

LABOUR LAW IN A NUTSHELL: THE INFLUENCE OF A NATIONAL CASEBOOK

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*1994 marked the 25th anniversary of Canada's first national casebook: *Labour Law, Cases, Materials and Commentary*. The author uses this occasion to reflect on the state of labour law in Canada. Examining the major decisions of courts, labour boards and arbitrators that appear in the case book, he finds a gap between the theory and practice of labour law. He identifies a common style of reasoning and analysis in the cases which is at odds with the understanding of law that is taught in the classroom. Happily, the writer reports that there are parts of the jurisprudence that do reflect the purposes and values which underlie our system of labour relations and provide cause for optimism that the theory and practice of labour law can be made compatible if we choose to make them coincide.*

1994 fut l'année du 25ième anniversaire du premier recueil national de textes au Canada: "Labour Law, Cases, Materials and Commentary". L'auteur profite de cette occasion pour réfléchir sur l'état du droit du travail au Canada. Ayant examiné les principales décisions d'arbitrage, des tribunaux administratifs de droit du travail et des tribunaux de droit commun incluses dans le recueil, il conclut que la théorie et la pratique du droit du travail divergent de façon importante. Il décèle un même style de raisonnement et d'analyse à travers ces décisions, qui ne s'apparente en rien à la vision du droit enseignée en classe. Heureusement, l'écrivain rapporte d'autre part que certains segments de cette jurisprudence reflètent effectivement les valeurs et les objectifs qui sous-tendent notre système de relations du travail, ce qui laisse croire qu'une meilleure alliance de la théorie avec la pratique est possible, dans la mesure où la volonté existerait de promouvoir cette alliance.

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Introduction

1994 marked the 25th anniversary of the publication of the first edition of *Labour Law: Cases, Materials and Commentary* by a group of teachers known as the Labour Law Casebook Group.¹ In preparing the first edition, Arthurs and his colleagues were inspired by another group of labour law teachers in the United States who had developed a set of materials which integrated a lot of historical, philosophical and social science literature around the cases and rules which were the bread and butter of more traditional casebooks.² Even though they were drawn from different faculties and held quite divergent views even about the existence of a coherent body of law of work relations, these scholars believed that their students would profit from a common set of interdisciplinary teaching materials.

Although many students have complained about the length and layout of the materials, on the whole, it has met with an enormously positive reception from students and faculty alike. Even though the material in the casebook has changed significantly over five editions, and the group has doubled in size,³ the book has been used, at one time or another, in every common law school so that all law students are introduced to the subject of labour law through “a common curriculum”. The pioneering efforts of these labour lawyers have set a standard and a precedent for legal academics in other areas of law to develop national casebooks of their own.

The endurance of this leading publication provides an opportunity to reflect on how labour law has been taught in Canada for the last quarter of a century. Surprisingly the story is not flattering, at least for those engaged in the teaching or practice of law. Rather, there persists a failure on the part of lawyers, judges and administrators alike to understand what law and adjudication are all about and how they are supposed to work. Although the casebook has enjoyed success in the law schools, the hard truth is that either the lessons of the classroom have not really been mastered or they have been abandoned when the students enter the real world.

The materials are organized around two related themes – one historical, the other conceptual. Historically, the materials tell the story of how employment law has evolved from a set of basic common law rules of contract and tort into

¹ Actually the casebook goes even further back in time, having first been conceived in Harry Arthurs' classes in labour law in the early 60s. Later in that decade the materials were taken over and substantially revised by Arthurs and a group of the leading labour law scholars of the day, including Bernie Adell, Don Carter, Innis Christie, Stan Schiff and Paul Weiler.

² B. Aaron and D. Wollett (eds.) *Labor Relations and the Law*, 2d ed., (Toronto: Little, Brown, 1960). This casebook has since evolved into a dozen separate “course books” compiled by another casebook group and published by the Bureau of National Affairs under the collective title of *Labor Relations and Social Problems*.

³ In subsequent editions George Adams, Rick Brown, Geoff England, Judy Fudge, Brian Langille, Ken Norman, Dianne Pothier, Rob Prichard, Ken Swan, Katherine Swinton, Jeremy Weber, Joe Weiler and myself have participated as members of the group.

a complex set of legislative initiatives which mandate minimum standards of remuneration, working conditions, fair treatment and, simultaneously, foster trade unions and collective bargaining. The students read about the legal doctrines developed, first by the courts and then in statutes and administrative rulings, to regulate (1) how employers operate a business and (2) how they terminate people from their jobs. The idea is that, by focusing on a common set of work related issues dealing with management rights and job security the students will see the way labour law has shifted and evolved through time as they read about the different legal regimes of the common law, employment standards and collective bargaining.

Conceptually, the materials are intended to challenge the students about the values and objectives which the law is designed to promote. Since 1984, when a preliminary fourth edition was conceived,⁴ the students' first view of the subject is provided through a set of readings which probe the values and assumptions underlying the human behaviour of working in general and the employment relationship (which is still the form of social organization through which most people in Canada pursue their occupational ambitions) in particular. Through the writings of diverse analysts and scholars⁵ [C.B. MacPherson and Milton Friedman, Harry Braverman and Robert Nozick, Alan Fox, Richard Posner, John Rawls, Max Weber, and Paul Weiler] students are asked to reflect on the purposes and goals which law and labour policy are meant to achieve. Wealth maximization (efficiency), equality (justice), and personal autonomy (liberty) are identified as the norms against which the rest of the materials can be evaluated. The idea is to provide students with a wide range of points of view which will allow them to think about the substantive rules of labour law. One of the group's ambitions is to challenge the students to think about the decisions of those responsible for enforcing the law (courts, labour boards, arbitrators, human rights tribunals and inspectors) in terms of the larger objectives which people pursue when they set off from their families and homes for work.

Generally, introducing students to the common law roots of our law, and highlighting the competing interests that people pursue in their jobs, allows students to ask themselves about the comparative advantages of negotiation (contract), politics (legislation) and law (adjudication) as techniques of social ordering. Although all three methods of fixing the rules under which people

⁴ In 1994, as it celebrated its twenty-fifth anniversary, preparation for a 6th edition of the book had already begun.

⁵ C.B. MacPherson, "Elegant Tombstones" in *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon Press, 1973); M. Freedman, *Capitalism and Freedom* (Chicago: Univ. Chicago Press, 1962); H. Braverman, *Labour and Monopoly Capital* (New York: Monthly Review Press, 1974); R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974); A. Fox, *History and Heritage: The Social Origins of the British Industrial Relations System* (London, Boston: Allen & Unwin, 1985); R. Posner, *Economic Analysis of Law* (Toronto: Little Brown, 1977); J. Rawls, *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1971); M. Weber, "Freedom and Coercion" in *Law in Economy and Society* (Cambridge: Harvard Univ. Press, 1954); and P. Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980).

work have been used extensively in Canada, there is a lively debate as to which of these instruments of social control is best suited to organizing people's lives at work.

Labour Law and the Courts

The first "black letter" law that the students see is the law of contract which the courts have devised to settle disputes that arise in the work place. The materials in the casebook focus on the extent to which employers are free to (1) run their businesses and (2) terminate employees as they see fit. The cases were chosen to show students both the good and the bad. Judgments are presented which support the position of Harry Arthurs and Allan Fox⁶ who believe that the work of the courts has often been prejudicial to employees as well as the views of Kahn-Freund and Innis Christie⁷ who cast the judicial record more favourably.

To illustrate how the courts have promoted the interests of workers and the overriding values of justice and autonomy, students read how the judiciary imposed restrictions on employers' ability to vary the job descriptions and working conditions of employees. Through cases like *Hill v. Gorman*,⁸ *Baker v. Burns Foods Ltd.*,⁹ and *Reber v. Lloyds Bank*,¹⁰ students learn about the rule of constructive dismissal which provides employees with some protection against the unilateral altering of the terms and conditions under which they were hired. They also study judgments in which courts have assisted persons terminated because of an isolated act of misconduct,¹¹ some illness or incapacity,¹² mediocre job performance¹³ or business exigencies¹⁴ which did not satisfy the requirements of the common law. Other cases reveal more general doctrines of fairness that regulate how management treats its employees.¹⁵

While making students aware that courts have developed doctrines in support of working people, no one has doubted that the performance of the courts has been weighted in favour of employers and employees who are already

⁶ A. Fox, *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber 1974); H.W. Arthurs et al, *Labour Law and Industrial Relations in Canada* (Toronto: Butterworths, 1988).

⁷ O. Kahn Freund, "A Note on Status and Contract in British Labour Law" (1967) 30 Mod. L. Rev. 635; I. Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980).

⁸ (1957), 9 D.L.R. (2d) 124 (Ont. C.A.).

⁹ (1977), 77 D.L.R. (3d) 762 (Man. C.A.).

¹⁰ (1984), 52 B.C.L.R. 90 (S.C.).

¹¹ *Laws v. London Chronicle*, [1959] 2 All E.R. 205 (C.A.).

¹² *Yeager v. R.R. Hastings Agencies* (1984), 5 C.C.E.L. 266 (B.C.S.C.).

¹³ *Stewart v. Intercity Packers* (1989), 24 C.C.E.L. 135 (B.C.S.C.). See also *Bardal v. Globe and Mail* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.).

¹⁴ *Paterson v. Robin Hood Flour Mills* (1969), 68 W.W.R. 446 (B.C.S.C.); *Baker v. Burns Foods*, *supra* footnote 9.

¹⁵ *Greenberg v. Meffert* (1985), 18 D.L.R. (4th) 498 (Ont. C.A.); *Nardocchio v. CIBC* (1980), 41 N.S.R. (2d) 26 (S.C.T.D.).

well off. The hard truth is that the courts have not imposed many restrictions on how employers run their businesses and have not provided much job security to employees with relatively few marketable skills.

Thus, students read about the judiciary's refusal to order reinstatement of employees wrongfully terminated.¹⁶ They also learn how the courts have developed a layoff exception providing managers with a device to circumvent the traditional rule that redundancy is not good grounds for dismissal¹⁷. And they study cases in which the courts worked out notice requirements which favoured the interests of employers¹⁸ and employees with the highest paying jobs.¹⁹

Later students are directed to the common law rules of the "economic" or "industrial" torts. These legal rules enhanced the freedom of employers by insulating them from economic and political pressures like strikes, pickets and boycotts which, if left unregulated, could be used by workers to advance their interests. These industrial torts imposed restrictions on the freedom of workers to picket and protest, and to solicit the support of their communities against unjust working conditions.²⁰

That the common law rules of contract and tort have systematically favoured employers is a running theme throughout the casebook. Even in the last chapter, which considers issues of health and safety, the students learn how the courts denied most workers injured in the course of their employment, by the negligence of the employer or a co-worker, compensation for the losses they sustained. The doctrines of the fellow servant rule, *volenti non fit injuria* and contributory negligence freed employers of virtually all responsibility for injuries and accidents.²¹

The common law rules created to regulate relations in the workplace provide an historical backdrop against which contemporary statutory and administrative regimes can better be understood. It also provides an introduction to the way law, through adjudication and legal reasoning, effects conflict resolution. The common law rules of employment make a superb case study of how adjudication acts as a method of social ordering that is both distinct from yet integrally connected to the reality of bargaining and the politics of legislation.

¹⁶ *Lumley v. Wagner* (1852), 42 E.R. 687. See generally, Christie, *supra* footnote 7.

¹⁷ *Greene v. Chrysler Canada* (1982), 38 B.C.L.R. 347 (S.C.); *MacKenzie v. Atlantic Neon and Plastic Signs* (1986), 15 C.C.E.L. 52 (N.B.Q.B.); cf. *Devonald v. Rossiter*, [1906] 2 K.B. 728.

¹⁸ *Bohemier v. Storwal Industries* (1982), 142 D.L.R. (3d) 8 (Ont. H.C.J.); var'd 7 D.L.R. (4th) 570 (Ont. C.A.); *Hunter v. Northwood Pulp and Timber* (1985), 7 C.C.E.L. 260 (B.C.C.A.).

¹⁹ *Bardal v. Globe and Mail*, *supra* footnote 13; *Cronk v. Canadian General Insurance* (1994), 128 D.L.R. (4th) 147 (Ont. C.A.).

²⁰ The classic treatise is I. Christie's, *The Liability of Strikers in the Law of Tort* (Kingston: Queen's University Centre for Industrial Relations, 1967); see also S. Tacon *Tort Liability in a Collective Bargaining Regime* (Toronto: Butterworths, 1980).

²¹ See E. Tucker "The Law of Employer's Liability in Ontario 1861-1900: The Search for a Theory" (1984) 22 O.H.L.J. 213.

There are two features of the common law rules of employment which stand out from the rest. The first, and most striking characteristic, is how frequently these rules are justified as those which the parties negotiated for themselves. In formulating the rules defining the scope of management's rights and employees' security, the courts most often deferred to what, (with little or no evidence) they believed the parties settled for themselves. Most of the important common law rules have been formulated in this way, including the rules governing: (1) how much notice an employee must be given before he or she is let go;²² (2) the freedom of the parties to contract out of the common law rules of termination;²³ (3) the employer's ability to lay off without notice;²⁴ and (4) who bears the risk of co-workers acting negligently.²⁵ All of these issues have been decided on the basis that these were the solutions that the parties had actually agreed to, or would have agreed to, if they had given the matter any thought.

If deference to market solutions and the intention of the parties is the first characteristic of the jurisprudence then resort to bright lines, discontinuities and very discrete categories is the second. As a result of the courts' preoccupation with the parties' intention and their strong aversion to judging the details of each and every dispute, the common law of employment has evolved in a highly compartmentalized, segmented way. The law of termination distinguishes between two mutually exclusive situations in which an employer can terminate an employee on notice or for cause. There is no "third alternative" in which an employee's record of long and loyal service would entitle her to some period of notice or compensation even when she had acted in a way which would allow the employer to terminate her for cause.²⁶ Similarly, a boundary has been drawn between the public and private sectors in the procedures to be followed when people are terminated.²⁷ Injunctions are available to employers to force employees to return to work when they act collectively but not when individual workers act on their own.²⁸ Picketing which is restricted to the premises of the struck employer is permissible; picketing anywhere else is not.²⁹

Sometimes the two characteristics are connected. Bright lines and discrete rules are justified on the basis of common intent. Traditionally, intention and bargaining power explained the rules of notice which allowed professionals and senior executives, but not unskilled or clerical personnel, time to find alternative

²² See e.g. *Bardal v. Globe and Mail*, *supra* footnote 13; *Bohemier v. Storwal Industries*, *Hunter v. Northwood Pulp and Timber*, *supra* footnote 18.

²³ *Wallace v. Toronto-Dominion Bank* (1983), 41 O.R. (2d) 161 (Ont. C.A.).

²⁴ *Greene v. Chrysler Canada*; *MacKenzie v. Atlantic Neon*, *supra* footnote 17.

²⁵ See *Tucker*, *supra* footnote 21.

²⁶ *Jim Pattison Industries v. Page* (1984), 10 D.L.R. (4th) 430 (Sask. C.A.).

²⁷ Compare: *Board of Education of Indian Head School Division v. Knight*, [1990] 1 S.C.R. 653; and *GTE Sylvania Canada Ltd.* (1983), 56 N.S.R. (2d) 424 (S.C. A.D.).

²⁸ Compare: *Winnipeg Builders Exchange v. I.B.E.W.* (1967), 65 D.L.R. (2d) 242 (S.C.C.) and *Lumley v. Wagner*, *supra* footnote 16.

²⁹ *Hersees of Woodstock v. Goldstein* (1963), 38 D.L.R. (2d) 444 (Ont. C.A.).

employment.³⁰ Similarly the sharply divergent rules fashioned by the courts for redundancies (where notice was required to be given), and temporary layoffs, (where it was not), were based on the parties' common intent.³¹

Several classes at the beginning of the labour law course are enough to highlight both the form and the substance of the common law approach to resolving conflict at the workplace and by the end of the second week of classes, students appreciate how our current system of regulation of employment has evolved. Reading the common law of management rights industrial conflict, job security and the like, shows the judiciary failing to show much sympathy for the basic purposes that people pursue when they head out their doors for work.

The cases reveal how, reasoning from the intention of the parties and the creation of discrete, highly segmented rules of law, works against the objectives which the law of employment is supposed to serve. The emphasis the courts have placed on framing legal rules that mirror what they believe the parties would have bargained for themselves explains why the common law of employment seems so skewed in the employers' favour. Such reasoning invariably favours the side with the stronger bargaining position, usually the employer. Occasionally the intent-based line of analysis resulted in doctrines which favoured the interests of workers, for example the constructive dismissal jurisprudence. However, the common law rules on hiring,³² layoffs,³³ notice,³⁴ and assumption of risk³⁵ show that when law favoured market solutions, it almost always rewarded investors and their managers.

This bias toward market oriented distributions in the common law rules of employment is exacerbated by the judiciary's attraction for bright lines and discrete categories. Any time a rule or doctrine was confined by a boundary or bright line it meant one group of workers suffered a burden (or was denied a benefit) which others were spared (or allowed to enjoy). On the common law rules of fairness and notice, for example, public sector and professional employees enjoyed a measure of justice and employment security denied the less privileged in the private sector. Equality and distributive fairness were sacrificed on a cartesian altar of order and simplicity.

Not only did the mode of reasoning of the common law threaten basic values of fairness and distributive justice, it also undercut people's ability to control their personal autonomy through their work. The common law rules of

³⁰ *Bardal v. Globe and Mail*, *supra* footnote 18; *Bohemier v. Storwal*, *supra* footnote 18; *Hunter v. Northwood*, *supra* footnote 18.

³¹ *Greene v. Chrysler*, *supra* footnote 17; *Mackenzie v. Atlantic Neon*, *supra* footnote 17.

³² *Board of Governors of Seneca College v. Bhaduria* [1981] 2 S.C.R. 181; *Christie v. York Corp.*, [1940] S.C.R. 139.

³³ *Green v. Chrysler*, *supra* footnote 17; *Mackenzie v. Atlantic Neon*, *supra* footnote 17.

³⁴ *Bardal v. Globe and Mail*, *supra* footnote 13; *Bohemier v. Storwal*, *Hunter v. Northwood*, *supra* footnote 18.

³⁵ See *Tucker*, *supra* footnote 21.

employment provide empirical proof for the view that the mere absence of legal or social regulation does not guarantee people will control the decisions that have the greatest impact on their lives.³⁶ Few students have difficulty understanding that rules of hiring and termination that come out of a process of bargaining and negotiation, and which are based on agreement and consent, do nothing to support the personal autonomy of people who, for example, are refused employment on account of their race or who are sacked without being given enough time to find other work.

Labour Law and the Experts

Insensitivity to notions of distributive justice and enforcement of rules which undercut the ability of people to control their own destinies, were the most serious failings of the common law rules and they were, therefore, the two primary evils which policymakers have been keen to redress. Most modern systems of employment regulation are made up of two distinct types of statutes and regulations. The first, dating from the Factories Acts of the 19th century, guarantee a measure of distributive justice by outlawing the most egregious conditions of employment settled by negotiation and enforced by the common law. The second, introduced in Canada in the middle of this century, promotes the autonomy of those without much bargaining power by substituting systems of democratic – or collective – decision-making for the contract model of individual negotiation on which the common law is based.

Employment law in all liberal democratic states is characterized by this two-pronged approach. Legislators have designed policy instruments which promote justice and workers' autonomy in the workplace in both substantive and procedural ways. Guaranteeing no one will fall beneath a floor of employment rights, whether it be remuneration, hours of work, job security, fair treatment, or accident compensation and rehabilitation, ensures that no matter how meagre a person's circumstances, they will be treated with a measure of respect. At the same time, designing systems of democratic, or collective decision making for the workplace ensures workers will be involved in settling the detailed terms of their employment in meaningful ways.

If substantive rights and procedural fairness are two of the distinguishing characteristics of Canadian labour law in the last half of the twentieth century, expert administration and supervision is the third. All of the major pieces of employment regulation – employment standards, workers' compensation, collective bargaining, human rights and employment equity have largely been taken out of the hands of the courts and given to expert administrators to

³⁶ See footnote 5 and also T. Scanlon "Liberty Contract and Contribution" in G. Dworkin, G. Bennett and P. Brown eds., *Markets and Morals* (Washington: Hemisphere Publishing, 1977); A. Brudner, "Ethical Perspectives on Health Hazards" in C.J. Tuohy and M.J. Trebilcock, *Policy Options in the Regulation of Asbestos-Related Health Hazards* Study #3, *Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario* (Toronto: Queen's Printer, 1982).

develop. Since the turn of the century, policymakers have seen administrative regulation by experts to be the preferred method of developing labour law.

Nowhere were the expectations for expert regulation by public officials greater than in the development of collective bargaining law. From its inception, the administrative orientation of the Canadian system of collective labour relations was not a matter of controversy. Influenced by earlier federal laws promoting compulsory mediation and conciliation, and in part by the *National Labour Relations Act (Wagner Act)* enacted in the United States a decade earlier, the Canadian model was predicated on a commitment to peace and prosperity, that is, economic efficiency, through various procedures and institutions of adjudication and administrative regulation. In fact, administrative regulation was emphasized even more in the Canadian model.³⁷ Labour boards and arbitrators were set up as alternatives both to conflict and to the courts. Flexible procedures and less legalistic methods of decision making were expected to generate outcomes which were more accessible, equitable and sensitive to the interests of employees.

At each stage of the collective bargaining relationship, administrators have been put in charge. Labour Relations Boards were assigned the task of ensuring that employees were given a full opportunity to decide whether they wanted to adopt this method of decision making in their workplace. Arbitrators were entrusted with the job of resolving disputes that arose after a collective agreement was signed. Only in the period in between, when the parties are negotiating the terms of their agreements, are they free to employ economic forces and even here, the Canadian model calls for a strict statutory timetable as to when strikes and lockouts can be called and for monitoring by labour boards to ensure the purposes of the *Act* are not abused.

In opting for a system of administrative regulation, Canadian legislators have been committed to the idea that, in the hands of those who were most sensitive to the nuances of the workplace, law and adjudication were the preferred means of regulating interpersonal relations. Freed of the formalistic, intent based, categorical method of reasoning that had undermined the common law regime, the expectation was that workers would be best served by a system in which adjudication and administrative regulation played the leading role rather than one in which either negotiation (and conflict) or political decrees (in the form of legislated standards) carried the day. In terms of the purposes that are typically found in collective bargaining legislation, law and administrative regulation were regarded as integral to furthering harmonious and stable relations between employers and employees, increasing employee participation in the workplace, and providing for fair and expeditious methods of dispute resolution.³⁸

³⁷ For example, in contrast with the American law which allows workers to resolve disputes during the life of a collective agreement by industrial conflict, in Canada grievances must be settled by arbitration and workers are prohibited from striking except when the agreement expires.

³⁸ See *Ontario Labour Relations Act*, R.S.O. 1990, c.L.2; s.2.1 as am. by S.O. 1991, c.56; S.O. 1992, c.21; S.O. 1995 c.1. For a similar statement of principles in the *Canada Labour Code*, see the preamble to Part V., S.C. 1972, c.18.

The Rules of Labour Law

How well the labour relations experts have responded to the expectations of the legislators is examined throughout the casebook. It is the single most important theme in the materials. It takes up two-thirds of the casebook. Sadly, however, in large part, it is a story of failed expectations.

Many administrators have replicated, rather than remedied, the methodology developed by the courts in working out the rules of collective bargaining law. Like their judicial colleagues, members of labour boards and arbitrators have consistently looked and deferred to the intention of the lawmakers – labour boards to tap the will of their legislative assemblies, arbitrators to the parties to the collective agreement – as the primary source of the rules they use to decide cases. In addition, they have created a jurisprudence which is marked by the same bright lines and divisive boundaries that characterized the bad old common law.

The jurisprudence of the Ontario Labour Relations Board provides an excellent case study of reasoning of this kind. Almost all of its major rulings rely on the same intent based method of reasoning that was favoured by the courts and with much the same results. For each phase of the collective bargaining relationship, this Board has developed a jurisprudence with the view of enforcing and giving effect to what is thought to be the will of their political masters. In defining the scope of the legislation, the rights of the parties during an organizing drive, the rules of strikes and bargaining, the shape of bargaining units, and even the responsibilities unions owe to their members, the Ontario Board has favoured rules with very rigid borders on the ground that this was the kind of jurisprudence desired by the legislators.

In marking out the parameters of the legislation and identifying which employees would get the benefit of the *Act*, the Board drew the line so as to exclude people who exercised supervisory functions. Even though the Board was well aware of the policy arguments in favour of extending the protection of the legislation to supervisory personnel, it felt it had no choice in the matter because it thought the legislature had spoken so clearly against bringing this group of employees in under the umbrella of the *Act*.³⁹

To regulate relations during the organizing drive, the Ontario Board crafted a set of rules which basically said “business as usual”. The only thing employers could not do was to act with the purpose or intent of frustrating or interfering with the union’s campaign.⁴⁰ Except for that, the employer was free to run its business the same way it did prior to the union’s arrival. The boundaries around property interests were especially bright and well marked. In explaining why it chose a rule which almost always made an employer’s property rights trump,

³⁹ *United Steelworkers of America v. Porcupine Mines Ltd.*, [1975] 2 C.L.R.B.R. 234 (O.L.R.B.).

⁴⁰ *Canadian Paperworkers Union v. International Wallcoverings*, [1983] O.L.R.B. Rep. 1316.

the Board told the industrial relations community that this was the way those who wrote the law wanted it to be read.

It was also the intention of the legislature, said the Board, that an employer's property rights should always take priority over the rights of union organizers to solicit members on the company's premises and override the employees' freedom to discuss collective bargaining during working hours. From this premise, the Board ruled that union organizers have no right to meet with a group of employees in non-work areas of the company's property without the company's consent, and employees risk being disciplined or even discharged for discussing a union's organizing drive during working time.⁴¹

The rules of bargaining fall into the same pattern. Many rulings issued by Ontario's Board draw sharp distinctions between what is permissible under the *Act* and what is proscribed. Typically these rules are also justified as the wishes of the legislature. The basic rule of disclosure adopted by the Board differentiates between projects still in the planning phase, which do not have to be revealed in negotiations, and those which – *de jure* or *de facto* – have received the green light, about which the union must be informed.⁴² The Board has also drawn a distinction between form (the methods and strategies that bargaining and negotiation procedures can take) which fall within its jurisdiction and substance (the actual content of proposals put on the bargaining table) which are deemed to fall outside the scope of the *Act*.⁴³

The Board's treatment of part-time workers and employees who respect picket lines are of a similar piece. Rules are formulated by making assumptions about the legislature's intent and the jurisprudence is characterized by bright lines and impregnable boundaries. Its insistence on keeping full-time and part-time employees in separate units, even when both had opted for collective bargaining, was driven largely by the perception that the Legislature did not want different units of employees to be aggregated in this way.⁴⁴ Employees who respect picket lines or hot cargo clauses are deemed by the Board to be on strike themselves because it defines a strike in strictly behavioural terms without regard to the motives of those who withdraw their services.⁴⁵ Any

⁴¹ See e.g. *Adams Mine, Cliffs of Canada*, [1982] O.L.R.B. Rep. 1767; *T. Eaton Co. Ltd.*, [1985] O.L.R.B. Rep. 491; *Re U.S. W. and Ralph Milrod Metal Products Ltd.* (1964), 64 C.L.L.C. 16,007, and see generally the cases collected in P. Macklem, "Property, Status and Workplace Organizing" (1990) 40 U.T.L.J. 74 at footnote 30.

⁴² *Amoco Fabrics Ltd. and International Woodworkers*, [1982] 2 C.L.R.B.R. 305; *International Woodworkers v. Consolidated Bathurst Packaging Ltd.*, [1983] O.L.R.B. Rep. 1411.

⁴³ *Canada Trustco Mortgage Co.*, [1984] O.L.R.B. Rep. 1356; *Formula Plastics Inc.*, [1986] O.L.R.B. Rep. 954; See also *Pulp and Paper Industrial Relations Bureau*, [1978] 1 C.L.R.B.R. 60 (B.C.).

⁴⁴ R. Davis, *The Ontario Labour Relations Board Policy on Bargaining Units for Part-Time Workers: A Critique* (Kingston: Queen's Centre for Industrial Relations, 1991).

⁴⁵ *Domglas Ltd.* (1974), 76 C.L.L.C. 16,050, aff'd (1978), 78 C.L.L.C. 14,135 (Ont. Div. Ct.); *Nelson Crushed Stone and United Cement, Lime and Gypsum Workers International Union*, [1978] 1 C.L.R.B.R. 115.

concerted activity on the part of two or more persons which restricts or limits production is caught.

The fact that so many arbitrators served an apprenticeship in administrative regulation as members of labour boards makes it unsurprising that arbitral and labour board jurisprudence have much in common. Especially in the early years, arbitrators developed the law of the collective agreement in the same way labour boards filled in the details of the legislation and the courts wrote the common law. For the most part arbitrators have been strict constructionists and have seen their role as enforcing the parties' common intent.⁴⁶ The most important rule of arbitral law, which holds that management is free to run its business as it sees fit except in so far as it has explicitly agreed to some specific constraint on its powers, is itself the product of an arbitrator reasoning from what was understood to be the parties' common intent.⁴⁷

The Bias of Labour Law

When judges deferred to the intention of the parties as the primary source of rules for the workplace, and created a jurisprudence of sharp divisions and bright lines, the result was that the goals of wealth maximization and efficiency triumphed over the autonomy of workers and principles of distributive justice. When expert administrators relied on the same methods of reasoning to develop collective bargaining law, the result was largely the same. Whenever labour boards and arbitrators defended their decisions by pointing to the will of the lawmakers, (whether politicians or the parties to a collective agreement), invariably the result favoured the employers' freedom of operation.

In the organizing phase, the employer's rights of property and managerial discretion were allowed to trump the values of worker autonomy and distributive justice in every case where they clashed. Practically the only restriction Ontario's administrators imposed on employers was the proscription against acting with the purpose of frustrating the wishes of the employees who favoured collective decision-making in the workplace. Union organizers were denied access to employees when they were on company property, unless they lived there, even when meeting with workers would not have been prejudicial to the employer's business interests. Similarly, employees were forbidden to talk about the union during working hours even if the adverse impact on the employer's business interests was negligible or non-existent.⁴⁸

The rules of bargaining were also skewed in the employer's favour. Not only was management not required to disclose anything that was still in the planning process until after a decision had been made, there would be no second guessing the substance of an employer's proposals unless they revealed an anti-

⁴⁶ The cases are collected in Brown and Beatty, *Canadian Labour Arbitration*, 3d ed. (Toronto: Canada Law Book) at 4:2100.

⁴⁷ *Re Russelsteel v. United Steelworkers* (1966), 17 L.A.C. 253 (Arthurs).

⁴⁸ *Supra* footnotes 40 and 41.

union intent. Employers were even allowed to contract out of the common law. There was nothing wrong in trying to negotiate an agreement that provided even less job security than was mandated by the very modest rules developed by the courts.⁴⁹

Other major doctrinal rulings promoted the employer's interests in a similar way. Denying supervisory employees the right to bargain collectively enhanced management's freedom to run its business as it saw fit.⁵⁰ Reading the legislation in a way that restricted the Board's ability to amalgamate bargaining units of full and part-time employees,⁵¹ or at different locations of a common enterprise,⁵² enhanced the employer's bargaining power and its ability to play off the competing interests of different groups of employees against each other. And, ruling that respecting a picket line was itself strike activity, notwithstanding its primary purpose was to show solidarity, not reduce output, reduced the effectiveness of lawful pickets.⁵³

When arbitrators reasoned from the intention of the parties, managers were guaranteed much the same freedom to act during the life of a collective agreement that labour boards had recognized during the earlier phases of the relationship. Paradigmatically, the "management's rights" rule which was endorsed by the Ontario Court of Appeal in *Metropolitan Toronto Police*⁵⁴ guarantees employers that no legal restriction will fetter their control of their business, unless they explicitly write it into their collective agreements. If employees want protection against an employer transferring its business or contracting out some of its work, they must negotiate directly with the employer before it will be recognized in law.

The Coherence of Labour Law

That the collective bargaining law, developed by labour relations experts, is similar to the law of employment created by the courts in both reasoning and result is a matter of general agreement within the casebook group and beyond.⁵⁵ What is debated, however, is what we – and our students – should make of this experiment of administrative regulation as it celebrates its first half century.

For those sceptical about the objectivity and integrity of law, the jurisprudence that has been written by the Ontario Labour Relations Board and many

⁴⁹ *Supra* footnotes 42 and 43.

⁵⁰ *Supra* footnote 39.

⁵¹ *Supra* footnote 44.

⁵² *National Trust #2*, [1988] O.L.R.B. Rep. 168.

⁵³ *Supra* footnote 45.

⁵⁴ *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1981), 124 D.L.R. (3d) 684 (Ont. C.A.).

⁵⁵ J. Manwaring, "Legitimacy in Labour Relations: The Courts, the B.C. Labour Board and Secondary Picketing" (1982) 20 O.H.L.J. 274; See also H. Glasbeek, J. Fudge, E. Tucker, *Labour Law: Cases and Materials on Labour Law* (Toronto: Osgoode Hall Law School).

arbitrators confirms their thesis that law is merely politics by another name. For them, these cases show law as a hegemonic institution in the service of ruling elites. The critics of law see the decisions of the experts as providing very powerful empirical evidence that workers and advocates for social justice would do better to focus their energies on exploiting the possibilities of politics and bargaining and give up on litigation.

Others in the group are less inclined to give up on the rule of law. For some, the criticisms of the sceptics seem wide of the mark. For democrats and pluralists, giving expression to the will of the lawmaker, whether in politics or the market, gives due recognition to the subordinate position of law. Still others, who are reluctant to embrace the nihilistic conclusions of the sceptic, point out that arbitrators and labour boards have not always mimicked the common law approach of the courts and that there are cases in the jurisprudence that offer hope for the prospects of law.

As one member of the casebook group I have struggled with these different attitudes towards Canadian labour law over the years. After almost twenty-five years of teaching the subject I have come to the conclusion that the position of those who are inclined to be apologists for the system is the most difficult to defend. To say adjudication has little or no role beyond probing the mind and the psyche of the lawmaker denies law any independence or autonomy. Law is reduced to being the handmaiden of politics and the market. It has no normative or moral character of its own. This is the sparest of those positivistic theories of law which have long since passed out of vogue.

And for good reason! Many of the decisions that apologists must defend seem impossible to justify even on their own terms. In none of the landmark rulings which are said to give expression to the will of the parties or politicians is there any hard empirical evidence of that intention. Certainly no reference is made to the legislative debates or background studies and reports in the landmark decisions in which the Ontario Board ruled that: supervisors are not covered by the *Act*;⁵⁶ proof of illicit intent is an essential ingredient of an unfair labour practice;⁵⁷ union organizers can have no access to company premises even in non-working areas and times;⁵⁸ the rules of bargaining do not contain any substantive standards of fairness or due process;⁵⁹ and people who respect a picket line, even when their collective agreement allows them to do so, are themselves engaged in an unlawful strike.⁶⁰

⁵⁶ *Supra* footnote 39.

⁵⁷ *Supra* footnote 40.

⁵⁸ *Supra* footnote 41.

⁵⁹ *Supra* footnote 43.

⁶⁰ *Supra* footnote 45. In fact, what empirical evidence there is on the legislature's intent with respect to the status of people who respected lawful picket lines suggests just the opposite. See D. Beatty, "Secondary Boycotts: A Functional Analysis" (1974) 52 Can. Bar Rev. 388.

In fact, typically, the intention of the law is said to follow logically, rather than empirically, from the overall structure of the legislative scheme. Frequently the intention of the legislature is based on no more than the application of a maxim like the redundancy principle or the *expressio unius est exclusio alterius* rule. However, as John Willis pointed out in the late 30's, there are a plethora of contradictory maxims from which an interpreter can choose, that can lead to very different readings of a text, and rarely is there ever any reason given why a particular maxim has been employed.⁶¹

Many of the landmark rulings in Canadian labour law provide examples of the logical errors Willis wrote about almost 60 years ago. Take the case of the Ontario Board's rule that, except in two or three very narrow circumstances,⁶² an anti-union intent is an essential element of an unfair labour practice. This doctrine, which allows an employer to do whatever it likes if done in good faith and to promote the best interests of the enterprise, including contracting out work or relocating the workplace no matter what the consequences for the union, and is based on the redundancy rule and about not reading parts of an *Act* in a way which renders other provisions superfluous and of no practical effect.

The argument focuses on two sections of the *Ontario Act*: sections 70 and 72. The first is a sweeping provision which prohibits employers doing anything that interferes with the formation, selection or administration of a union. The second makes it unlawful for an employer to discriminate against any employee, or person seeking employment, because of their membership or involvement in the union. It is the relationship between these two sections, says the Board, which shows the Legislature's intent must have been to limit all unfair labour practices to acts done with a clear motivation of defeating the union. The argument is that if section 70 could be violated simply by the impact of an employer's decision to contract out work or move its plant on the union's organizing drive, that would render section 72, which clearly requires proof of anti-union intent, redundant and practically meaningless. If section 70 could be violated without proof of any wrongful motive, it would mean that other sections of the *Act*, like section 72, in which anti-union intent is made an explicit element of the offense, would never be used. Workers and unions would always file their complaints under the broader offense with the result that sections like 72, and 76, would be read out of the *Act*. And that, said the Board, "would be a dubious application of legislative intent".

⁶¹ J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1. See also Neil MacCormick and Robert Summers, "Interpretation and Justification" in MacCormick and Summers, eds., *Interpreting Statutes: A Comparative Study*, (Aldershot: Dartmouth Publishing, 1994), who argue that claims about intention can almost always be reduced to textual, structural or logical methods of interpretation.

⁶² In *International Wallcoverings*, *supra* footnote 40, the Board ruled that complainants did not have to prove an employer had an anti-union animus where: (1) an employer insisted that its property rights allowed it to prohibit workers soliciting union memberships on company premises in off-duty time; (2) a penalty imposed on an employee is out of all proportion to his or her misconduct; and (3) where it could be shown the employer had simply made a mistake.

I can not imagine there are many labour law classes where the logic of this analysis withstands scrutiny. Firstly, even if section 70 were read to require an anti-union motive, that does not eliminate the problem of overlap between the different sections of the *Act*. Even when it is limited by a criterion of unlawful intent, the fact remains that section 70 could still apply to every kind of behaviour that the subsequent sections address.

More importantly, the Board is simply mistaken in asserting that if section 70 is interpreted so as not to require proof of an anti-union intent, it would result in making other sections like 72 and 76 redundant. In fact, such an interpretation contemplates the two sections being operative in two quite distinct situations. Section 70 renders illicit activities that interfere with a union's opportunity to conduct its organizing drive more than they promote any legitimate interests of the employer. By contrast, in those sections in which an anti-union intention is at the core of the proscribed offence a violation is made out once the requisite intention has been established, regardless of how the employer's decision impacts on the well-being of the enterprise and the union's organizing drive. Even showing an employer was motivated in part by a desire to frustrate the union's organizing campaign is sufficient to establish liability regardless of the relative weight of the other interests that are involved.⁶³

Beyond its textual and logical failings, the redundancy argument used by the Board to minimize the duties imposed on an employer during the course of an organizing drive is inadequate because it is at odds with the purposes of the *Act*. As section 2.1 of the Ontario *Act* makes clear, the overriding purpose of this legislative regime is to promote the process of collective bargaining. The essential character of the statute is remedial not punitive. As courts and administrators have affirmed in the context of parallel human rights legislation proscribing discrimination in employment, the purposes of these statutory regimes would be hindered if the only behaviour that was proscribed was that which was intended to frustrate their objectives.⁶⁴ If the purpose of our Labour Relations Acts is to promote collective bargaining, logic requires that the focus of a provision like section 70 must be on the impact of different kinds of employer activity rather than on the mindset of the persons who initiated or performed them. Given that the objective is to facilitate collective bargaining, it is important to proscribe those activities, – for example contracting out some or all of the work performed by the employees, – which have the effect of destroying any possibility of collective bargaining even if they were undertaken purely for economic or other business reasons. In the language of our human rights law, the logic of a remedial statute like the *Labour Relations Act* requires that both direct and indirect, intentional and "adverse impact" behaviour be proscribed. In addition to dealing with employers who deliberately try to frustrate the goals of the legislation, the law must also be attentive to the situation of employees whose desire for democratic decision making in their

⁶³ *Barrie Typographical Union and the Barrie Examiner*, [1976] 1 C.L.R.B.R. 291 (O.L.R.B.).

⁶⁴ See e.g. *Re Bhinder and C.N.R. Co.* [1985] 2 S.C.R. 561.

workplace can just as easily be destroyed by decisions of management which are made in good faith.

The rule that the legislature only intended to deal with employers who deliberately set out to frustrate the purposes of the *Act* was the product of faulty reasoning. Instead of interpreting the *Act* with a view to promoting the overriding goals of this regulatory regime, the Board tried to reason deductively from the text and structure of the *Act*. This is a mistake, it turns out, that the Ontario Labour Relations Board has made time and time again.

In fact there is one particular variant of this textual style of reasoning that the Board has found especially attractive. It is an interpretive maxim that is known as the *expressio unius exclusio alterius* rule. According to this principle, when certain benefits and burdens are expressly covered in a text like a statute or a contract that necessarily means that all other benefits and burdens that have not been mentioned are excluded. At least half a dozen major doctrines of collective bargaining law have been "deduced" following this mode of reasoning. Like the redundancy rule, the *expressio unius* maxim purports to derive the intention of the lawmakers by the relationship that holds between two or more parts of the *Act*.⁶⁵

Both the determination that first level supervisory personnel fall outside the scope of the *Act* and the finding that union officials are not entitled to meet with the employees they want to organize on company property even in non-working hours and areas, were justified by the Board on a logic of negative inferences. *Expressio unius* was also the primary explanation the Ontario Board gave for its refusal to embrace the accretion rule that the British Columbia Board developed to allow it to alter and aggregate bargaining units as circumstances required. The Board also perceived it had limited jurisdiction to regulate the parties' behaviour in the course of negotiations because of the negative inferences it drew applying the *expressio unius* rule. Both the rule that a labour board has no authority to judge the substantive reasonableness of positions taken by the parties in bargaining and the rule that they have no remedial authority to fix the terms of employment in a collective agreement even when an employer has been found guilty of having bargained in bad faith were, for the most part, defended in this way. And finally, when the Ontario Board was asked to define strike activity, it ruled that strikes included any concerted behaviour by two or more persons which had the effect of restricting or limiting output, no matter what reason the employees gave for their action, pointing to the text of legislation in other jurisdictions and saying its hands were tied.

In each of these cases, the Labour Board formulated a rule of collective bargaining by drawing an inference which could not be justified as a matter of either empirical evidence or logical analysis. All of these cases illustrate why the *expressio unius* rule and reasoning from negative inferences are notorious as being open to manipulation and abuse. After seeing the technique in so many

⁶⁵ For a description of how pervasive this method of statutory interpretation is, all over the world, see MacCormick and Summers, *supra* footnote 61.

places in the casebook, students become adept at pinpointing where the leap in the logic occurs.

The first time the students see the *expressio unius* rule used to develop a major rule of collective bargaining law is in *Porcupine Mines*;⁶⁶ a landmark case on the rights of supervisory employees. In it, the Board held that supervisors could not be covered by the Ontario *Act* because it neither provided that they could be put into separate bargaining units as other jurisdictions had done, nor did it allow the Board to insist supervisors choose a bargaining agent different from whatever union had the bargaining rights for the workers they oversaw. Because the statute did not expressly give it the power to do either of these things, the Ontario Board drew the conclusion that the legislature did not intend supervisors to be able to bargain collectively under the *Act*.

The chasm in the logic is especially wide in the *Porcupine Mine* case where the reasoning is grounded primarily in legislation in an entirely different jurisdiction. In justifying its decision that supervisory personnel were not entitled to enjoy the full protection of the *Act*,⁶⁷ the Ontario Board relied heavily on the fact that in other jurisdictions, notably British Columbia and Canada, when the legislature wanted to cover this segment of the workforce did so explicitly. By expressly providing for separate bargaining units for supervisors, both the British Columbia and Canadian Boards had the tools to resolve conflicts of interest that might arise in situations when supervisors and the supervised are intermingled too closely. The fact that there was not a similar provision in Ontario's *Act* led the Ontario Board to conclude, that it was not intended that supervisory workers, as a group, should enjoy the advantages of collective bargaining.

The argument was reinforced by a reference to what is now section 14 of the *Act*. In this section, which was aimed at similar conflict of interest problems, the legislature directed the Board to establish a separate unit of plant guards whenever this group opted for collective bargaining. In the Board's mind, the fact that the legislature provided for special bargaining units for plant guards underscored, by negative inference, that it did not intend a similar scenario for supervisors.

The reasoning process which the Ontario Labour Relations Board used to justify its decision to deny supervisory employees the right to opt for collective bargaining provides an example of the dangers of imputing a very specific and particular intention to the legislature from the overall text and structure of the *Act*. The fact is that the Ontario Board, like its counterparts in British Columbia, and Ottawa, has sweeping, virtually unfettered powers to define units of employees that are appropriate for bargaining. In the same way it could have

⁶⁶ *Supra* footnote 39.

⁶⁷ Even though supervisory workers are not entitled to engage in collective bargaining under the *Act*, like all managerial personnel they can claim the protection of the unfair labour practice sections of the *Act*. See *Re Barbara Jarvis and Associated Medical Services Inc.* (1961), 61 C.L.L.C. 16,218, rev'd [1964] S.C.R. 49.

read section 70 in a liberal fashion, it could have interpreted its mandate to formulate the basic criteria to identify which units are appropriate for bargaining to include the power to create units of supervisory employees. The fact that supervisors were not mentioned explicitly in the text did not logically mean that the Board had no jurisdiction to deal with them pursuant to its general powers.

Certainly the British Columbia Board did not think that the provision which explicitly gave it the power to set up separate bargaining unit of supervisors "constituted a radical breach with the earlier legal tradition."⁶⁸ If, as the British Columbia Board believed, putting the supervisors into separate bargaining units would take care of any conflict of interest between them and the people they supervised, there was no reason why the Ontario Board could not have ordered the supervisors to bargain by themselves pursuant to its general power to fashion appropriate units.⁶⁹ Interpreting its general power in such fashion would significantly enhance the autonomy of supervisory personnel and promote the objectives of the *Act*.

The next time the students see the *expressio unius* maxim invoked to support a conclusion it can not logically sustain is in the development of the rules governing an organizing drive. It is one of the cardinal rules of collective bargaining that union organizers are not entitled to meet with employees on company property, even in non-work areas and in non-working time, unless the employees live and work on the same premises. The basis for the Ontario Board's narrow definition of union solicitation rights is a specific, but common, provision that guarantees union organizers access to company property in those specific circumstances. Invoking the maxim *expressio unius* labour boards everywhere have said that by guaranteeing access for union organizers in the very specific circumstances, where employees live and work on the same premises, legislatures have demonstrated a clear intention not to allow them to have access in any other circumstances without employers' consent.

Here, then, is yet another rule of labour law established by a process of negative implication. Its simplicity and seduction are hard for students to resist. However, as Patrick Macklem has written, it is both illogical and inappropriate to presume the legislature intended its statute to be read in this way.⁷⁰ What is problematic about applying the *expressio unius* rule to the issue of union access to company property, is that other sections of the *Act* and the Board's own rules contemplate that the employees themselves can organize on company property so long as it occurs in non-working hours. As Macklem explains, whatever instinct one might have to apply the *expressio unius* rule to the question of what access union organizers should have to company property should be resisted in light of the rights that employees have to engage in the same activity. In fact, the logic of permitting the latter to organize in off-duty hours argues very strongly that union representatives should have the same opportunities to

⁶⁸ *Corporation of the District of Burnaby*, [1974] 1 Can. L.R.B.R. 3.

⁶⁹ *Labour Relations Act*, s.9(1), *supra* footnote 38.

⁷⁰ P. Macklem, "Property, Status and Workplace Organizing", (1990) 40 U.T.L.J. 74.

organize employees that the law allows the employees themselves. Even if divining for the legislature's intention were an appropriate way to resolve the question of what entitlements union organizers should possess, the text of the *Act* is not as solicitous of the employer's property as the Board's analysis would suggest.

Given the purposes of the *Act*, unless an employer can point to some legitimate interest, beyond a bare assertion of property rights, that would be adversely affected by treating employees and union organizers alike, it makes no sense to read a provision that guarantees access when employees live on the premises where they work, according to the *expressio unius* rule. To fill in the interstices of the law in this way defeats the policies of the *Act*. In the context of the *Act*'s objectives and the Board's own rule of recognizing the solicitation rights of employees in non-working hours, it makes more sense to read a special provision like section 13 as emphasising the importance the legislature placed on ensuring employees who lived on company property had a meaningful opportunity to opt for collective bargaining if they so wished. In the same way the Board might have read the unfair labour practice sections of the *Act*, Section 13 could have marked off a situation in which union representatives have an automatic right to access while all other applications would be decided on a case-by-case basis after the Board had had an opportunity to evaluate the competing employer interests that might be involved.

Sooner or later most students become alert to the impropriety of attributing very specific intentions to the legislature by a process of negative implication. One student, Ron Davis, once wrote an essay on how the Board misused the *expressio unius* maxim to justify its ruling that it had no power to amalgamate different bargaining units and its decision that part-time and full-time employees should normally bargain separate and apart. That essay eventually found its way into the casebook and, like Macklem's work on the solicitation rights of union organizers, prompted Ontario's former New Democratic Government to amend the legislation by allowing part-time and full-time employees to bargain together when it could be shown to be in the mutual interests of both groups.⁷¹

The core of Davis's critique was the Ontario Board's failure to embrace what is known in the trade as the *Amon principle*. The Amon principle is the name given to the rule developed by the British Columbia Labour Board, that allows for the accretion of bargaining units. According to the principle, when one group of employees who have opted for collective bargaining has a sufficient community of interest with another group already organized, labour boards should vary the bargaining unit of the latter to include the former, rather than create two separate units, whenever it is reasonable to do so.

The principle is obviously relevant for the design of bargaining structures for full-time and part-time employees. If full-time employees are more inclined

⁷¹ Davis, *supra* footnote 44. Those provisions, ss. 6 & 7, S.O. 1992 c. 21 were later repealed by the subsequent Conservative Government in S.O. 1995 c.1.

to collective bargaining than part-time workers, as the Ontario Board believes, a policy of bargaining unit accretion would seem to be most consistent with the overall objectives of the *Act*. Full-time units would be recognized by the Board until such time as the part-timers were ready to make a similar choice. If when that occurred, the Board could include these employees in the original unit where that was appropriate.

Even though all of the evidence suggested such a policy would have promoted collective bargaining among both groups of employees and enhanced stable labour relations, the Ontario Board resisted such an approach. Once again, the major justification offered by the Board to support its ruling was the *expressio unius* principle. Pointing to sections of the *Act* where it was explicitly given the power amalgamate existing units, the Board invoked the "logic" of negative inferences to defend its ruling that it had no general power to order the amalgamation of bargaining units when, from a labour relations perspective, that would seem to be the appropriate decision to make.

The defect in using this argument to reject the *Amon principle* is as clear here as it was in the cases defining the nature and extent of a union's solicitation rights. Even though there are special provisions that apply in the construction industry,⁷² on the sale of a business,⁷³ and in jurisdictional disputes,⁷⁴ to draw the negative inference that the Board has no residual authority to amalgamate units in any other circumstances flies in the face of other provisions in the *Act* and its overriding objectives.

As with the rules the Board developed on employer unfair labour practices and union solicitation rights, the text of the *Act* is not as unambiguous as the *expressio unius* style of definition would have one believe. Here, as in the organizing phase of the relationship, the Ontario statute contains both a variety of specific provisions and a more general residual clause.⁷⁵ The problem here is the same structural one of integrating and reconciling different pronouncements in the *Act*.

Logically, reasoning by negative inference is no more decisive here than it was when settling the rules about employers' unfair labour practices and a unions' solicitation rights. Reading provisions which recognize the Board's jurisdiction to alter bargaining units in specific circumstances, for example in jurisdictional disputes or on the sale of a business, as being exhaustive of the Board's powers is one way to interpret the statute, but it is not the only way. As well as supporting negative inferences, they could just as easily have been read positively. Rather than defining the limit of where the Board can redesign bargaining units, they could have been read as evidence of an intention on the

⁷² *Labour Relations Act*, *supra* footnote 38, s.135.

⁷³ *Ibid.* s.69 (4).

⁷⁴ *Ibid.* s.99(7).

⁷⁵ In fact, in addition to its general power to set the rules which determine which units are appropriate for bargaining, the Board also has a very sweeping power under section 114 to reconsider any of its decisions any time it thinks fit.

part of the legislature to recognize the Board's general authority to rearrange bargaining units under its residual power with respect to appropriate bargaining structures. Rather than representing limits on the Board's general authority to determine when units are appropriate for bargaining and when they are not, these provisions can be regarded as affirmations of the Board's inherent powers over the definition of bargaining units.⁷⁶

Indeed, if it had been analyzing its powers in terms of the larger purposes of the *Act*, that is the interpretation it would have favoured. Notwithstanding the Board's claims to the contrary, joint bargaining structures work to the advantage of both full-time and part-time workers. By avoiding their vulnerability to being "whipsawed", the bargaining power of both groups will be enhanced and the working conditions they will be able to negotiate will be fairer and more just.

As the casebook follows the life cycle of a collective bargaining relationship, the readers next see the Ontario Board succumb to reasoning by negative implication in the bargaining phase when it confronts the broad statutory formula of "bargaining in good faith and making every reasonable effort to make a collective agreement" and has to transform it into very concrete rules. In fact, there are at least two major rules of collective bargaining law that are the product of reasoning by negative implication. One relates to the conduct of the parties when they are negotiating a collective agreement, and the other to the powers of the Board when the negotiators fail to meet the standards of the *Act*. As noted above, labour boards have generally agreed, until recently, that the intention of legislators has been to refrain from imposing any substantive standards or criteria of bargaining that the parties must meet and to deny labour boards the power to impose terms they think are just and reasonable on those occasions when the rules of bargaining have been broken.

The Ontario Board has always said that the duty to bargain recognized by the *Act* has nothing to say about the reasonableness or the substance of the parties' demands.⁷⁷ Once again, the rationale that is offered for the rule is a textual one and the arguments used to justify the Board's position are of a contextual or structural kind. According to the Board, to imply some minimum standard of substantive reasonableness into the rules of bargaining would cast it in the role of an "interest arbitrator." It would charge it with the function of imposing substantive conditions of employment on the parties and that, according to the Board, would be inconsistent with the approach of the labour relations system which the statute puts in place. Labour Relations Acts, unlike standards legislation, are all about procedure and equal bargaining power, not imposing

⁷⁶ The criteria that all labour boards rely on in exercising their general power to define bargaining units are catalogued in *Insurance Company of British Columbia and C.U.P.E.*, [1974] 1 C.L.R.B.R. 403 (B.C.).

⁷⁷ Unless, of course, the employer's bargaining position can be said to provide evidence of its anti-union intent. In the same way the Board has indicated that it can infer an anti-union animus from actions taken by an employer that are "inherently destructive" of a union's organizing drive, (see e.g. *International Wallcoverings*, *supra* footnote 40) it can find an employer to have engaged in mere "surface bargaining" without any intention of signing a collective agreement just from the extreme nature of its position.

substantive rules on the parties. The very essence of these Acts is a system of voluntarism and pluralism; a system of *free* collective bargaining; or so it is said.

This argument is reinforced by reference to the fact that when legislatures have intended labour boards to act in the capacity of an interest arbitrator they have done so explicitly. Thus, reference is made to special provisions, governing the situation of parties negotiating first agreements where it is recognized such exceptional powers may be required. The existence of such special sections, even in statutes in other jurisdictions, can support an "*expressio unius*" type of argument that in no other circumstances was it intended that labour boards should be able to interfere with the free will of the parties and the forces of the market to insist on the inclusion of some specific term or other in a collective agreement.⁷⁸

The force of this line of reasoning is no more powerful here than it was in justifying any of the other rules developed by the Board in the earlier phases of the bargaining relationship. Once again drawing a negative inference can not carry the day either as a matter of logical deduction or as an empirical description of the legislators' intent. And again this analytical approach inhibits the basic objectives of the *Act*.

Empirically, the bright line drawn between form and substance is entirely one of the Board's own making. There is no evidence any legislature ever contemplated let alone endorsed it. Logically the Board's refusal to evaluate the substantive proposals of the parties, in determining whether both sides are "bargaining in good faith and making every reasonable effort to effect a collective agreement" "can not be sustained. It draws too sharp a distinction between self interest and bad faith and this leads to arbitrary results. As Brian Langille and Patrick Macklem have explained, the Board's refusal to evaluate the content of an employer's bargaining position means powerful employers can rationally develop bargaining strategies which will effectively undermine the status of the union."⁷⁹ As a practical matter it leaves a very large gap in the *Act*. Only employers that act irrationally and practically declare their hostility towards the union will be impugned. Employers who are powerful enough to insist on the *status quo* are allowed to do as they please even though it means that no real bargaining takes place. Like the rule that employers need not disclose important matters of policy until after a final decision had been made, the overriding objectives of worker autonomy and employee participation which the system is designed to promote, are completely undermined by such a rule.

Allowing labour boards (i) to rule that it is a violation of the *Act* to reject terms and conditions of employment that are widely accepted as standard, and

⁷⁸ *United Steelworkers of America and Radio Shack*, [1980] 1 C.L.R.B.R. 99.

⁷⁹ B.A. Langille and P. Macklem, "Beyond Belief: Labour Law's Duty to Bargain" (1988) 13 Queen's L.J. 62. In its latest pronouncement on this issue, the Supreme Court of Canada has shown some sympathy for the idea that Labour Boards should concern themselves with the substance as well as the form of bargaining; see *Royal Oak Mines v. Canada* (1996) 193 N.R. 81 (S.C.C.).

(ii) to impose an agreement on the parties whenever an employer has not bargained in good faith, does not turn a labour board into an interest arbitrator; nor does it alter the whole character of the *Act*. Once again, a specific grant of power like first contract arbitration must be reconciled with a residual power to measure the substantive fairness of proposals put forward in bargaining and a remedial power to fix the conditions of employment when the purposes of the *Act* will be served by such a ruling. In the same way that a specific direction that unions can solicit prospective members on company property when they live on the same premises as they work can be read as providing an absolute right in the circumstances to which it applies, first contract provisions can also be read as marking off situations in which parties have an automatic right to have the Board settle the terms of their collective agreement, in contrast with workers in more mature relationships who must persuade the Board, on the facts of their case, that circumstances and the purposes of the *Act* would be furthered by a similar order.

After the cases on the duty to bargain, the casebook directs the students to the issue of industrial conflict. Although this is a phase of the collective bargaining relationship that has traditionally been regulated by the courts, labour boards have always exercised some jurisdiction defining what constitutes strike activity and regulating when strikes can be used to help resolve an issue of employer-employee relations. Few students are surprised to discover that although their role has not been pro active, even here the idea of identifying the intention of the lawmakers by drawing negative implications from the text has worked its hypnotic effect.

According to the Ontario Board a strike is a concerted activity by two or more people that has the effect of restricting or limiting output no matter what the purpose of that activity might be. The Board has embraced this "objective" definition of a strike because the Ontario *Act* does not make reference to a particular purpose, such as "compelling their employer to agree to terms and conditions of employment", as statutes in other jurisdictions have done.⁸⁰ Once again the Ontario Board purports to draw logical conclusions from the wording of the text on a transjurisdictional scale. Because other jurisdictions have expressly made the motivations of strikers essential characteristics of strike activity, it is assumed Ontario did not intend to embrace a subjective definition when it did not make any reference to the specific purposes of those individuals who were withholding their labour.

This assumption of legislative intent is, like all of the others we have seen, without a solid, empirical foundation. Indeed on the question of whether workers who respect the picket lines of others, lawfully on strike, for the purpose of expressing their solidarity should themselves be regarded as being on strike, there is some evidence that the Government of the day did not intend such activity to fall within the definition of that term.⁸¹ In addition, even though the

⁸⁰ See e.g. *British Columbia Hydro and Power Authority*, [1976] 2 C.L.R.B.R. 410; *International Longshoremen's v. Maritime Employers' Association* [1979] 1 S.C.R. 120.

⁸¹ See Beatty, *supra* footnote 60.

Ontario Act did not make the single purpose of "compelling one's employer to agree to certain terms of employment" an essential characteristic of being on strike, it did use the words "*designed* to restrict or limit output" which expressly connotes having a purpose or a plan.

As well as lacking both an empirical and a textual base, the "objective definition" that the Ontario Board decreed seems quite at odds with the Legislature's express commitment to permit striking employees to solicit the support of others when they go out on a lawful strike.⁸² As noted above, if those who respect picket lines and calls for boycotts are themselves deemed to be on strike, and so liable to the penalties prescribed by the Act or by the arbitral jurisprudence, few lawful primary site picket lines will have their desired effect. Sweeping all concerted activity into the definition of a strike has the perverse effect of frustrating, not promoting, the overriding objective of the Act to enhance the power of people to define the rules which govern their working lives. It undercuts the most important tool workers have at their disposal to ensure that their participation in the organization of the workplace is effective.

The Possibility of Labour Law

By the time the materials have laid out the law for the whole lifecycle of a collective bargaining relationship, few students are strongly inclined to defend the record of the experts. Explanations and excuses are possible; justification is not. No doubt, especially in their formative years, all labour boards, including Ontario's, felt acutely the resistance of the parties (especially the employers) to their developing a bold and creative jurisprudence of collective bargaining law. Still, the cases and materials show that all too frequently the justification that is offered for a rule of collective bargaining law is very weak, even on its own terms. Empirically, logically, and normatively there is no basis for the claim that the most important rules have been settled by the intention of the legislators. In most instances the lawmakers never turned their minds to the specific issues which labour boards have been asked to resolve and if they had they would, or should have rejected the motivation which the experts imputed to them.

Most students are concerned by the persistent attribution to legislatures of an intention to act irrationally and inconsistently, in contravention of basic legal norms and the underlying values and objectives which the system is designed to promote. The rule which denies union organizers access to employees on company premises at times and in places where the employees are recognized to have a right to discuss and solicit membership in the union imputes to the legislature an intention to treat employees and organizers differently even when there is no reason to do so. On the Board's bargaining rules only irrational, unsophisticated employers will be caught while those who coolly make sure all planning decisions are finalized only after the bargaining is over and constantly

⁸² *Labour Relations Act*, *supra* footnote 38, s.83(2).

⁸³ *Canada Post Corp.* (1987), 15 C.L.R.B.R. (N.S.) 289 (C.L.R.B.).

profess a willingness to sign a collective agreement no self-respecting union could accept, will get off scot free. And a rule which says that workers who respect picket lines are themselves engaged in unlawful concerted activity seems inconsistent with the legislature's recognition that lawful strikes and associated activities like picket lines are the most effective ways employees can influence the bargaining process and participate in the formulation of the rules which govern their lives at work.

In addition to generating rules which impute to the legislature an intention to act inconsistently, many of the doctrines developed by the Ontario Board also entail the unnecessary sacrifice of workers' autonomy and the opportunity to promote their interests through a regime of collective decision making. Limiting unfair labour practices to behaviour which is motivated by an unlawful intention to frustrate the purposes of the *Act* means that in all other circumstances the interests of the workers can be sacrificed even when there is little, if any, offsetting benefit to the employer or community at large. Freeing an employer from an obligation to apprise its workers of plans it is considering unless and until a firm decision is made, makes it impossible for workers to participate in the operation of the business except in reaction to decisions already taken. Similarly, making part-time and full-time employees bargain in separate units reduces the bargaining power of both groups in fixing the conditions on which they work.

As the jurisprudence builds up, some students are inclined to give up on the integrity and legitimacy of law and legal reasoning altogether. Frequently they, and even members of the casebook group, become so disillusioned with the experts that they come to dismiss the idea that law possesses an inherent objectivity and determinacy as a fiction. Seeing administrators mimic judges, both in reasoning and in result, persuades many to give up on adjudication and the law. The temptation is to turn to the other methods of reconciling interpersonal relations and think of ways that decision-making in the marketplace and politics can be done more fairly; in ways which are more sensitive to the overarching values of personal autonomy, distributive justice and the well being of the community at large.

While it is easy to understand the sense of disappointment felt after reviewing the major rules of collective bargaining law, the temptation to nihilism and the collapsing of all distinctions between politics and the law is one I encourage my students to resist. It is too extreme, and it is as unwarranted for the sceptics to claim that the record of almost a half century of administrative regulation shows there is no legitimacy to law and adjudication as a method of social ordering as it is for apologists to pretend the policy makers and analysts were just giving effect to legislative intent. The fact is, by showing the apologists the mistakes that have been made in the development of the rules of collective bargaining, commentators like Macklem, Langille and Davis have made the case for the integrity and possibility of law. Pointing out where someone has made a mistake, unavoidably entails suggesting to them how to do it right.

In their critiques, academic commentators have not been content with showing where the experts went wrong. They have tried to explain that both logic and the underlying values on which the system is based require rules that are exactly the opposite of those that the Board enforced. It is a central part of the writing of commentators like Davis, Langille and Macklem, that if the intentions of the lawmakers, and the rules of collective bargaining, were deduced from the overriding purposes of the legislation and were made to conform with all of the basic values the system was created to support, the law of organizing, bargaining and striking would look very different.

It is true that in many of their rulings members of the Ontario Board have argued that in addition to respecting the intention of the lawmaker, their decisions in fact did give effect to the overriding purposes of the *Act*. Reference to the basic objectives and underlying values of the legislation do figure in the jurisprudence that has been written by the Ontario Board. In fact, however, in all of the examples considered above, the rule that the Board devised to reconcile the interests of employers and employees were generally decidedly prejudicial to the latter. Excluding supervisors, interdicting only deliberate initiatives by employers to frustrate a union, limiting the solicitation rights of unions and employees, minimizing the bargaining obligations managers must meet and expanding the potential liability of unlawful strikes has created a jurisprudence which favours the interests of employers and devotes itself exclusively to the value of efficiency and community welfare. These rules have done nothing for workers' autonomy and distributive justice – the other two foundational values on which the whole system is based.

Had the Ontario Board grounded the intentions of lawmakers in the larger values and objectives the system is designed to serve, it would have formulated rules which would have: (1) prohibited employers from engaging in behaviour which seriously prejudices the employees' opportunity to opt for a system of collective labour relations, even if their purposes were benign; (2) allowed unions and their organizers to have the opportunity to meet with workers in off-duty hours in the non-working parts of the enterprise; (3) required employers to divulge all relevant information about future contingencies during the course of negotiations and refrain from making proposals which differ significantly from industry standards; and (4) allowed supervisory employees to enjoy the full benefit and protection of the *Act*. Reasoning deductively and developing the law of collective bargaining from the overriding purposes of the *Act* would also have meant workers could refuse to cross a legal picket line or handle struck work without the fear of being sanctioned for having participated in an unlawful strike.

To conclude that law is inherently subjective and incapable of generating objective and just results on the basis of the jurisprudence that has been written by the Ontario Board is to miss this central theme in the writing of the academic commentators. Their story is that whatever mistakes have been made by labour relations experts are examples of human error, not evidence of something inherently defective in the law. It is an essential part of this genre of critical commentary to show that if the experts had restricted their search for legislative

intent to the overriding objectives of the *Act*, the rules of collective bargaining law would promote and support workers' autonomy and principles of justice much more than they do today.

Not only does the sceptical perspective miss the central thrust of much of the critical commentary on the development of collective bargaining law, it also fails to take account of other parts of this jurisprudence that have been written with the intention of promoting the objectives of personal autonomy, social welfare and distributive justice which the system is designed to serve. Imputing an intention to the legislature by a process of negative inferences has been the usual method the Ontario Board has used to formulate the rules of collective bargaining but it has not been employed to develop the law in every case. Many of the rules fixed by labour boards in other parts of the country have been justified as solutions which directly enhanced the autonomy and well-being of workers.

For example, the Canada Labour Relations Board does not limit the rules of unfair labour practices to intentional wrongdoing,⁸³ nor does it segregate full-time and part-time workers in separate bargaining units.⁸⁴ Both the Canada and British Columbia Boards have developed rules to define what bargaining units are appropriate in industries where employers operate out of multiple locations, for example retail stores and banks, which have been sensitive to ensuring that collective bargaining has a meaningful opportunity to get off the ground.⁸⁵ As well, supplementary rules, like the *Amon principle*, have been embraced by some boards to allow them to aggregate bargaining units where it furthers the purposes of the *Act*.⁸⁶ The way the Canada Labour Relations Board ruled that employers could not offer strike replacements permanent employment provides another example of how some rules of collective bargaining law have been derived from and give expression to all of the values and objectives that our collective bargaining legislation is designed to promote.⁸⁷ On occasion even the Ontario Board has relied on a process of reasoning from first principles. The rules that it originally developed to define the status of a trade union, for example, were designed to ensure people have as much freedom to choose whether they want a union as possible.⁸⁸

Labour relations experts also seem to be more inclined to reason deductively, from first principles, when they go to work wearing a different hat. When they

⁸⁴ *CHNQ* 1975 di 16. The B.C. Board has also adopted a practice of joining full time and part time workers in a single unit; see *Edoco Healey Technical Products Ltd* (1980), 1 Can. L.R.B.R. 570.

⁸⁵ See e.g. *S.O.R.W.U.C. and Canadian Imperial Bank of Commerce*, [1977] 2 C.L.R.B.R. 94 (C.L.R.B.); *C.N.T.U. and National Bank of Canada* (1986), 11 C.L.R.B.R. (N.S.) 257; cf. *National Trust*, *supra* footnote 52.

⁸⁶ See e.g. *Amon Investments Ltd.*, [1978] B.C.L.R.B. 49.

⁸⁷ *Eastern Provincial Airways Ltd. and Canadian Airline Pilots Association* (1983), 3 C.L.R.B.R. (N.S.) 75; 5 C.L.R.B.R. (N.S.) 368 (C.L.R.B.).

⁸⁸ See e.g. *London Association of Painting and Decorating Journeymen v. Gaymer and Oultram* (1954), C.L.L.C. 17,073 (O.L.R.B.); *I.U.O.E. and Metropolitan Life Insurance Co.* (1967), 67 C.L.L.C., 16,026 (O.L.R.B.) rev'd [1970] S.C.R. 425.

are fleshing out the meaning of collective agreements as arbitrators, many of the experts have tended to be more sympathetic to the idea of law as a set of rules designed to promote values of fairness and autonomy as much as efficiency and productivity. Although, early on, many arbitrators with judicial experience favoured the same intention-based, categorical style of reasoning they used to develop the common law of employment and some of the most important awards like *Russelsteel* invoked the "voluntaristic" approach, the fact is that, over time, arbitrators have developed a series of doctrines that are based on very basic precepts of justice and fairness and which can be enforced even in spite of the parties apparent agreement to the contrary. Some, like the requirement that plant rules that are established by management must satisfy a basic standard of reasonableness,⁸⁹ or the rule that a union must discharge its responsibilities to give effect to the spirit and not just the letter of the agreement,⁹⁰ or the doctrine of progressive discipline⁹¹ are long standing traditions in the common law of the shop. Others like the doctrine of estoppel or the duty of fairness and reasonable contract administration are more recent vintage.⁹² Whatever their origin, these rules of arbitral law are not only not based on the will of the parties, but are sometimes enforced despite what the parties had agreed.

In the seminal case of *Re Canadian National Railway*⁹³ the employer was ordered, on the basis of the principle of estoppel, to pay its employees a sick pay benefit from the first day of illness even though the agreement said no payment would be made until the fourth day of absence unless the employee was hospitalized. Similarly in the leading case of *Council of Printing Industries*⁹⁴ the arbitrator required the employer to consider the seniority of the people it was considering for a "permanent classification" even though the seniority clause did not include such decisions in the long list of situations to which it applied. Again, in *Wardair*,⁹⁵ the employer was ordered to allow its male flight attendants to wear the same kinds of earrings that were worn by its female staff

⁸⁹ See e.g. *K.V.P. Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson) and see generally *Brown and Beatty*, *supra* footnote 46.

⁹⁰ *Re Polymer Corp. v. Oil, Chemical and Atomic Workers Union* (1958), 10 L.A.C. 31 (Laskin); (1962), 33 D.L.R. (2d) 124 (S.C.C.).

⁹¹ *Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356; *North York General Hospital* (1973), 5 L.A.C. (2d) 45; see generally *Brown and Beatty*, *supra* footnote 46 at 7:4422.

⁹² See e.g. *Canadian National Railway v. Beatty* (1981), 34 O.R. (2d) 385 (Div. Ct.); *Re Council of Printing Industries of Canada and Toronto Printing and Assistants Union* (1983), 149 D.L.R. (3d) 53 (Ont. C.A.); *CUPE and Metropolitan Toronto (Lights and Sirens)* (1990), 74 O.R. (2d) 239 (C.A.) and see generally D. Beatty, "The Role of the Arbitrator – A Liberal Version" (1984) 34 U.T.L.J. 136 at 163-164.

⁹³ *Ibid.*

⁹⁴ *Supra* footnote 92. The award in this case provides a particularly dramatic example of a labour relations expert showing much more sympathy for a process of reasoning from first principles and eschewing any use of mechanical rules of textual interpretation (such as the "expressio unius" rule) when they are enforcing the terms of a collective agreement than they were giving effect to the legislature's pronouncements in the Act (see e.g. *Porcupine Mines*, *supra* footnote 39; *International Wallcovering*, *supra* footnote 40.

⁹⁵ (1988), 63 O.R. (2d) 471 (Div. Ct.).

even though that was contrary to what the written rules said. In none of these cases were the arbitrators tempted to rely on structural rules of textual exegesis like *expressio unius* to find the proper solution to the case.

By highlighting cases in which labour boards and arbitrators have developed rules to resolve disputes that are as sensitive to the values of personal autonomy and distributive justice as they are to efficiency and the well being of the community as a whole, the casebook provides strong empirical evidence and support for those who might otherwise be inclined to succumb to a profound scepticism about the law. However deficient the experts' record is overall, part of the jurisprudence they have created does prove the possibility and the integrity of law. It confirms that when they reason from foundational values and first principles, rather than search for a mythical intent, labour relations experts can do as well or better than the courts.

In addition to providing comfort to those who are inclined to be sceptical about the independence and legitimacy of the law, these cases in which labour boards and arbitrators have developed doctrines and rules which promote the interests and ambitions people pursue in the places they work, should also allay the concern of those who fear the force of the law. Within the casebook group there have always been pluralists and populists who have argued that the rules of the workplace are better settled by those who are governed by them rather than being imposed from above. For them, rules and regulations that are resolved in procedures that permit effective participation by everyone who is affected by them are more democratic and therefore preferable to those emanating from an "eminent, wise persons" group, playing the role of labour relations physicians, telling the parties what they think is best for them.⁹⁶

The decisions in which arbitrators have developed doctrines of reasonableness, estoppel, progressive discipline, and fairness show that law is not something which is external or imposed from the outside on the parties. If the cases are read carefully, one can see that the principles that arbitrators have developed in their supervision of collective agreements are actually the same as those which the commentators have criticized the Ontario Board for failing to apply in enforcing the *Labour Relations Act*. Moreover, as the materials at the end of the casebook are intended to illustrate, they are also the same principles that are used by the courts in the enforcement of the *Charter of Rights* and by administrative tribunals set up to hear human rights complaints. Rather than transforming adjudicators into omnipotent sovereigns with the power to impose whatever rule they think will serve the parties best, law's mandate is structured and focused. Whether it is applied by arbitrators, labour boards or the courts, law consists of very few and very particular standards of rationality and consistency which lawmakers, whether in politics or in the marketplace, are required to meet.

⁹⁶ The model of an arbitrator as a labour relations physician is developed and debunked by P. Weiler in his celebrated essay "The Role of the Labour Arbitrator: Alternative Versions" (1969) 19 U.T.L.J. 16.

When arbitrators insist that management must exercise its discretionary powers reasonably and fairly, or invoke doctrines like estoppel or progressive discipline, it is always the same principles, of either consistency (equality) or rationality (necessity), which do all the work. Progressive discipline, for example, is a doctrine built on and giving expression to a maximization principle which lies at the heart of Rawls's theory of justice and the economist's test of paretian efficiency.⁹⁷ The principle requires managers to maximize the personal autonomy and well-being of workers by choosing the least drastic penalty which will accomplish its objective of an efficient and highly disciplined workforce. Like the constitutional test of minimal impairment,⁹⁸ or the definition of reasonable accommodation in human rights law,⁹⁹ it insists that where an employer's interests can be accomplished by a number of different sanctions, it must choose the one that accommodates the employee's interest the most. It must choose the least drastic sanction, – warning, suspension, fine or termination – that will do the trick.

Rules that impose duties on employers to exercise their managerial prerogatives fairly, and in a way which respects basic common law rules like estoppel, operate in exactly the same way. In ruling that management had exercised its discretion unfairly in *Metro Toronto* and *Wardair*, the arbitrators were enforcing exactly the same standard that underlies the doctrine of progressive discipline. On the facts of both cases management did not produce any evidence to show that allowing their employees to drive, in *Metro* and dress, in *Wardair* as they chose would adversely affect their interests in some way.

The doctrine of estoppel marks out yet another set of circumstances where the value of personal autonomy and the interests of workers in maintaining as much control of their lives as possible trumps claims of voluntarism and the agreement of the parties. Even when a collective agreement explicitly gives management the right to act in a certain way, (in *Canadian National Railways* to withhold payment from employees during the first three days they were absent from work on account of sickness), if the employees have been led to believe such powers would not be used and have relied on that belief, then the law will insist management must respect that reliance and the autonomy of the worker.

Maximizing the most basic values and objectives of the system, like workers' autonomy and well-being, is one way of describing the principle or rule of law that is enforced in cases like these. Law insists that those with the legal authority to make decisions about the lives of others exercise that power

⁹⁷ See Rawls, *supra* footnote 5.

⁹⁸ See D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995). And see Arthurs, *Labour law without the state*, (1996) 46 U.T.L.J. 1.

⁹⁹ *Renaud v. Board of Education of Central Okanagan*, [1992] 2 S.C.R. 970; *Central Alberta Dairy Pool v. Alberta Human Rights Comm.* [1990] 2 S.C.R. 489; *City of Saskatoon v. Saskatchewan Human Rights Comm.* [1989] 2 S.C.R. 1297.). It should be noted that in some cases where a ruling is made that an employer must bear some (but not a disproportionate amount of) hardship (cost) in accommodating the interest of an employee, it is the principle of equality (proportionality) rather than necessity, which does most of the work.

by meeting a very simple duty of rationality or necessity. In addition, in many of these cases it is a principle of consistency or equality which does the work. Fairness in the *Wardair* case meant male flight attendants were entitled to wear the same costumes as female attendants so long as the employer was unable to prove any adverse effect on its business. Similarly, when arbitrators decide whether a less severe sanction would adequately serve an employer's interests, they look to see how other employees have been treated elsewhere and in the past. Even an estoppel case like *Canadian National Railways* can be explained in terms of requiring employers to exercise their powers consistently over time.

Rationality and consistency are also precisely the qualities that the academic commentators have been saying are lacking from the law of collective bargaining that the Ontario Board has written. A rule that denies union officials access to those parts of an employer's premises where the employees are permitted to discuss the pros and cons of unionization fails both standards by treating the organizers differently from the organized even though no independent business interest is furthered thereby. Langille and Macklem's writing on the rules of bargaining emphasize that the doctrines developed by the Ontario Board are based on arbitrary distinctions and impose restraints on rather than encourage employee participation in fixing the rules that govern their lives. The Ontario Board's treatment of full-time and part-time workers, its characterization of sympathetic action as a strike, and its exemption of contracting out from the successor provisions of the *Act*¹⁰⁰ can be criticized on the same principles of rationality and consistency as well.

The idea that most if not all of the major rules of labour law can be reduced to norms of consistency and rationality is reinforced by other parts of the legal regime that are included in the casebook. Although the Supreme Court of Canada has been very reluctant to subject the rules of labour law to constitutional review, whenever that court has invalidated a law for violating the *Charter* it was because it could not meet the standards of consistency and/or rationality.¹⁰¹ Similarly, although human rights law uses different doctrinal labels like "bona fide occupational qualification" and "duty to accommodate" to describe its principle rules, the decisions of the tribunals and the courts are again based on standards of rationality and consistency in the end. The duty to accommodate imports the rationality standard of maximizing the interests of everyone affected by a rule and the discrimination principle – or similarly situated test – is just the equality standard by another name.¹⁰² The duty to accommodate in human rights law, like the doctrine of progressive discipline in the arbitrators' common law of the shop, requires employers to justify the way they have exercised their legal authority by showing there was no other policy instrument available to them to accomplish their purposes in a way that would allow

¹⁰⁰ *CUPW v. Canada Post and Nieman's Pharmacy* (1990), 4 C.L.R.B.R. (2d) 161; *Re Metropolitan Toronto Parking Inc.*, [1980] O.L.R.B. Rep. 193.

¹⁰¹ See Beatty, *supra* footnote 98.

¹⁰² On the conceptual identity between equality and discrimination, see D. Beatty, "The Canadian Conception of Equality" (1996) 46 U.T.L.J. (forthcoming).

workers more freedom to determine for themselves, for example, their schedules,¹⁰³ and the duration¹⁰⁴ of their work and/or that did not require them or other workers to bear a disproportionate ("undue") measure of hardship and/or cost.

Conclusion

If one reflects on the materials in the casebook as a whole, I think it tells a modest story about the law and how it can enhance the primary techniques (politics, negotiation) we use to regulate interpersonal relations. Law can not guarantee a just society either in a country at large or in the places people work but it can make a contribution to both. When it is resolutely enforced it can ensure that whenever anyone is given the power to exercise some authority over the lives of others they must exercise no more of it than is necessary to accomplish their purposes and never in a way that differs sharply with how that authority has been exercised elsewhere and in the past.

Defined in this way, law should be seen as being complementary to politics and markets. Neither voluntarists and pluralists, nor the sceptics have any reason to fear the rule of law when it is understood in this way. Law just ensures that whatever legal powers are recognized in those systems will be exercised rationally and in a way that is faithful to the overarching values and objectives they are designed to promote. The law assumes people are more or less free in politics and markets to formulate their own agendas and agreements. Subordinating both of these primary processes of social organization to the rule of law simply commits those who pursue their projects in the marketplace and legislative assemblies to do so rationally and with a measure of consistency.

Understood in this way, it is more likely that in future years, when today's students are asked to chair arbitration tribunals, and labour relations boards or are called to the Bench, they will not repeat the mistakes we, and those who have gone before us, have made in the past. If those who are in the vocation of teaching law are to avoid having to share responsibility for the failures and inequities of the current law with those who practice and administer it, we must be clear about how law and adjudication and legal reasoning operate to improve interpersonal relations in the places we work. To do anything less means that the great success of the casebook as a teaching device will unlikely ever reach beyond the classroom into the communities in which most people live and work.

¹⁰³ See e.g. *Central Alberta Dairy Pool v. Alberta Human Rights Comm.*; *Renaud v. Board of Education of Central Okanagan*, *supra* footnote 99. See also *Commission Scolaire...de Chambly v. Bergevin* ([1994] 2 S.C.R. 525.).

¹⁰⁴ *City of Saskatoon v. Sask. Human Rights Comm.*, *supra* footnote 99; *City of Moose Jaw v. Sask. Human Rights Comm.* [1989] 2 S.C.R. 1317.; see also *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103. and *Large v. Stratford (City)* (1995), 128 D.L.R. (4th) 193 (S.C.C.).