Clancy v Butchers' Shop Employees Union (1904) 1 C.L.R. 181, at 206-207, per O'Connor J.

202 See A. Shonfield, Modern Capitalism (1974), Ch. III entitled as quoted.
all sectors - affecting "many and varied fields" - regardless of industry classifications. Economists believe it is also one of the principal causes of post-war industrial instability. The rate by which it is accelerating is evidenced by the diminishing time interval between the idea and its development into a marketable product. Producers of technology force their product on the market and the market need to be competitive forces it on the employer. As the rate of technological achievement quickens, the treadmill employers tread to maintain their competitive advantage becomes faster and the burden of increased capital cost - incurred in purchasing technology - greater. The other side of the cost-accounting equation to offset that burden, of course, is the reduction of labour cost, which technology itself promotes.

In the competitive market economy, redundancies do and will continue to occur amid the ebb and flow of resources to areas that serve the consumer's wants. Traditionally the market economy was able to absorb these redundancies, and maintain a reasonably stable demand for labour, by virtue of the job opportunities this resource reallocation created. The problem post-war technology poses is that the job opportunities it creates cannot match the reduction in the overall market demand for labour. What will become more apparent this decade is that as fast as the redeployment of

203 See the Arbitration Court's observations, Law Practitioners' case, 268.
204 Eg., Shonfield, supra, note 202, at 230.
205 See ibid, at 41 (note 4), illustrating by reference to the development of the telephone (1820-76), radio (1867-1902), television (1922-36) and more recently transistor technology (1948-1953).
206 "[With] the more rapid obsolescence of machines and equipment, as technology advances, costs are saddled with a larger proportion of the value of the plant which has to be written off each year"; Shonfield, ibid, at 361.
resources primes that demand, the faster will technology develop and the
greater will become the discrepancy between supply and demand for labour.
Even the Arbitration Court in the Law Practitioners' case was disposed to
comment:

"It is clear that new technology, whatever its scope,
has increased, is increasing and will increase...It
is also clear that in a number of instances in industry,
specific jobs will become unnecessary and that future
job opportunities may not be created".207

Now consider the legal question in the Law Practitioners' case, whether
an employer decision to introduce technology is a permissible subject of
award regulation. Immediately the Arbitration Court addressed this question,
its references to technology could just as well have been references to
the automatic fuel feeder of 1904208 - the fact that technology "has
increased, is increasing and will increase" notwithstanding.209 "[T]he
scope of the section [defining "industrial matters"] is well discussed
in New Zealand Bank Officers I.U.W. v Australia and New Zealand Banking
Group Limited, I.C. 71 of 1977", observed the Arbitration Court in the Law
Practitioners' case:

"...a decision of the Industrial Court delivered by
Jamieson J. In that case, although the factual issue
was quite different, there is a full discussion of the
phrase 'industrial matter' and we set out hereunder
some lengthy quotations from that decision".210

207 Supra, note 198, at 271.
208 See supra, text corresponding to note 201.
209 Supra, text, corresponding to note 207.
210 Transcript, at 4.
This effectively disposed of the issue without the need for specific judicial consideration of it or independent analysis of the statutory definition. Clancy established that industrial matters have nothing to do with "the quantity of work which the employer is to provide" or indeed with "what work shall be provided".\footnote{Supra, note 201, at 202-203 per Griffiths CJ.} Hence they have nothing to do with the introduction of computer technology affecting both the type and quantity of work the employer provides. It was as though to clarify this that O'Connor J. in Clancy instanced the railway's automatic fuel feeder, the introduction of which his Honour said "would very largely affect the amount of work to be done by employees".\footnote{Ibid, at 206.} Yet "[c]ould it be contended for one moment that there was jurisdiction in the Arbitration Court to prohibit the use of such apparatus on the ground that it affected the work to be done...", his Honour asked, "or that it had the power to direct what kinds of machinery should be used...?\footnote{Ibid, at 206-207.}

(c) Quaere the statutory justification?

It was held that the clerical and office staff employees' demand, to secure the right to consultation prior to any decision to instal word processing machines, was managerial and not industrial in character and
could not be pursued by the Union. But wherein lies the statutory justification for this decision? The first limb of the definition of "industrial matters" embraces *inter alia* "all matters affecting or relating to work done or to be done by workers*.\(^{214}\) The installation of word processing machines (for that matter, any micro-electronic technology) not only affects or relates to "work done or to be done", it clearly changes it both as to the nature and quantity of work provided or to be provided pursuant to the employees' contracts of service. Consider also the second limb of the definition, embracing "all matters affecting or relating to...the privileges, rights, and duties of employers or workers in any industry". If the introduction of technology enables the employer to reduce his labour force, does not the decision to install it affect the rights of workers? A decision to introduce, for example, word processing machines is a decision *inter alia* to create redundancies which is a decision to terminate the existing right to employment secured by the employees' contracts of service; whether the reason for termination be justifiable or otherwise\(^{215}\) the definition unambiguously speaks of matters affecting the rights of workers, and the Arbitration Court has always insisted that workers within its principal jurisdiction are distinguished by their engagement under such a contract.\(^{216}\)

\(^{214}\) Industrial Relations Act 1973, s. 2. (quoted in full supra).

\(^{215}\) *Cf*, Industrial Relations Act 1973, s. 117.

Indeed, does not the second limb speak also of the privileges and rights of employers? This embraces the notion of managerial prerogative itself, managerial prerogatives being either privileges or rights employers enjoy. By the same fact a management-union difference over the exercise of an assumed managerial prerogative is a difference in relation to an industrial matter which, by virtue of the compulsory bargaining procedures of conciliation and arbitration, extinguishes the unilateral right of decision that managerial prerogative implies. Viewed thus, the statutory definition excludes the very distinction (between "managerial" and "industrial" matters) which the ANZ Bank case incorporated from the Australian decisions and on which the Arbitration Court relied to uphold the employer's unilateral right of decision to introduce computer technology.
VII. JUDICIAL CONTROL OF INTEREST DISPUTES

"All contracts regarding labour are controlled and may be modified or abrogated. The Court can make the contract or agreement that is to exist between the workman and the employer. It abrogates the right of workmen and employers to make their own contracts".

Taylor and Oakley v Edwards J. (1900) 18 N.Z.L.R. 876 (C.A.), at 885 per Stout C.J.

A. INTRODUCTION

Judicial control of labour disputes is integral to the very system of Industrial Conciliation and Arbitration in New Zealand. However, since the most direct and telling judicial control is that enforced with respect to the substance of bargaining examined in the previous chapter¹ this aspect of the comparison with the British Columbia system may be brief.

¹ Supra, VI. THE JURISDICTIONAL CONCEPT OF "DISPUTE".
B. THE NATURE OF ARBITRATION

It has been observed that the arbitral body, the Arbitration Court, is a Court of Record possessing, in addition to those powers specifically conferred by the Industrial Relations Act 1973 or any other Act, all the powers inherent in such a Court. Yet, when discharging its arbitral functions in award proceedings it would be unjustified to accuse the Arbitration Court of being an instrument of judicial control over terms and conditions of employment. In this sense industrial arbitration must be distinguished from the more common forms of commercial arbitration. In essence the distinction is between interest and rights disputes.

The commercial arbitrator is concerned only with the latter, disputes about rights. Hence, unlike the Arbitration Court qua industrial arbitrator "[t]he office of [commercial] arbitrator is like that of a Judge to the extent that it is for him to declare the law and not to make it". For another judge, "[o]ne can have no mental conception of [commercial] arbitration without parties in difference over some matter capable of judicial adjustment by an arbitrator". The commercial arbitrator is concerned only with the latter, disputes about rights.

---

2 Industrial Relations Act 1973, s. 32.
4 *Australian Boot Trade Employees Federation v Whybrow & Co.* (1910) 11 C.L.R. 311, at 321-22 per Barton J., quoting himself in the *Bootmakers* case (No. 1) 10 C.L.R. 266, at 293-95.
5 Ibid, at 329 per O'Connor J.
arbitrator's award is a truly judicial determination intended to be final and binding, involving usually the determination of questions of fact and the application of existing rules (which he may or may not be required to first interpret) to those facts. For this reason the High Court of Australia held in Australian Boot Trade Employees' Federation v Whybrow & Co. that for purposes of section 51 (XXXV) of the Australian Commonwealth Constitution the term "arbitration" did not contemplate the power to impose common rules upon an industry whereby the arbitrated award could affect persons or parties beyond the immediate disputants.

Contrast the commercial arbitrator's judicial function with that of the industrial arbitrator. Because the latter in New Zealand is a Court of Record an industrial award is in form a judicial decree, "but in substance", explained Salmond J. in New Zealand Waterside Workers' Federation I.A.W. v Frazer, "it is an act of legislative authority":

"An industrial award...is the establishment of a set of authoritative rules regulating an industry, and determining not the present rights and obligations of litigants, but the future relations and mutual rights and obligations of all persons who thereafter during the currency of the award choose to enter into contractual relations with each other as employers and employed in that industry. The making of an industrial award is as much an act of delegated and subordinate legislative authority as the making of by-laws by a municipal authority...".

---

6 But a clause of a commercial contract purporting to oust the overriding jurisdiction of the court over a dispute submitted to arbitration is void: Doleman & Sons v Ossett Corporation [1912] 3 K.B. 257; Scott v Avery (1856) 25 L.J. Ex. 308.

7 "Beyond all question the award is a judicial determination...The tribunal, being judicial, its office is to decide questions of fact and in respect of such conclusions to declare or apply existing laws,...": Bootmakers' case, supra, note 4 per Barton J.

8 Supra, note 4.


10 Ibid.
Viewed thus, the Arbitration Court is more the delegate of Parliament exercising judgment according to the relative requirements of individual industries rather than an adjudicator making final and binding decisions between parties *inter se*. Yet, as the previous chapter shows the same Court is capable of wearing two hats in interest disputes, one quasi-legislative, the other truly judicial.

C. JURISDICTIONAL ERROR

From the initial Industrial Conciliation and Arbitration Act 1894 the ordinary civil courts in New Zealand have accepted that the Arbitration Court should be master in its own specialist field and that they will not sit as courts of appeal from its decisions. Whenever actions in the civil courts impinge on matters governed by the industrial statute, the courts are circumspect. In *Wellington Hotel etc. Employees' I.U.W. v Attorney-General, ex rel Just* the Court of Appeal for the reason above refused to uphold the writs issued below in the Supreme Court striking down the Union's attempt to extend its occupational coverage by amendment to its membership rule. The entire structure of the Act, said the appeal court, suggests that the administration of the industrial affairs of industrial unions was intended to be "under the control and direction" of the Arbitration Court and that Court alone: here the issue involved a question

---

11 Supra, VI. THE JURISDICTIONAL CONCEPT OF "DISPUTE".

of fact which should be left to the authority to whom Parliament committed the responsibility for decision, said the Court.\textsuperscript{13} Note also Wellington Municipal Officers' Association (Inc.) v Wellington City Corporation,\textsuperscript{14} decided three months prior to the Wellington Hotel Employees' case, in which the Supreme Court declined on jurisdictional grounds to entertain an application under the Declaratory Judgments Act 1908 seeking a declaration as to which of two instruments, one an award of the Arbitration Court, governed the conditions of employment of the plaintiff Association:

"Having regard to the special and exclusive jurisdiction of the Court of Arbitration in the making of industrial awards, and having regard to the fact that the matters raised in this summons are matters in the industrial sphere, I think that such intervention on the part of this Court in the business of the Court of Arbitration as the answering of the questions submitted would compel, would be contrary to the spirit and purpose of the Industrial Conciliation and Arbitration Act, 1925".\textsuperscript{15}

However, while the superior courts have been careful to respect the privative clause contained in the successive Industrial Conciliation and Arbitration statutes they are also adamant that it cannot be read so as to "produce the extraordinary result that the Arbitration Court possesses uncontrolled authority to make in any matter whatever such orders and awards as it thinks fit, in disregard of the limits of its jurisdiction, in infringement of the jurisdiction of other Courts, and in violation of the

\begin{itemize}
\item \textsuperscript{13} Ibid.
\item \textsuperscript{14} [1951] N.Z.L.R. 786.
\item \textsuperscript{15} Ibid, at 788 per Gresson J.
\end{itemize}
law of the land...". What doubts resulted from the Court of Appeal's equivocation in the early decision of Blackball Miners v Judge of the Court of Arbitration, New Zealand Waterside Workers' Federation, Industrial Association of Workers v Frazer soon dispelled. It is judicially agreed that Salmond J.'s judgment in Frazer's case settled the superintendent relationship of the High Court to the Arbitration Court. The following is the oft-quoted dictum:

"The...[privative clause] is to be read subject to the proviso that the award, order, or proceeding so protected from examination is an award, order or proceeding within the jurisdiction of the Arbitration Court. The section means merely that so long as the Court keeps within the limits of its jurisdiction entrusted to it by the Legislature its proceedings and judicial acts within those limits are not subject to the examination, question, or control of any other Court...But as soon as the Arbitration Court goes beyond the limits of the jurisdiction so assigned to it, whether by a mis-interpretation of the Act by which it is constituted or otherwise, and deals with matters which are not its lawful business, it is subject to the control of the [High] Court in the exercise of the authority of that Court to keep all other Courts within the scope of their appointed jurisdiction".

In fact, contrary to the potential for conflict in British Columbia between the Board and the ordinary courts, the High Court's residual powers to enforce the jurisdictional limits imposed on inferior courts is now expressly preserved with respect to the Arbitration Court by statutory provision. Section 48 of the Industrial Relations Act 1973

16 New Zealand Waterside Workers' Federation I.A.W. v Frazer, supra, note 9 at 701 per Salmond J.
17 (1908) 27 N.Z.L.R. 905 (C.A.).
18 Supra, note 9.
19 Eg., see New Zealand Federated Labourers etc. I.A.W. v Tyndall and Others [1964] N.Z.L.R. 408, at 413, per Hutchison J.
20 Supra, note 9, at 702-3.
re-enacts the privative clause formerly contained in the Industrial Conciliation and Arbitration Act 1954, but now prefaces it with this phrase which is new to the legislation: "Except on the ground of lack of jurisdiction..."21 Indeed, the section is exceptional in that it actually specifies the precise grounds on which the Arbitration Court will suffer from lack of jurisdiction, namely, when:

"(a) In the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or

(b) The decision, order, or award is outside the classes of decisions, orders, or awards which the Court is authorised to make; or

(c) The Court acts in bad faith".22

However, inasmuch as these codify the general grounds courts have established for penetrating the usual privative clause,23 there is no reason to suspect that the courts' attitude towards the present Arbitration Court is any different today from that expressed by Cooke J. with respect to the old Court: "[T]he courts of general jurisdiction should be slow", his Honour advised, "to hold that when establishing a court or tribunal of limited jurisdiction Parliament meant it to have authority to determine conclusively for the purposes of any given case the meaning of provisions in the Act by which it is constituted and under which it operates".24

21 Industrial Relations Act 1973, s. 48(6).
22 Section 48(7).
Mindful of this supervisory jurisdiction, the Arbitration Court is itself careful to observe the limits of its jurisdiction assigned by its constating statute. The decision on the outstanding issue in dispute in the Law Practitioners' case is a good illustration. This arose in the context of the dispute of interest between the New Zealand Federated Clerical and Office Staff Employees' Industrial Association of Workers, as applicant, and the Wellington Law Practitioners' Industrial Union of Employers and Others, as respondents. The matter was referred to the Arbitration Court by a conciliation council pursuant to section 84 of the Industrial Relations Act 1973 as a partial settlement of the dispute. The Court disposed of the remaining matters in dispute in the performance of its ordinary award-making functions, save with respect to the technology clause which the Court acknowledged would constitute a precedent for all future award proceedings. This issue was to be resolved by adjudication, not arbitration, the Court said in effect. Appended to the Award was this Memorandum explaining:

"The effects of the introduction of new technology and related economic factors have resulted in the insertion of clause 39 [conferring a right to be advised of any managerial decision to introduce new computer technology, but denying any right to consultation prior to such decision being made]...Because of the far reaching submissions and evidence presented at the hearing, the Court will be issuing a separate decision on the matters raised including the extent of the phrase 'industrial matters' as well as technological and economic matters and this further decision will follow shortly".26

---


26 Ibid.
The decision referred to, of course, has been examined in the previous chapter dealing with the legal question of what constitutes a "dispute" sufficient to confer jurisdiction. The decision thus epitomises the dual capacity of the Arbitration Court in interest disputes to act as though it were a commercial arbitrator - "...like that of a Judge..."\textsuperscript{27} presiding over a "...difference over some matter capable of judicial adjustment..."\textsuperscript{28} - rather than an industrial arbitrator. For present purposes, it portrays both the Arbitration Court and the High Court (the latter in the exercise of its powers to police jurisdictional error) to be instruments of judicial control over terms and conditions of employment beyond the central issue of remuneration.

D. THE CONCURRENT JURISDICTION OF CIVIL COURTS

With the extensive judicial controls already secured by New Zealand's Industrial Conciliation and Arbitration statute, one might be forgiven for believing that any concurrent jurisdiction in the ordinary courts to determine the liability of unions and their officers at common law would be superfluous. Yet, the New Zealand unionist has never known even the limited protection from civil liability afforded by the "golden formula" presently re-enacted in the Trade Unions and Labour Relations Act 1974 (U.K.), granting immunity from suit in respect of union activity "in contemplation or furtherance of a trade dispute".\textsuperscript{29} In consequence, an employer who is strikebound in New Zealand has

\textsuperscript{27} See supra, note 4.
\textsuperscript{28} See supra, note 5.
\textsuperscript{29} See ss. 13-14.
at his disposal an arsenal of legal rules beyond the regime of New Zealand's comprehensive industrial statute by which to enjoin the union, its officers and its members and to sue for damages in respect of any loss sustained.\textsuperscript{30} A classical example of the common law action is \textit{Northern (except Gisborne) Road Transport Motor and Horse Drivers' etc I.U.W. v Kawau Island Ferries Ltd.}\textsuperscript{31}

Indeed, although this itself was an appeal against the grant of an interim injunction restraining the defendant Union from continuing a ban against the carrying out of certain supply contracts, the Court of Appeal thought it "necessary to emphasise" that in New Zealand "the common law right to sue in respect of unjustified interference with contractual relations is not peculiar to industrial disputes"; "it is available in all circumstances and to all people", continued McCarthy P. for the Court, "providing the requisite interference and absence of justification exist".\textsuperscript{32}

As in that case, the employer will invariably found his action in one or more of the economic torts: namely, inducement to breach contract, intimidation and conspiracy\textsuperscript{33} (\textit{quaere} the existence of a forth tort of deliberate and unjustifiable interference with another's trade or business involving unlawful means but falling short of actual interference with the

\begin{footnotes}
\item[31] [1974] 2 N.Z.L.R. 617.
\item[32] Ibid, at 620.
\item[33] See the English authorities cited infra, note 44. See also the New Zealand decision of Pete's Towing Services Ltd v Northern Drivers' I.U.W. [1970] N.Z.L.R. 32 per Speight J.
\end{footnotes}
plaintiff's contractual relations\textsuperscript{34}). The potential for these torts to be thought of as strictly "industrial torts" in New Zealand results from the fact that each can be readily established in the industrial setting without reference to any statutory illegality; a sufficient illegality to support these actions can often be found in the common law itself. Witness the Kawau Island Ferries case where the element of direct and deliberate interference with the plaintiff's contractual relations was sufficient \textit{per se} to found a \textit{prima facie} case for the grant of the interim injunction.\textsuperscript{35}

It may well be, further, that a simple breach of contract - be it actual or only threatened - will suffice to satisfy the "unlawful means" element where the industrial action complained of is of a secondary or indirect nature.\textsuperscript{36}

Yet, what renders these torts so readily available and so tempting to the strikebound employer in New Zealand is that seldom ever is it necessary to look beyond the provisions of the Industrial Relations Act 1973 itself for this purpose. Coupled with its expansive definition of the term "strike",\textsuperscript{37} the Act's extensive anti-strike provisions are capable of rendering most, if not all, the common forms of direct action unlawful.

\textsuperscript{34} See J.T. Stratford \& Son Ltd v Lindley [1965] A.C. 269, per Lords Reid Pearce and Radcliffe, who favoured the existence of this "forth" tort. And see Lord Denning's enthusiastic dicta in Torquay Hotel Co. v Cousins [1969] 2 Ch. 106 and Acrow Ltd v Rex Chainbelt Inc. [1971] 2 All ER 1175. For uncritical acceptance of the existence of this tort in New Zealand, see Emms v Brad Lovett Ltd [1973] 1 N.Z.L.R. 282, per Perry J. For comment see Mathieson, \textit{supra}, note 30, at 226.

\textsuperscript{35} \textit{Supra}, note 31.

\textsuperscript{36} See generally Rookes v Barnard [1964] A.C. 1129; Stratford v Lindley, \textit{supra}, note 34; Morgan v Fry [1968] 2 Q.B. 710, particularly Lord Denning M.R.

\textsuperscript{37} See s.123, quoted \textit{infra}, VIII. THE LEGALITY OF INDUSTRIAL ACTION IN NEW ZEALAND.
This includes even strikes in support of award demands which are no longer expressly prohibited by the legislation (provided the dispute is not in conciliation, in which event section 81 is operative\textsuperscript{38}). Observe the much-publicised case of \textit{Harder v New Zealand Tramways and Public Passenger Transport Authorities Employees' I.U.W.}\textsuperscript{39} which culminated in contempt proceedings against the defendant Union and its officers for defying the Court's interim order restraining the Union from continuing its campaign of rolling strikes for an indefinite period.\textsuperscript{40} The feature point is that these strikes were at least capable of being lawful because they related to a dispute of interest and because both sides had withdrawn from conciliation. Yet it was held that the Tramways Union had failed to give notice of its intention to strike on the days in question. Public transport is an essential industry under Schedule I of the Industrial Relations Act 1973 and in such industries at least fourteen days' written notice of strike action must be given.\textsuperscript{41} Indeed, although Chilwell J. had already found for the plaintiff on an alternative ground his Honour could not resist adding that the statutory notice requirement was for the protection

\textsuperscript{38} Discussed \textit{supra}, \textit{V. INDUSTRIAL CONCILIATION AND ARBITRATION}.


\textsuperscript{40} Pursuant to the plaintiff's application for the writs of sequestration (against the Union funds) and attachment (against the Union's national and Auckland secretaries), Chilwell J. found the Union and its officers to be in contempt for proceeding with their avowed policy of striking on Thursdays and Fridays of successive weeks. However counsel for each side managed to defuse the situation by striking a compromise which the Court accepted: that the applicant withdraw his motion for leave to issue a writ of attachment in return for which the Union pay a fine of $100 for contempt in lieu of the writ of sequestration. See also the Kawau Island Ferries case, \textit{supra}, note 31, which culminated in the short-term imprisonment of a union official for openly defying the Court's interim injunction.

\textsuperscript{41} Industrial Relations Act 1973, s. 125.
of the public as a whole, but that failure or refusal to comply on the part of the Union amounted to the tort of breach of statutory duty for purposes of conferring "standing" to complain and for the raising of "a serious question to be tried". The anxiety felt at the Federation of Labour's annual conference just days following the grant of this interim injunction was not surprising: if failure to comply with the notice requirement in this instance amounted to a sufficient denial of private right to warrant the Court's relief (it is to be noted that the plaintiff was an ordinary member of the public who incurred no "special loss" other than a few dollars each week by reason of having to take taxis instead of buses), what guarantee could there be that any strike in the course of an interest-dispute inconveniencing the public would not also invite the High Court's intervention?

Typically in these actions, the court's function is not to embark on an examination of the merits of the plaintiff's case. The immediate objective of the employer suffering a stoppage that may paralyse his operations is to seek an injunction at the interlocutory stage. The interim remedy granted preserving the status quo, what incentive will the employer have to commit the matter to a full trial? Not only will the strike be a think of the past, but also damages that can be said to flow directly from the union action are notoriously difficult to quantify. Notwithstanding

42 See American Cynamid v Ethicon Ltd [1975] A.C. 396 (the first case to which Chilwell J. turned in his decision) redefining the standard to which the applicant in interim proceedings is put: Cf, e.g., Stratford v Lindley, supra, note 34, persisting with the (then) traditional standard of a "prima facie case" in order to warrant the court's order preserving the status quo. For comment, see Reid, supra, note 30.
Lord Denning's estimation in Fellowes v Fisher, that "in 99 cases out of 100" the interlocutory proceeding is "the end of the matter"43 (citing a lengthy list of English authorities involving trade unions - "All were decided on applications for interlocutory injunctions: and never went to trial"44), the writer knows of not one case out of 100 in New Zealand where the employer's action has progressed in accord with the theory of the interlocutory proceeding to full trial.45

In conclusion, whilst any discussion of the substantive rules obtaining to interlocutory relief would merit a separate examination not warranted here46 it is common ground that the "serious question to be tried" requirement and the "balance of convenience" test and the damages question

43 [1975] 2 All ER 829, at 836.


45 But cf., Nauru Local Government Council v New Zealand Seamen's I.U.W. and Others, High Court, Wellington A583/73, 27 July 1982 (unreported) in which Ongley J. held that the plaintiff was entitled to $58,568 special damages and $5,000 general damages (plus interest at 11% per annum from the date of the cause of action in 1973) against the Union for wrongfully depriving the plaintiff of the benefits of the three trips for which the plaintiff's ship was scheduled for June-August 1973. This is the only decision to the writer's knowledge in which a union in New Zealand has been held liable in damages as a result of industrial action. However, not only was this particular plaintiff unlikely to experience the industrial consequences a New Zealand employer could expect in such circumstances but also the action did not entail prior interlocutory proceedings.

46 Reid's casenote on Harder's case contains an adequate discussion, supra, note 30. See also Mathieson, supra, note 30; and also the two-part article by S.D. Anderman and P.L. Davies, Injunction Procedure in Labour Disputes (1973-74) 2 Indust. L.J. 213, 3 Indust. L.J. 30.
each leans heavily in favour of the employer in interim proceedings. This prompts even the New Zealand observer therefore, who is well familiar with the ordinary civil action in industrial matters, to question why there are nevertheless comparatively few 'labour injunction' cases in New Zealand. If the above shows that the explanation lies not in the law or in procedural difficulties, then perhaps it lies in this: "It must be accounted for by the fact that many employers remember that they will have to live with the unions when the present troubles have subsided, and by the fact that enforcement of defied injunctions involves attachment and imprisonment, and tends to create martyrs".47

Finally, although theoretically the registered union is in exactly the same position as the employer for purposes of instituting civil proceedings there is not one reported instance of a union in New Zealand ever having entered upon this alternative to strike action.

47 Mathieson, ibid, at 227.
VIII. THE LEGALITY OF INDUSTRIAL ACTION IN NEW ZEALAND

"What the [Industrial Conciliation and Arbitration] Act was primarily passed to do was to put an end to the larger and more dangerous class of strikes and lock-outs. The second object of the Act's framer was to set up tribunals to regulate the conditions of labour".

Per William Pember Reeves, State Experiments in Australia and New Zealand, Vol. II, at 135; Te Rossignol and Stewart, State Socialism in New Zealand, at 218.

A. GENERAL

Despite Pember Reeves' humanitarian sentiment and avowed intent to improve the status of New Zealand labour, his first objective was to put an end to the industrial conflagration that had gripped New Zealand during the middle months of 1890. This was the year of the great Maritime Strike. "The Maritime Strike of 1890", wrote Reeves, "dissipated many bright visions of peaceful cooperation between Labour and middle-class altruism".\(^1\) As one

---

1 State Experiments in Australia and New Zealand (1902) Vol. I, at 75. See further H. Roth, Trade Unions in New Zealand (1973), Ch. I.
historian recalls, this:

"...was the first nationwide industrial dispute which extended over several occupations. Its length, the number of participants, and its impact on the country's economy set it apart from all previous labour struggles and caused it to be classed with those other major landmarks in New Zealand industrial history..."²

Its relative short-term effect was this:

"A seventy-seven days' struggle ended in complete defeat, and New Zealand unionism suffered a blow from which it took many years to recover. Trade unionists were forced to forgo their claim to a share in the control of industry, and employers' authority was not again seriously challenged in New Zealand for almost a quarter of a century".³

But vastly more enduring was the impetus it gave for the conception and passage of the first Industrial Conciliation and Arbitration Act of 1894. Upon the defeat of the strike Reeves was confident that the union leaders were in, what he termed, "a chastened and pacific frame of mind" sufficient to ensure a receptive response to his novel experiment.⁴ Events soon proved him right. Not for a further twelve years was a single New Zealand union to resort to that "old and barbarous system of strikes": by the turn of the century New Zealand had truly become "the country without strikes".⁵ The simple quid pro quo underlying the first statute established New Zealand's legislative aversion to strike action: Encapsulated by the preamble (inter alia)

---

² Roth, ibid, at 14.
³ Ibid, at 16.
⁴ W.P. Reeves, The Long White Cloud (1950, 4th ed.), at 280. See also Roth, ibid, at 20.
⁵ Roth, ibid, at 21, 25 and 26.
"...to encourage the settlement of industrial disputes by conciliation and arbitration" the whole philosophy of the legislation as it then stood was that registration under the Act as an industrial union was voluntary, but once a union did register it was bound by the arbitration system. This meant that in return for the real and considerable advantages the system offered, the registered union gave up the right to invoke direct industrial action. Strikes therefore were made illegal.

So too were lockouts. As the chapter headnote shows, Reeves himself did not distinguish between the two forms of industrial action in depirating the type of confrontation New Zealand had recently experienced. Yet the fact remains that not only was the legal sanction devised in response to a strike - the Maritime Strike of 1890 - but the whole thrust of the legislation was to encourage the formation of a union movement that would look to the state rather than the strike weapon to promote and further the worker's interests. As N.S. Woods in his excellent account of the early years of Industrial Conciliation and Arbitration in New Zealand observes, "Mr. Reeves...provided in his measure that, although an employer might be the unit on one side, only a union should be the recognised unit on the other".

6 Industrial Conciliation and Arbitration Act 1894, Preamble.
8 N.S. Woods, Industrial Conciliation and Arbitration in New Zealand (1963), at 43-44.
"Disputes between individual men and their masters, or between employers and bodies of men not legally associated, were excluded because of the practical need for some definite organisation on which to fasten the machinery of the Court. Hence 'to encourage the formation of industrial unions and associations' was a necessary objective if the Act was to achieve adequate scope".  

Woods then footnotes the New Zealand Parliamentary Debates for Reeves' "main statement" on this point, "...being that unorganised workers seldom cause disputes of serious magnitude".

It is instructive that in discussing the statutory offences penalising direct industrial action introduced by way of amendment in 1905, le Rossignol and Stewart comment: "[u]nder this law a large number of strikers have been punished in the past three years". Significantly no reference is contained to employers, even though the 1905 offences applied equally to both strikes and lockouts. Indeed, subsequent events show that these

---

9 Ibid, at 44. The full legislative Preamble of the Industrial Conciliation and Arbitration Act 1894 read: "An Act to encourage the formation of industrial unions and associations and to facilitate the settlement of industrial disputes by conciliation and arbitration". Observe also in this regard the reflections of le Rossignol and Stewart, State Socialism in New Zealand, at 225: "As intended by its author, the Act [of 1894] has greatly encouraged the formation of industrial unions and associations. Only unions or associations could be registered under the Act; hence workers desiring to enjoy the benefits of conciliation and arbitration were obliged to form unions, and these soon were federated into associations".


11 Ibid.

12 State Socialism in New Zealand, at 224.

13 Imposing a maximum penalty of one hundred pounds on unions and employers in the event of strikes and lockouts respectively, and a maximum penalty of ten pounds on an individual worker who was a party to a strike.
lockout provisions, which have been systematically re-enacted in the successive statutes, have never been invoked against employers. These exist simply to balance the equation and to give the appearance of legislative equality as between the industrial parties. The exception proving the rule is that only once recently has a union ever successfully managed to persuade the Arbitration Court that an employer refusal to provide work to his employees constitutes a lockout within the meaning of the Act.\textsuperscript{14} Such refusals tend to arise in New Zealand at the end of a strike when the workers once again present themselves for work and are denied access to the workplace. In this situation the Arbitration Court has not hesitated to find the employer merely to be exercising his right "...to obtain assurances from the men concerned that their expressions of willingness to return to work are genuine and that they are prepared to honour their contracts".\textsuperscript{15} This factual inference - of lack of genuine willingness to return - has invariably sufficed to notionally extend the continuance of the strike, and thus relieve the Court of the question of a lockout,\textsuperscript{16} or to negative the most constraining element of the definition, that the employer act "with a view to compelling any workers or to aid another employer in compelling any workers, to accept terms

\begin{itemize}
  \item \textsuperscript{15} New Zealand Engineering Union and Shortland Freezing Co. Ltd [1973] 1 N.Z.L.R. 326. See Hughes \textit{ibid}, at 182 \textit{et seq.} (Arb. Ct.), per Blair J.
  \item \textsuperscript{16} Cf., Blair J., \textit{ibid}, at 333: "...a party to a contract who has himself repudiated such contract cannot claim under [it] for an injury resulting from the repudiation".
\end{itemize}
of employment or comply with any demands made by him. Not even a complete closure of the employer's plant will amount to a "lockout" if the workers are still 'on strike' or if that motive is ostensibly absent. Section 124 defines the term thus:

"124. Definition of lockout - (1) In this Act the term 'lockout' means the act of an employer -
(a) In closing his place of business, or suspending or discontinuing his business or any branch thereof; or
(b) In discontinuing the employment of any workers, whether wholly or partially; or
(c) In breaking his contracts of service; or
(d) In refusing or failing to engage workers for any work for which he usually employs workers -
with a view to compelling any workers, or to aid another employer in compelling any workers, to accept terms of employment or comply with any demands made by him.
(2) In this Act the expression 'to lockout' means to become a party to a lockout".

Contrast the present definition of the term "strike" introduced in 1976.

This omits any comparable reference to motive:

"123. Definition of strike - (1) In this Act the term 'strike' means the act of any number of workers who are or have been in the employment of the same employer or of different employers -
(a) In discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or
(b) In breaking their contracts of service; or
(c) In refusing or failing after such discontinuance to resume or return to their employment; or
(d) In refusing or failing to accept engagement for any work in which they are usually employed; or
(e) In reducing their normal output or their normal rate of work -
the said act being due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any workers; but does not include a stopwork meeting authorised by an employer.
(2) In this Act the expression 'to strike' means to become a party to a strike".

17 Industrial Relations Act 1973, s. 124.
18 Industrial Relations Amendment Act 1976, s. 2.
However, even under the earlier definition which required proof of intent *inter alia* "[t]o compel or induce any...employer to agree to terms of employment or comply with any demands...",\(^{19}\) strikes within the meaning of the statutory definition were commonplace. Whereas employer refusals to provide work may be justified for a multitude of economic, market, or indeed legal reasons,\(^{20}\) a withdrawal of labour bears but one construction: to induce the employer to agree to terms of employment or otherwise comply with worker demands. Despite these earlier similarities of language therefore between the definitions of "strike" and "lockout", the legislative prohibition has never pretended as a matter of fact to operate equally as between the parties.

It remains to observe the many types of worker action that satisfy the definition of "strike". Since the tests pertaining to paragraphs (a) to (e) of the definition are entirely objective, it matters not what the action in question is called: a "work-to-rule",\(^{21}\) an "overtime ban",\(^{22}\) a "black-ban",\(^{23}\) a "go-slow"\(^{24}\) and even a "stopwork meeting"\(^{25}\) not authorised by the employer.

---

19 See the former s.123(l)(e).
20 See the dictum of Blair J. in the Shortland case, *supra*, text, corresponding to note 15; and also Blair J.'s dictum, *supra*, note 16.
24 *Te Miha v Dunlop (N.Z.) Ltd*, unreported, Industrial Court, Christchurch, 12 December 1975, I.C. 79/75.
can all constitute strikes for purposes of incurring the Act's penalties. Nor is it material that the action complained of is generally accepted by the labour relations community, or indeed that it is not independently unlawful under the Act or at common law. In particular, it has been held that the action does not have to be a breach of award to constitute a "strike," nor does it have to be in breach of the workers' individual contracts of service (albeit a workers' combination being so will, without more, constitute a strike within the meaning of paragraph (b) of subsection 1).

These features of the definition are amply illustrated by two decisions of the Arbitration Court, one in 1976, the other in 1981. In Te Miha v Dunlop (N.Z.) Ltd, the Arbitration Court had to consider whether the dismissals of a number of employees who were parties to a "go-slow" were justified. The Court accepted that these employees only reduced their output to the point at which they received a basic award rate, but no incentive bonus. The employees contended that they were contracted - and therefore legally bound - to produce a basic output in accordance with the award rate; but that incentive payments were a matter of choice for the individual worker who might or might not feel like exerting himself. Accordingly they argued that as their refusal to perform the additional output was neither a breach of award nor a breach of contract, their

26 Re Gisborne Slaughtermen (1907) 8 Bk of Awards 146.


28 Supra, note 24.
dismissals were unlawful. Judge Jamieson rejected the argument on two grounds however, the first of which was that the workers' low level of output constituted a strike under section 123(1)(a). This speaks of "...the act of any number of workers...(a) In discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it..."

The second case is *Northern (except Gisborne) Road Transport and Motor and Horse Drivers' I.U.W. v Mobil Oil (N.Z.) Ltd.*[29] This was an action instituted by the Drivers' Union to recover arrears of wages which it alleged were owing to a number of its members. Following the dismissal of a member of the Storemen and Packers' Union at the respondent company's Auckland depot, the Storemen and Packers' Union declared the company's products "black" and thereupon the drivers refused to handle them. However, notwithstanding its finding that the drivers may have had a moral obligation to observe the ban the Arbitration Court did not hesitate dismissing the action. Such a ban could have no significance in law, the Court explained. The drivers, it was held, in refusing to carry out lawful and reasonable orders, were on strike within the meaning of section 123 and were not entitled to wages. The fact that the drivers were not prepared to perform that one facet of their employment to which the ban applied rendered them in breach of their contractual obligations; in view of (*inter alia*) paragraph (b) of section 123(1) the Union's submission that they were ready and willing to carry out their contracts in every other respect and to comply with all "reasonable" orders was no answer to the company's allegation that they were parties to an unlawful strike.

---

[29] *Supra*, note 23.
Finally, although proof of a motive directed against the employer is no longer required the element of "combination, agreement, common understanding or concerted action" is still a basic requisite of a "strike" as defined. The presence of this element can be decisive; that workers would be quite entitled to do individually what they are doing collectively is no defence. In *Lightfoot v Auckland Boilermakers' I.U.W.* the Union pointed out that the workers were not obliged to work overtime, and could properly decline to do so under their award. Nonetheless, the Court held that as all of the workers were declining to do so in concert, their collective action constituted a strike.

B. THE PRE-1973 POSITION

Only by way of a curious oversight between the years 1898-1905 were strikes and lockouts not punishable as statutory offences during the Act's early life. Under the legislation drafted by Pember Reeves, the Arbitration Court could declare a strike or a lockout to be a breach of award and punishable by way of a fine. However, an amendment to the Act in 1898 altered this. Although a strike or lockout might be a dispute, it no longer constituted a breach of award *per se* for which penalties could be imposed. Section 15 of the Industrial Conciliation and Arbitration Act 1898, s.3, requiring the Arbitration Court for all purposes to stipulate in the award itself what shall constitute breach of it and the maximum penalty it shall incur, being then a sum not exceeding in aggregate five hundred pounds.

30 Section 123(1).
31 (1920) 21 Bk of Awards 1056.
32 See le Rossignol and Stewart, supra, note 9, at 223-4.
33 See the Industrial Conciliation and Arbitration Amendment Act 1898, s.3, requiring the Arbitration Court for all purposes to stipulate in the award itself what shall constitute breach of it and the maximum penalty it shall incur, being then a sum not exceeding in aggregate five hundred pounds.
Amendment Act 1905 remedied this by declaring every strike and lockout to be an offence to be proceeded against in the same manner as if the union, association, employer or worker (whichever the case) was guilty of a breach of award. The section further provided that the maximum penalty for any such offence was not to exceed a fine of one hundred pounds in the case of a union, association or employer, or ten pounds in the case of an individual worker.

This blanket illegality introduced in 1905 was to remain a dominant feature of the successive Industrial Conciliation and Arbitration Acts. For this reason Speight J.'s finding in Pete's Towing Services Ltd v Northern Industrial Union of Workers\(^{34}\) is curious - "...open to grave doubts" to quote one commentator,\(^{35}\) "...more the result of good intention than close legal reasoning" to quote another.\(^{36}\) Under the Industrial Conciliation and Arbitration Act 1954 (the last of the Acts to be so entitled prior to the Industrial Relations Act 1973), his Honour concluded that a strike as such was not illegal:

"As I understand it, with particular reference to Part X of the Industrial Conciliation and Arbitration Act 1954, a strike as such is not illegal and indeed there are lawful methods of striking. A fortiori it may be lawful to threaten a strike, depending on the type of action contemplated...For these reasons it has not been proved that the defendant was employing illegal means..."\(^{37}\)

---

35 I.T. Smith, supra, note 7, at 56.
37 Ibid, at 44.
This finding may well have been crucial to Speight J.'s conception of "industrial justice" in this instance (the finding that the Union had employed "unlawful means" would almost inevitably have sustained the intimidation action and negatived the defence of justification for the torts of conspiracy and inducement to breach contract\textsuperscript{38}) but it required ignoring those provisions which had been with the legislation since 1905 expressly outlawing strikes and lockouts. Consider, for example, these sections of the 1954 Act. Section 192(1) imposed a maximum penalty of fifty pounds on every worker who was a party to a strike when covered by an award or an industrial agreement (subsection 2 specified with the necessary modifications the same with respect to lockouts albeit with an increased maximum penalty of five hundred pounds). Section 193(1) imposed on workers, officers of unions and unions varying penalties for inciting, instigating or aiding and abetting any person to become a party to "an unlawful strike". Indeed subsection 4 of section 193 was explicit for this purpose.

"(4) In this section the term 'unlawful strike' means a strike of any workers who are bound at the commencement of the strike by an award or industrial agreement affecting the industry in which the strike arises."

Subsection 3 further provided that where a majority of the union's members were involved in a strike, that union was deemed to have instigated the strike. Section 195(1) also deemed the union to have instigated the strike for purposes of section 193(1) where the union failed to hold a strike ballot in accordance with the strike-ballot rule deemed to be included

\textsuperscript{38} See e.g., Smith's discussion, \textit{supra}, note 7.
in every union's rule book under section 191. Section 195(2) placed additional penalties on members and officers for failure or refusal to conduct the ballot or, in the event of a ballot, for striking despite lack of majority support of the members. For enforcement of these provisions, section 194 provided that penalties shall be recoverable at the suit of an Inspector of Awards in the same manner as a penalty for an ordinary breach of award.

These sections, it would seem, were conclusive. However, in complete disregard of their existence Speight J. seized upon the common law concept of strike notice, which in 1970 had only recently featured prominently in Morgan v Fry, and distinguished the earlier New Zealand authorities on the ground that in those cases the threats to strike were illegal only by reason of the insufficiency of notice to the employers. The fallacy of this rationalisation is that the extensive anti-strike provisions of the Industrial Conciliation and Arbitration Act 1954 left no room for the adoption of the common law concept of strike notice: what statute expressly prohibits the common law cannot permit. Further implicit in Speight J.'s preoccupation with this common law concept was that compliance with section 195(1), imposing the strike-ballot requirement, was the one statutory prerequisite of a legal strike. However it is respectfully submitted that section 195(1) was of a different genus. Viewed aside its companion provisions in Part X, non-conformance with this section could only add to


already unlawful action a further ground of illegality; it could not, simply, by reason of a union's compliance, have the reverse effect of legalising strikes. As no more than an acknowledgement that strikes do occur regardless of legalities, section 195(1) merely sought to encourage the use of strike ballots once a union contemplated that course of action.

Consequently, it is common ground despite Speight J.'s finding that all forms of industrial action falling within the definition of the term "strike" under the Industrial Conciliation and Arbitration Acts were illegal per se exposing all those involved liable to the statutory penalties prescribed.

C. THE 1973 RECONSTRUCTION

The Government Memorandum on the original Industrial Relations Bill stated: "A major departure from the present legislation is that the Bill recognises a right to strike at the time of renegotiation of a collective instrument...". 41

The division of the legislation into disputes of interest and disputes of right was the avenue by which the 1973 Act sought to effect this "major departure". 42

---

41 Para 23, dated October 1972.

42 The division was initially introduced by way of amendment to the Industrial Conciliation and Arbitration Act 1954; see the Industrial Conciliation and Arbitration Amendment Act 1970. However, not until the 1973 Act did the division into the two types of "dispute" affect the legality of strikes in any general way under the legislation.
(a) **Re Disputes of Right**

 Strikes in relation to disputes of right remain illegal as being in violation of the "uninterrupted work clause" automatically included or deemed to be included in every collective agreement or award concluded under the Act.\(^{43}\) Section 115 entitled "Provision for disputes of rights" declares:

"(1) Every award made or collective agreement registered after the commencement of this Act shall contain a clause, in the form set out in section 116 of this Act, for the final and conclusive settlement, without stoppage of work, of all rights, including differences between the persons bound by the award or agreement concerning its interpretation, application, or operation."

Section 116, subsections (1) to (6), specifies the model procedure to be followed for the resolution of rights disputes,\(^{44}\) and subsection 7 declares:

"(7) The essence of this clause being that, pending the settlement of the dispute, the work of the employer shall not on any account be impeded but shall at all times proceed as if no dispute had arisen, it is hereby declared that -

(a) No worker employed by any employer who is a party to the dispute shall discontinue or impede normal work, either totally or partially, because of the dispute;

(b) While the provisions of this clause are being observed, no such employer shall, by reason of the dispute, dismiss any worker directly involved in the dispute".

---

43 Industrial Relations Act 1973, s.116(7), quoted text, infra.

44 Cf., AHI N.Z. Glass Manufacturing Co. Ltd v The North Island Electrical Related Trades I.U.W., unreported, C.A. 35/77, dated 6 September 1977, holding the provisions of s.116 to be narrower in scope than s.115(1), resulting in certain disputes of right within the meaning of s.2 falling outside the jurisdiction of the model disputes committee convened under the s.116 clause. For comment on this decision see W. Hodge, A Dispute of Interest in the Guise of a Dispute of Right [1978] N.Z.J.I.R. 38.
Breach of this provision by a strike as defined (that is whether total or partial\textsuperscript{45}) will mean that the workers concerned are in breach of their award or agreement which will render the strike illegal. Pursuant to section 148 entitled "Penalties for breach of award or collective agreement", this could render the union concerned liable to a fine of $500 and the workers individually liable to a fine of $50. Further, section 124A entitled "Penalty for failure to observe disputes procedure"\textsuperscript{46} expressly stipulates that no person bound by an award or agreement containing the disputes procedure "shall become a party to, or incite, instigate, aid or abet a strike or lockout concerning a matter that is within the disputes procedure". By virtue of subsection 3 a separate breach of award or collective agreement is deemed to have been committed on every day on which the strike or lockout continues.

(b) Re Disputes of Interest

The 1973 reconstruction aimed at implementing the North American precept that whilst parties are morally bound to abide by what they could extract over the bargaining table for the duration of the fixed-term contract, they ought to be free to pursue their demands through industrial action at the time of renegotiation of the terms and conditions which will prevail for the next contract period. Thus the Industrial Relations Act 1973 did not continue the previous legal ban on strikes and lockouts about disputes of interest.

\textsuperscript{45} See s. 123, \textit{supra}.

\textsuperscript{46} Inserted by the Industrial Relations Amendment Act (No. 2) 1976, s.20.
The principal exception is where the strike or lockout relates to a dispute that is in conciliation. As has been noted, such action will be illegal as being in contravention of section 81. The other exception preserving the legal ban in 1973 relates to strikes and lockouts in any of the seventeen essential industries specified in the First Schedule of the Act. These pertain generally to the provision of port pilotage and fire brigade services; the production and supply of processed fuels, electricity and coal; the supply of water, milk and meat for domestic consumption; and the provision of transport services for the carriage of passengers and goods throughout New Zealand. Section 125 prohibits any strike or lockout taking place in any of these specified industries without the workers (or the workers' union on the workers' behalf) or the employer giving within one month of the strike or lockout (as the case may be) not less than fourteen days written notice of intention to invoke the action. Maximum fines of $150 and $1,500 respectively may be imposed on workers and employers who fail or refuse to comply. Additional penalties may be imposed on workers ($150), officers of unions ($700), unions ($1,500), persons acting on behalf of employers ($700) and employers ($1,500) who "incite, instigate, aid or abet" breaches of section 125.

Particularly in light of the potential for the section 68 application to convene conciliation to be used as a ploy to activate section 81 pending the final settlement of the dispute, discussed

47 Discussed supra, V. INDUSTRIAL CONCILIATION AND ARBITRATION, text, corresponding to note 84 et seq.


49 The penalties noted denote maxima.
previously, section 81 alone is a considerable limitation on the "right to strike" proclaimed upon the enactment of the Industrial Relations Act 1973. However, what inroads this statute made on New Zealand's long-standing legislative aversion to strike action, the industrial relations amendments of 1976 have virtually destroyed.

D. THE 1976 AMENDMENTS

These fall into two categories: those instituted directly by amendment to the Industrial Relations Act 1973 and those instituted indirectly by amendment to the Commerce Act 1975.

(a) Industrial Relations Amendment Acts

The Industrial Relations Amendment Act (No. 1) 1976 and the Industrial Relations Amendment Act (No. 2) 1976 can be dealt with briefly since they mostly relate to the definition of the term "strike" and to new or increased penalties for strikes and lockouts already illegal under the principal Act.

The present definition of the term "strike" has been examined. This was introduced by section 2 of the No. 1 Amendment. Its thrust was to enlarge upon the types of collective action that would constitute a "strike", notably by the inclusion of a new paragraph (e) which speaks simply of a reduction in normal output or rate of work, and by the deletion of the need to prove an intent in terms of an inducement to the employer.

---

50 Supra, note 47.
51 Supra, A. GENERAL, text, corresponding to note 18 et seq.
52 Ibid.
The No. 2 Amendment substituted the new section 125 discussed above. This new section attached the fines, already outlined, to failure to fulfil the fourteen days' notice requirement. By a new section 125A inserted by section 21 of this Amendment Act similar provisions are applied to export slaughterhouses: reproducing the same penalties for failure to comply provided in section 125,53 section 125A prohibits a strike or lockout taking place in an export slaughterhouse unless the party (or parties) concerned gives not less than three days' notice in writing of intention to strike or lockout (as the case may be) within fourteen days of invoking the action.

Further new or increased penalties introduced by the No. 2 Amendment concern illegal strikes about rights disputes, which do not concern us.54

(b) Commerce Amendment Act 1976

In view of the extensive limitations this Amendment Act imposed on the residue of the "right to strike" proclaimed in 1973, why was it not effected directly by amendment to the principal industrial statute? Apparently the proposed changes were originally contained in a separate

53 See supra.

54 See particularly s.20, inserting the new s.124A imposing new penalties for failure to comply with the disputes procedure. See also s.27 of the Amendment Act, increasing the amounts recoverable as penalties for ordinary breach of award from $400 to $500; see s.148 of the principal Act.
Industrial Relations Amendment (No.3) Bill but this subsequently became the No. 2 Amendment Act shorn of those provisions which were to become the Commerce Amendment Act 1976. "[B]y a piece of parliamentary legerdemain not noteworthy for its subtlety", reflects one commentator, "the provisions about 'political' strikes and lockouts contrary to the public interest ended up in the Commerce Amendment Act 1976". 55 She explains:

"Professor N.S. Woods had suggested in the course of making submissions on the No. 3 Bill that provisions designed to protect the public interest such as these should cover, not just unions, but all persons and organisations capable of acting against the public interest, and that they should therefore be framed accordingly and taken out of a specifically industrial relations measure. With transparent cynicism the Government simply lifted these provisions, virtually without modification, from the Industrial Relations (No. 3) Bill and put them into a Commerce Amendment Bill relating to monopolies, mergers and takeovers which happened to be before the House". 56

At the time the Federation of Labour did not reveal whether it was persuaded that the provisions of the Commerce Amendment Act 1976 did indeed, as a result of their transposition, apply to "everyone" and not just to unions. However, in view of the two principal offences enacted it is extremely unlikely the Federation was so persuaded: these lend credence to the above commentator's view that the transposition was meaningless in anything other than political terms. 58 It is also significant that

56 Ibid.
57 Viz., Commerce Amendment Act 1976, s.36, inserting in the principal Act (Commerce Act 1975) s.119B entitled "Offence to strike or lockout in respect of non-industrial matter" and s.119C entitled "Failure to resume work where public interest affected".
58 Supra, note 55.
Part IVA inserted in the principal Act by virtue of the 1976 Amendment Act is entitled "Strikes and Lockouts contrary to the Public Interest" and that the general interpretation section expressly declares that expressions used in Part IVA "which are defined in the Industrial Relations Act 1973 have the meanings so defined".

The first of the principal offences is created by section 119B, commonly termed the "political strike" provision. However, pursuant to the above incorporation of the meanings assigned expressions contained in (and borrowed from) the Industrial Relations Act 1973, even the section heading "Offence to strike or lockout in respect of non-industrial matter" reveals that the offence encompasses considerably more than what might strictly be termed "political strikes". Section 119B(1) reads:

"(1) Every person commits an offence who is a party to or incites, instigates, aids, or abets -

(a) A strike or lockout concerning a matter -
   i) Which is not an industrial matter; or
   ii) Which the employers and workers involved in the strike or lockout or their respective unions do not have the power to settle by agreement between them; or

(b) A strike or lockout that is intended to coerce the New Zealand Government (in a capacity other than that of employer) either directly or by inflicting inconvenience upon the community or any section of the community".

59 Section 36.
60 Section 119A of the principal Act.
61 Eg., see Reid, supra, note 55.
62 Section 119A.
63 Cf., the judicial construction of the term "industrial matters" as defined in the Industrial Relations Act 1973, s.2; supra, VI. THE JURISDICTIONAL CONCEPT OF DISPUTE.
Subsection (2) imposes on persons convicted of an offence against subsection (1) maximum penalties of $150 for workers, $700 for union officials, and $1,500 for unions (the latter two penalties apply similarly to representatives of employers and to employers respectively in the event of a lockout). But aside from the considerable potential of these offences to expose (inter alia) unions, their officers and workers to criminal sanctions, section 119B is novel for the dual civil sanction it provides. Subsection (3) stipulates that in addition to any fines imposed upon summary conviction, those in breach of the section shall also be liable at the suit of any person suffering loss or damage as a result of the breach "...or apprehending the suffering of any loss or damage thereby to any or all of the remedies available in civil proceedings in tort, and to the same extent as if the strike or lockout were a tort independently of this section". This is noteworthy notwithstanding Harder's case; for the cause of action justifying the grant of damages and injunctive relief is made available to ordinary members of the public who can point simply to "any loss or damage". The reality is that few strikes, of course, industrial or non-industrial, can ever disclaim such loss or damage.

64 [1977] 2 N.Z.L.R. 162. The applicant, Harder, was at the time a Law student at the University of Auckland - the decision is notable (inter alia) in that he successfully managed establishing standing owing to the extra few dollars spent each week in taxi fares incurred as a result of the Tramway Employees' strike sufficient to warrant the grant of the interim injunction against the Union. For comment, see supra, VII. JUDICIAL CONTROL OF INTEREST DISPUTES, text, corresponding to note 39 et seq.

65 Eg., see the "damage" Harder suffered as a result of the tramway employees' strike, ibid, sufficient to confer standing for purposes of ordinary civil proceedings.
The fact that to date no individual employer or member of the public has taken advantage of these civil remedies is perhaps the more surprising in view of the number of strikes occurring to which the section applies.\(^66\) A strike over the matter contested in the Law Practitioners\(^67\) case, for example, would be a strike over a "non-industrial matter" attracting both the penal and civil sanctions. Despite the judicial construction of "industrial matters",\(^68\) employer decisions to introduce new computer technology impinge in the most direct sense on the employee-employer relationship so as to be, in ordinary parlance, industrial decisions: yet because such decisions have been committed to the province of management, strikes about them attract the section 119B sanctions. The same applies to all strikes in respect of matters deemed "managerial", "social" or "political". Further, even strikes over truely "industrial matters" will incur these sanctions if accompanied by the specified intent to coerce the government. Consider presently in New Zealand a strike over wages. Since these are subject to government controls vetoing wage increases (indeed conciliation proceedings \textit{per se}),\(^69\) to strike in support of an increase must involve a challenge to the wage freeze sufficient to manifest the requisite intent to coerce the government. Consider also the actions of the shop employees' unions in 1977 in expressing their objection

\(^{66}\) See generally, supra, VI. THE JURISDICTIONAL CONCEPT OF "DISPUTE".

\(^{67}\) [1980] A.C.J. 267, discussed \textit{ibid}.

\(^{68}\) \textit{Ibid}.

\(^{69}\) See supra, V. INDUSTRIAL CONCILIATION AND ARBITRATION.
to the Shop Trading Hours Bill which proposed to introduce Saturday trading in New Zealand. Although their concerted action concerned their hours of work, it was clearly directed towards, and thus intended to coerce, the government contrary to section 119B.70

Subsection (1)(a)(ii) also merits attention in assessing the extent to which this 1976 Amendment ridicules the proclaimed freedom to strike in interest disputes. The commentator referred to above who reviewed these amendments in 1977 believed the wording of subsection (1)(a)(ii) to be imprecise and obscure, "...but could without too much license cover much secondary action taken in support of another union's claims against another employer".71 For the obvious reason her caution is understandable: it could be argued that whenever a union imposes a secondary ban on goods, a "dispute" is created with the employer which is capable of being settled by the employer's agreement not to handle the goods until the ban is lifted. However, if this argument were defensible in terms of the legislation, what was Parliament hoping to achieve by inserting subsection (1)(a)(ii)? Other than expressly outlawing secondary strikes, what possible purpose could it serve? Perhaps there would be some merit in the argument were these forms of sympathy action unknown to New Zealand's industrial legislation in 1976. The former definition of the term "strike", however, then requiring proof of an "intent", specified as one of the requisite intents "(g) To assist workers in the employment of any other employer to compel or induce that employer to agree to terms of

70 Noted by Reid, supra, note 55, at 388.
71 Ibid.
employment or comply with any demands made upon him by any workers".\(^72\)

That definition of the term "strike" introduced in 1973 was replaced by the present definition which omits any reference to "intent", the former paragraph (g) intent inclusive. Within a matter of weeks of that change, the Commerce Amendment Act 1976 was enacted \(^73\) making express reference to a "(a) strike or lockout concerning a matter - ... (ii) Which the employers and workers involved in the strike or lockout or their respective unions do not have the power to settle between them". Can there be any real doubt, therefore, that in enacting these works Parliament was referring to a strike or lockout about the "original dispute", of which the secondary boycott was simply the result? It is submitted not. Section 119B(1)(ii) constitutes then an express outlawing of secondary strike action (contemplating also civil law sanctions) amounting to a major inroad on the legal freedom advocated in 1973.

Section 119C creates the second major inroad. Entitled "Failure to resume work where public interest affected", this provision is reminiscent of the cynic's perception of the revered right to protest in the liberal democracy - the right of public protest exists provided what is not asserted is the right of effective protest. In the only reported case involving section 119C the Arbitration Court reiterated the "primary purpose" of this provision, simply:

\(^72\) See the former s.123(1) introduced upon the enactment of the Industrial Relations Act 1973.

\(^73\) Receiving royal assent on 7 December 1976; the Industrial Relations Amendment Act 1976, replacing the former s.123, receiving royal assent on 18 August 1976.
...to stop strikes and lockouts which are against the public interest and this is spelt out clearly in the section itself. The accent is on the public interest, and more particularly on the protection of the economy of New Zealand and the economy of industries affected by a strike or lockout.\textsuperscript{74}

No reference to the question of legalities was appended, nor is there any contained in the section itself. Thus what is anticipated in effect is that unions are free to lawfully strike provided the strike does not 'hurt'. The section stipulates that where the Court is satisfied that a strike (a) substantially affects or is likely to affect the economy of New Zealand,\textsuperscript{75} (particularly its export trade); or (b) seriously affects or is about to affect the economy of a particular industry;\textsuperscript{76} or (c) endangers the life, safety or health of the community,\textsuperscript{77} the Court "...shall order a resumption of full work". Subsection 5 specifies those competent to seek such an order: namely, any Minister of the Crown on the grounds set out in paragraphs (a) or (b), or with reference to any of the three grounds any person (or organisation representing such person) who proves he is directly affected by the strike. Note that in any section 119C application the Court's discretion is confined to the question whether the appropriate ground for the order exists; once satisfied that it does, the Court enjoys no discretion to refuse the remedy. Thus the only material issues are when will

\begin{itemize}
\item \textsuperscript{74} Hori v New Zealand Forest Service [1978] A.C.J. 35 (Arbitration Court)
\item \textsuperscript{75} Section 119C(1)(a).
\item \textsuperscript{76} Section 119C(1)(b).
\item \textsuperscript{77} Section 119C(1)(c).
\end{itemize}
a strike be of the type described, and, in the case of applicants other than Ministers, when will it affect them in the requisite way? Reid aptly comments: "Employers clearly fall within the category of persons directly affected, as do their organisations, and it will be relatively easy for them to prove that the economy of their particular industry is 'seriously' affected as well, in the case of most strikes, since the purpose of strike action commonly is to do just that". It further appears that the burden of proof a Minister must discharge under the paragraph (a) ground may not be particularly onerous in the case of many unions operating in New Zealand's main primary produce-export oriented industries: a strike of any duration by, for example, watersiders, seamen, export slaughterhouse workers, timber and pulp and paper workers or even general drivers and transport workers might readily satisfy the ground (a) criterion.

Breach of an order for the resumption of work under this section leads to the same monetary penalties provided for breach of section 119B, being a maximum of $150 for workers and $1,500 for unions and employers. Subsection (8) is worth noting since this deems every union whose members are shown to have breached an order to resume work to have committed an offence against the section, punishable by the fine mentioned, in a wide range of circumstances: for instance, if it is proved that the union advocated, connived or even merely suggested non-compliance, or wilfully failed to inform any

78 Paras. (a), (b) and (c), ibid.
79 Supra, note 55, at 389-90.
80 Section 119C(8)(a)(i).
worker that failure to comply would constitute an offence. Officers and executive members of the union are also automatically deemed to commit offences attracting fines of up to $700 where their members are in breach of an order and it is proved that as officers or members of the union's executive they were party to any of the acts or omissions mentioned.

As with the relative paucity of civil law suits against unions, it is equally notable that section 119C has rarely been invoked. Moreover on those occasions when it has been invoked no application has been granted. An application in 1978 by the Freezing Companies Association at the height of the national meatworkers' strike was withdrawn when the Arbitration Court could not give an early fixture; an application at the same time by the private organisation "Strike Free" was withdrawn after the Court raised questions as to locus standi; an application lodged in December 1982 by the Minister of Labour to end the stoppages of the combined unions at the Marsden Point Oil Refinery was withdrawn following the unions' undertaking to negotiate; and in the only reported case involving section 119C

81 Section 119C(8)(a)(ii).
82 Section 119C(8)(b)
83 Noted supra, VII. JUDICIAL CONTROL OF INTEREST DISPUTES, text, corresponding to note 46 et seq; and also the present chapter, supra, with regard to the s.119B "statutory tort".
85 Quaere, whether this application was lodged under the new ss.125B,125C 125D and 125E introduced by the Industrial Relations Amendment Act 1981 dealing specifically with strikes in essential industries (listed in the First Schedule of the Act, as replaced by s.16 of the 1981 Amendment Act) contrary to the "public interest". Media reports at the time of the Minister's application, however, cited the Commerce Amendment Act 1976 as the instrument under which the application was lodged.
the requirements of the section were not satisfied. No doubt it was partly because of this inauspicious record that the Government in 1981 elected to strengthen further the procedures governing strikes contrary to the "public interest".

E. THE 1981 AMENDMENTS

Section 9 of the Industrial Relations Amendment Act 1981 inserted into the principal Act sections 125B, 125C, 125D and 125E. These deal specifically with strikes and lockouts in essential industries that substantially affect or threaten to so affect the public interest. In its background paper to the amending legislation, the Government claimed that "despite the Government's concern for the public interest there is no special procedure available in the Act which may be initiated by the Minister [of Labour] to assist in resolving such disputes". This, of course, overlooks the extensive power available to the Minister to obtain a resumption of work order from the Arbitration Court under section 119C of the Commerce Act 1975, a power available in respect of strikes and lockouts in any industry that affect or threaten to affect the economy of New Zealand or which endanger life, safety or health of members of the community. It also overlooks the power conferred on the Minister to

86 Hori v New Zealand Forest Service, supra, note 74.
88 Industrial Relations Act: Proposed Legislative Amendments, at 1.
89 Supra.
call a compulsory conference under section 120 of the principal Act. Unfettered by any requirement other than that the Minister "...has reasonable grounds for believing that a strike or lockout exists or is threatened", section 120 empowers him to call a compulsory conference of the parties in an endeavour to secure a settlement of the dispute, and, if the Minister so chooses, to actually confer on the chairman power to make a decision settling the dispute. However one writer has pointed to the absence of any penalty attaching to a party's failure to attend a section 120 conference and, pointing also to the marked lack of success of the section 119C remedy, has suggested that the 1981 provisions were drafted to overcome the problems inherent in the existing remedies, but which leave the existing remedies themselves unchanged. This may indeed explain the reason behind the 1981 amendments, but whether in truth they significantly add to the existing powers and remedies is, in the writer's opinion, debateable.

In the only case to have arisen under the new provisions since their introduction, the Arbitration Court commented:

"Sections 125B, 125C, 125D and 125E constitute a new additional concept of the functions of the Arbitration Court by imposing upon it a jurisdiction hitherto unprecedented save by the Commerce Act 1980 [sic] which has yet to be the subject of any determination by this court [sic]. We are now compelled to hear and determine a dispute of national importance at the direction of the Minister of Labour. This is a far cry from the court's normal arbitral function where it is required to resolve an industrial dispute on the application of one or more of the parties concerned".91

90 See Hughes, supra, note 87 at 188.

91 New Zealand Government Railways Department v New Zealand Merchant Service Guild I.U.W., unreported, Wellington, 2 April 1982, A.C. 47/82, per Judge Castle. Not only is the reference to the Commerce Act 1975 incorrect, but also the comment is in oversight of Hori v New Zealand Forest Service [1978] A.C.J.35 in which the Arbitration Court declined to grant a s.119C application for a return to work order.
Considered cumulatively, these new sections provide that where the Minister of Labour is of the opinion that a strike or lockout exists or is threatened in an essential industry or an export slaughterhouse, and that it substantially affects or will substantially affect the public interest, the Minister may request a conciliator or mediator or some other appointee to inquire into the dispute and endeavour to settle it. Upon discharging that function such person or appointee must report his findings to the Minister. If the dispute has not been settled when the Minister receives the report, the Minister may refer the matter to the Arbitration Court for settlement. The Court must set a date for hearing as a matter of urgency. If, after inquiring into the dispute, the Court is satisfied that the strike or lockout substantially affects or will substantially affect the public interest, then it must make a determination settling the dispute. The Court's determination is final and binding. If there is no return to work the Court shall, on the application of the Minister (or of any of the parties to the dispute) grant a return to work order, "...unless the Court determines that there is good reason not to make an order". Substantial monetary penalties are provided for failure to comply with any such order. Liability

92 Section 125B(1)(2)(a).
93 Section 125B(2)(b).
94 Section 125C(1).
95 Section 125C(2).
96 Section 125C(4).
97 Section 125C(5).
98 Section 125C(6).
99 Section 125D.
attaches to individual workers, unions and officers of unions and members of their executive committees under the same wide range of circumstances as provided in section 119C of the Commerce Act 1975 in respect of a failure to comply with a return to work order granted under that section. The extent of liability is increased, however, to a maximum fine of $300 in the case of a worker (with a possible further penalty of $10 for every day the order is breached), $1,500 in the case of a union officer or member of the executive committee (with a possible further penalty of $40 for every day the order is breached), and $3,000 in the case of a union (with a possible further penalty of $100 for every day the order is breached).

It may be noted that the new procedures are distinguished from the section 119C procedure in that the former, in contrast to the defined categories of public interest specified under section 119C, provide no assistance as to what the recent legislation contemplates by the phrase "public interest". Perhaps it was because of this that the Arbitration Court in the only decision to date chose to simply brush over this aspect of the legislation by first noting that the operation of the Cook Strait ferries (the subject of the strike threat here) was an essential industry within the First Schedule of the Industrial Relations Act 1973 and then, as if it were res ipsa loquitur, by observing "A strike which

100 See supra, text, corresponding to notes 79-82.
101 See the Commerce Act 1975, s.119C(1)(a)-(c), listed supra, text, corresponding to notes 75-77.
102 Supra, note 91.
disrupts the ferry services must substantially affect the public interest". The point is that if any discussion of this requirement would have been merely superfluous here, will not every strike or threat of a strike in an essential industry simpliciter qualify for the purpose of inviting the Minister's intervention?

103 Ibid.
IX. CONCLUSION

There would be little to be gained from advocating change to British Columbia's collective bargaining regime in view of the Code's disclaimer of rigid rules to be imposed on parties from outside the bargaining relationship. By insisting on no more than minimum standards of bargaining conduct, the Code proclaims the parties' right to self-determination in their bargaining relationship and their sovereignty over contract settlements. Subject to the limited section 70 exception providing for first-contract arbitration, the Code's assumption is that the mature bargaining relationship cannot tolerate normative intervention in interest disputes. It is significant in this respect that New Zealand's leading decision on the jurisdictional requirement of "dispute" under the Industrial Conciliation and Arbitration legislation was itself immediately reversed by strike action: what the Arbitration Court's ruling denied the Bank Officers' Union, strike action secured. The pretense of industrial regulation by judicial decree is even more pronounced following the Arbitration Court's ruling on the technology issue.

1 See supra, IV. THE DUTY TO BARGAIN COLLECTIVELY IN BRITISH COLUMBIA: THE AMERICAN JURISPRUDENCE REJECTED.

2 Ibid, Part D. SECTION 70 "FIRST CONTRACT" ARBITRATION: THE EXCEPTION PROVING THE RULE.

3 New Zealand Bank Officers' I.U.W. v ANZ Banking Group Ltd [1979] Ind. Ct. 219, examined VI. THE JURISDICTIONAL CONCEPT OF "DISPUTE".

any other single issue of the 20th century, will throw in doubt the
efficacy of New Zealand's Industrial Conciliation and Arbitration system.
Weekly, if not daily, media and other reports filter through of the
conclusion of informal house agreements securing the type of compromise
on the new technologies one would expect of a mature industrial relations
system. Just as regularly, notice is being served that unions will strike
in support of a realistic compromise on the issue no matter the provisions
of the Commerce Amendment Act 1976. Addressing these questions elsewhere,
the writer has observed:

"The trend that can be expected to continue [in New
Zealand] is for stronger unions to move away from
institutionalised collective bargaining on technology,
preferring instead informal 'single-issue' bargaining.
The notable examples are the recent informal agreements
in the freezing industry. As these prohibit the
introduction of new technology unless agreement has
been reached in joint consultation or, in the event of
impasse, supported by the decision of a disputes committee,
their terms are wider in scope than the original claim in
the Law Practitioners' case".6

When it is considered that the Award clause ultimately fixed by the
Court permitted only a right to be advised of an employer decision to
introduce new computer technology and the duty to "consult fully with the
employees affected" ("...once the employer has fulfilled his or her
obligation to consult", 'the matter is at an end'7), the formal

5 See supra, VIII. THE LEGALITY OF INDUSTRIAL ACTION IN NEW ZEALAND.
6 Is Technology a Bargaining Issue? (1981) l Canta L.R. 123 (co-author,
J. Hughes), at 144-45.
7 Ibid, at 135 (quoting from the dissenting opinion of Sir Leonard
Hadley).
Industrial Conciliation and Arbitration system has effectively washed its hands of the entire issue. At least for the Court which rendered its pronouncement in the Law Practitioners' case, it would be a nice thought indeed that this decision really was an end of the matter. However, the alleged consequences of introducing new technology include higher unemployment, redundancies, de-skilling, declining pay differentials, inter-union demarcation disputes and new hazards at work (not to mention loss of productivity through strikes in opposition to specific employer decisions to instal new technology).\(^8\) Hence the "fundamental question" appended to the quotation above,"whether the traditional New Zealand approach to industrial relations, industrial conciliation and arbitration, can cope with the stresses placed upon it by the new technologies":\(^9\) to repeat what is proffered there, "the Law Practitioners' decision does little to suggest that it can".\(^10\)

The more the terms of settlement of disputes can accommodate the parties' respective situations and actual needs, the more sensible the bargaining relationship. This is why the Labour Relations Board of British Columbia has insisted that it will not assess bargaining proposals qua proposals or otherwise evaluate the substantive positions of bargaining parties in order to determine which is the more reasonable for purposes of disposing of unfair labour practice allegations. It is also, of course, the reason for the trend in New Zealand away from institutionalised collective

\(^8\) See generally, *ibid*, but particularly at 145.

\(^9\) *Ibid*.

\(^10\) *Ibid*.
bargaining on technology.\textsuperscript{11} When matters of the moment of the new technologies arise in the course of employment relations, the reality is foremost about bargaining strength, not fair play in accordance with the law. The British Columbia labour statute endorses this through its encouragement of the economic sanction as the means of breaking the bargaining impasse. The New Zealand statute is to exactly the opposite effect: Chapter VIII might well have been entitled "The Illegality of Industrial Action in New Zealand" in view of what the post-1973 amendments subtracted from the residue of the freedom to strike or lockout under the 1973 statute.

With these stark contrasts in mind one questions the ability of Industrial Conciliation and Arbitration to endure. Yet, whether born of apathy, inertia or a positive belief in the system, the New Zealand union movement by and large seems content to abide by the strictures of the legislation that began its life as a late-nineteenth century experiment. If change is to occur, this is the side from whence the impetus must come. Governments desiring to retain control of the private sector wage-fixing system cannot be expected to take the initiative,\textsuperscript{12} nor can any enthusiasm for reform be expected of employers who declare their support for government controls on wage escalations. Perhaps, in this regard, any zeal labour might have for reform is tempered by knowledge of the reality underlying New Zealand's extensive industrial system - what cannot be secured through the

\textsuperscript{11} See the quotation, text, \textit{supra}, corresponding to note 6.

\textsuperscript{12} See \textit{supra}, V. INDUSTRIAL CONCILIATION AND ARBITRATION, Part D. \textit{THE OMNIPRESENT STATE} for government reliance on the formal Industrial Conciliation and Arbitration procedures and institutions to implement wages-control measures.
formal procedures can just as easily be secured by other means. Yet this does not absolve the Arbitration Court for its myopic obstinancy in declining to make available those procedures to deal with issues as pressing as the one, for example, in the Law Practitioners' case. In contrast, British Columbia is to be congratulated for the courage it showed in allowing parties to assume the very responsibility demanded of them in contract negotiations.
BIBLIOGRAPHY

Books


Broadhead, State Regulation of Labour and Labour Disputes in New Zealand (1898) . . . 171, 172, 187, 258

Carrothers, Collective Bargaining Law in Canada (1965) . . . 73, 80, 81

Challaye, L'Arbitrage Obligatoire en Nouvelle-Zelande (1903). . . 200

Clark, The Labour Movement in Australasia (1907) . . . 201

Dicey, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century (2nd ed., 1914) . . . . 253

Dussault, Le Controle Judiciare de l'Administration au Quebec (1969) . . . . 69

Flanders and Clegg (eds.), The System of Industrial Relations in Great Britain (quoting Kahn-Freund). . . .

Galbraith, The New Industrial State (1967) . . . . 262, 265

Goode, Commercial Law (1982) . . . . 280

Hadden, Company Law and Capitalism (2nd ed., 1977) . . . . 122

Mathieson, Industrial Law in New Zealand (1970) . . . . 184, 191


Reeves, State Experiments in Australia and New Zealand (1902) Vol. II . . . . 187, 259
le Rossignol and Stewart, State Socialism in New Zealand, (undated) 187, 190, 259, 294, 297, 303

Rostow, To Whom and For What Ends is Corporate Management Responsible? in The Corporation in Modern Society (1970) Mason (ed.) 262

Roth, Trade Unions in New Zealand (1973) 187, 189, 239, 294, 295


Schwartz, Koretz, Labour Organisation (Statutory History of the United States) (1970) . . 74, 75

Selznick, Law, Society, and Industrial Justice (1969) . . 257


Shonfield, Modern Capitalism (1974) . . 265, 273, 274

Sinclair, William Pember Reeves (1965) . . . 187

S. and B. Webb, Industrial Democracy (1892) . . . 173


H.D. Woods, Labour Policy in Canada (1973) 73, 75, 76, 77, 78, 79 80, 82, 83, 85, 86, 89, 93, 95

N.S. Woods, Industrial Conciliation and Arbitration in New Zealand (1963) 187, 188, 189, 190, 296, 297

MONOGRAPHS


Catt, A Portrait of the New Zealand Share Investor (1966), Research Paper No. 9, New Zealand Institute of Economic Research . . . 268

Ellis, Industrial Concentration (1976), Research Paper No. 20, New Zealand Institute of Economic Research . . . 266

Fogelberg, Changing Patterns of Share-Ownership in New Zealand's Largest Companies (1978), Department of Business Administration, Victoria University of Wellington . . . 270


Szakats, *Recent Changes in Industrial Law* (1971), Industrial Relations Centre, Victoria University of Wellington, Occasional Papers in Industrial Relations No. 5 172

**ARTICLES**


Haladner, *Notes on the Code - Section 70* (1975) 35 (No. 6) PERSPECTIVE 1 96, 168
Hodge, A Dispute of Interest in the Guise of a Dispute of Right [1978] New Zealand Journal of Industrial Relations 38


Hughes, Redundancy and the Law in New Zealand (1980) 9 New Zealand Universities Law Review 122


Laskin, Certiorari to Labour Boards: The Apparent Futility of the Privative Clause (1952) 30 Canadian Bar Review 986

Lederman, The Independence of the Judiciary (1956) 34 Canadian Bar Review 716

Lyon, Comments (1971) 49 Canadian Bar Review 365

Manson, Technological Change and the Collective Bargaining Process (1973) 12 Western Ontario Law Review 173


Reid, Industrial Relations Amendments in 1976 (1977) 7 New Zealand Universities Law Review 384

. . . . . 288, 290, 291, 292


1, 206, 209, 211, 212, 213, 217

Sigal, The Evolving Duty to Bargain (1963-64) 52 Georgetown Law Journal 379

. . . . . 102


. . . . . 99


. . . 296, 304, 305


. . . . . 62

Wade, Note on Anisminic v East Elloe (1977) 93 Law Quarterly Review 8

. . . . . 16

Wade, Anisminic ad Infinitum (1979) 95 Law Quarterly Review 163

. . . . . 16


. . . . 199, 210

P.C. Weiler, Making a Virtue Out of Necessity (Reflections on Strikes by Essential Public Employees), Keynote Address, 27th Annual Conference, Industrial Relations Centre of McGill University (April, 1979)

. . . . . 90


. . . . . 261


. . . . . 89

H.D. Woods, Labour Relations Law and Policy in Ontario (1958) 1 Canadian Public Administration (No. 2) 1

. . . . . 89


. . . . . 180