LABOUR LAW

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I. Two Recent Developments in Labour-Management Relations

Two reports completed in 1968 will shape the course of labour-management relations law in Canada for years to come. The late Ivan C. Rand submitted the Report of the Royal Commission Inquiry into Labour Disputes in Ontario (hereinafter referred to as "the Rand Report") to the Lieutenant-Governor in Council in August, and the Report of the Federal Task Force on Labour Relations (hereinafter called "the Task Force Report") was submitted to the Prime Minister of Canada in December, 1968. After inquiring into all facets of labour-management relations and assisted by the thoughts and wisdom of all interested parties, the commission and the task force have made determined attempts to find practical solutions in this troubled field of social and economic conflict.

There is a difference in the basic approach to a remedial solution in the two reports. The Rand Report, after a brief glance at the historical background in the United States and England, concludes:

> With such a parallel history in the leading industrial countries of Britain and the United States, it appears inevitable that with the "explosion" of population, the universal exposure to the spectrum of ideas and the surrender of populations to materialism, more, not less, regulation of labour as well as all civil relations is the *sine non qua*, the absolute necessity, of democratic government. The alternative is social anarchy and chaos, the reality of which we are witnessing today in different parts of the world. What that history, beyond serious doubt, establishes is the fact that the government of labour-management relations cannot be left to the uncontrolled action of the immediate parties to them. [1]

The major recommendation of this report is the establishment of an industrial tribunal empowered to regulate labour-management relations disputes in the province. Numerous other recommendations, dealing with the status of strikers, the hiring of replacements, the consequences for strikers who take other employment, ratification and approval of collective agreements, civil liability of unions for breaches of collective agreements, the internal affairs of trade unions are all secondary and, in most cases, are subject to the overriding jurisdiction of the all-powerful tribunal.

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[1] Report of the Royal Comm'n Inquiry into Labour Disputes 5-6 (Ontario 1968) [hereinafter cited as the Rand Report].

The Task Force Report, on the other hand, accepts "the foundations and essence of the present Canadian industrial relations system and the role of collective bargaining and trade unionism within that system. . . .[n]ot only because of its virtues, . . . but also because we see no alternative that is compatible with the heritage of western values and institutions . . . ." [2] Consequently the bulk of the recommendations of this report are intended to improve the form of the collective bargaining process rather than make any radical changes in labour-management relations. However, the report does recommend considerable changes in the form, tenure and jurisdiction of the Canada Labour Relations Board.

The role of government in our everyday affairs is growing and in recommending a powerful regulatory tribunal, composed of the most highly qualified men, with the same security of tenure as judges of the regular courts, the Rand Report would greatly augment the governmental role in labour-management relations. Besides its regulatory function, the tribunal would necessarily have wide investigative, advisory and legislative powers.

The Task Force Report is also concerned with the role of government. It remarks on the federal government as an employer, "as determiner of the legal framework within which collective bargaining takes place, as intervener in labour disputes, and as determiner of labour standards." [3] Particularly, it recommends that the Canada Department of Labour strengthen its work in the fields of research, education and information, and in the promotion of effective co-operation between federal and provincial officials and in the international sphere. Many of these roles, although very important, involve somewhat indirect government intervention. However, the increased powers recommended for the Canada Labour Relations Board and the creation of a Public Disputes Commission for the handling of "public interest disputes" envisages an important new role for direct governmental participation in Canadian industrial relations.

This article will attempt to analyze the legal machinery of direct governmental intervention. The following section will deal with some general principles upon which the role of law in Canada is predicated. Next, in section III, the functions of the major agencies of government will be outlined with particular reference to the regulatory agency. Finally, we will note how the government now seeks to attain its goal of industrial peace and the major innovations suggested in the Rand and the Task Force Reports.

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[2] REPORT OF THE FEDERAL TASK FORCE ON LABOUR RELATIONS 137 (1968) [hereinafter cited as the TASK FORCE REPORT]. The Task Force says that the "rule of law has much on its side. . . . The issue is not whether society will have a rule of law but what kind of law it will have. The ideal of freedom under the law—an important value judgment as to how society should be ordered—is a fundamental heritage of western society. But freedoms are not absolute; they cannot be and co-exist. They need channeling; and liberal democratic traditions have been accepted as the most appropriate means of making the important, sophisticated choices that determine the limits of freedom." *Id.* at 40.

[3] *Id.* at 199-215.

II. Some General Principles

Strikes and other forms of industrial unrest take their toll from all Canadians. Income is lost, the public is inconvenienced and often endangered, production is curtailed and Canada's competitive position in world markets is undermined due, in some degree, to such unrest. There is no panacea but a rule of labour-management relations law must prevail in Canada.

The objectives and functions of democratic government need continual examination and concise statement. Primarily, it must be recognized that the predominant objective of the government is to enhance the general welfare or, as might be otherwise expressed, to promote the public interest. This is axiomatic. The government does not exist for some intrinsic reason of its own or to further particular interests of special groups. In a democratic state, the general welfare must correspond to majority opinion; the majority opinion represents the collective will of the state, and the collective will is enforced by regulatory and service functions.[4]

The government of a democratic state must operate within the framework of law. It has basic ideals or goals, often expressed in the words freedom, justice and equality. Although these concepts have no consistently employed definition, it is submitted that they may be defined in an intelligent, embracive and simple way to provide guides for the formulation of institutions and the regulation of conduct in a democratic state. To these ends, freedom connotes that everyone has the privilege of doing as he pleases provided that he does not interfere with like privileges of others to do as they please. Thus a person may carry on trade or join any organization of his choice so long as he respects the rights of others to do likewise and, of course, in so doing does not infringe the law of the land. Used in this sense, freedom is only restricted by legislative decree or judicial determination in accordance with legal processes. The word "justice" generally connotes the idea that right, not might, is a supreme goal of government. A burning question today in labour-management relations is what is a "just" reward for the workers' efforts? Obviously, "justice" in this sense is not easily defined. There is certainly no general accepted criteria by which such reward can be measured, but it is a goal with which all functions of government should be concerned. "Equality" has many meanings.[5] For present pur-

[4] I think that this statement needs no elaboration. Every social order that is capable of consistent action may be regarded as an organization of the wishes of its members. A social order that can be rightly so called must rest on, and embody, the appetites and natural desires of a majority of the individuals that compose it. The name "social order" also implies that the wishes are disciplined and controlled in the interest of the group as a whole.

[5] It could be said that for practical application, its meanings are meaningless. For example, it is patently absurd to say that everyone is born equal; and the concept "equality of opportunity," although highly desirable, is too remote at present to be a guide for governmental action.

poses, it is used in the sense that no person or organization is above the law of the land and that every person and organization is responsible for its actions in accordance with the laws and in the regular courts of the land.

The usual classification of governmental functions is threefold: the legislature (which makes the law), the executive (which executes and administers the law) and the judiciary (which interprets and applies the law). However, this classification is much too simple for the purpose of analyzing a modern governmental structure. The processes of making, executing, interpreting and applying laws are not confined to separate bodies with exclusive legislative, executive or judicial functions. For example, subsidiary legislation is required more often than not in the effective administration of laws. Advisory opinions by subordinate agencies are often helpful and requisite for many reasons. Disputed interpretations and applications of laws may require the exercise of judicial functions by bodies other than the regular courts. Generally, multitudinous administrative acts of a legislative, executive and judicial nature are involved in the effective execution of laws.

A simple example can be used to illustrate the problem. The legislature enacts an Old Age Pension Act. Subsidiary legislation, such as regulations respecting age requirements, times of payment, methods of proof of age, are necessary in order to fill in the statute and to make it work. The legislature (and the higher executive) may wish to keep abreast of medical and other developments concerning our senior citizens, to study their psychological, social and economic problems and to seek answers to a host of related questions that are continually arising in this field. Investigators and research staff must collect and assess information, studies must be made and conclusions reached. Disputes between parties affected and administrators will invariably arise concerning the interpretation of laws and the discretion and actions of the officials administering them. As the regular courts do not have the staff, the expertise or the requisite procedure in many instances to deal with these questions, the judicial work will be done by a specially appointed body. Finally, a large group of people will be needed to perform various duties of an administrative nature; all relevant information must be obtained and much of the voluminous statistical data that is garnered from the various sources must be verified, recorded and kept up to date.

The functions of government are complex; they cannot be precisely defined and they overlap to a considerable extent. They have increased at a phenomenal rate during the past century. Their growing influence and pervasiveness now extend to every corner of social and economic life. They will continue to expand as more and more is expected from the central authority. The advent of more regulation in business, industry, transportation and communication, housing, mental and physical fitness and in many other areas is inevitable. Even the problems of education will necessarily become subject to governmental interference as the needs of money and

public interest dictate. The very complexity of the age demands concentration of social, economic and political forces on scales never before known in order to cope with the vast problems facing our times.

The increase in scope of governmental functions brings up difficulties in maintaining democratic principles. These functions must be kept under constant surveillance to conform their exercise with the concepts of freedom, justice and equality. In Canada, the legislature is virtually untrammelled. Within the constitutional framework, its power is plenary. It is mainly (although by no means exclusively) concerned with the principle of freedom, that is, with defining the bounds of lawful conduct within the state. The judiciary is concerned primarily (although not exclusively) with the interpretation of what is just. Individual justice is of paramount concern to the judiciary as well as the interpretation and application of statutes. The maintenance of a limited supervisory role over the functions of the other branches of government is also a function of our courts. Much concern is now expressed about the operation of the executive (administrative) function. Consequent on the great growth of governmental activity, it is becoming increasingly apparent that the discretionary powers of advising, legislating, adjudicating, and administering, resident in the executive arm, are very great. Some discretionary powers are inevitable, necessary and desirable but their exercise must be in accordance with the law and subject to control.

According to Montesquieu's doctrine of the separation of powers, good government rests on the strict separation of the functions of the component parts—the legislature, the executive and the judiciary—and freedom, justice and equality are only preserved if these functions are exercised by different authorities. The doctrine was never generally applicable to the British constitution, as Professor Jennings points out in his celebrated treatise; the differences in the functions are matters of degree only. [6] The functions should not be gauged or delimited by arbitrary standards but only by the criteria of good government, or, as so-well stated by Griffith and Street: "Thus the real argument is not whether the Executive, for example, is exercising legislative or judicial powers which properly belong to Parliament or the courts (for no kind of power belongs to any particular authority) but whether the power is being exercised by the authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action." [7]

The goal of governmental action in labour-management relations is the establishment of industrial peace. It is undeniable that industrial peace is in the public interest and that the government has the predominant role in attaining it. What is the role of each branch of government and what innovations are necessary to establish the machinery for the institution of a

[6] See I. JENNINGS, THE LAW AND THE CONSTITUTION 2 (1933), where it is stated: "He [Montesquieu] considered that the end of government was liberty, and that the only effective way to secure liberty was to distinguish the three functions which he mentions and to place the respective powers in separate hands."

[7] J. GRIFFITH & H. STREET, PRINCIPLES OF ADMINISTRATIVE LAW 16 (3d ed. 1963).

labour-management relations rule of law? It is now proposed to analyze, in a general way, the roles of the legislature, the judiciary and the executive in the Canadian governmental system.

III. The Legislature, Judiciary and Executive

1. *The Supremacy of the Legislature*

The doctrine of parliamentary supremacy is firmly entrenched in the Canadian governmental system. It connotes that the legislatures are the supreme law-making authorities in the state, that their legally enacted laws must be recognized by the courts, and that they are constituent assemblies with power to alter the constitution itself.

The doctrine is inherited from the United Kingdom where there are no limitations on the legislature except those inherent in the character of the citizen representatives, political expediency and practical considerations of enforcement of the laws.[8] Also, as the Canadian Constitution, the British North America Act of 1867,[9] is a British statute, the Imperial Parliament in London is as supreme in Canada as it is in the United Kingdom. This means that the Canadian Constitution can only be amended or repealed by an act of the Imperial Government.[10] The most practical effect of that doctrine in Canada is that the powers of the Canadian Parliament and the provincial legislatures, as defined within the ambit of the powers set forth in the British North America Act, are "as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow."[11]

The role of the legislature is to make laws for the governance and guidance of persons and organizations amenable to its jurisdiction. It is the great debating forum of the state. It employs committees and other fact-finding devices to obtain all available information on the question in issue, to receive the best advice possible and to determine the most satisfactory means to achieve the best results by statutory expression.

The process of enacting a law usually extends over a considerable period of time.[12] A law is sponsored by the government or by a private member.

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[8] Abstract declarations of rights of citizens are virtually useless unless there exists the will and the means to make them effective. Although in Great Britain, history is replete with examples that clearly show that the will (the basic desires and determination of the people) and the means (the instruments of government) exist, the British have not found it necessary to put them in written form. Other countries, however, may not be so fortunate. Declarations and other promulgated standards of governmental conduct may be invaluable to stimulate the will of the people and to provide the means of attaining them.

[9] 30 & 31 Vict., c. 3 (1867).

[10] Of course, only because Canadians have not seen fit to change the legal situation.

[11] Hodge v. The Queen, 9 App. Cas. 117, at 132 (P.C. 1883).

[12] *See generally*, Driedger, *The Preparation of Legislation*, 31 Can. B. Rev. 33 (1953).

Usually the public becomes aware of the proposed legislation when it is announced in the Speech from the Throne, or by the government on some other occasion. A statute has its beginning for most people when it is introduced in the legislature. However, there is much preliminary work. Policy must be ironed out, and a draft bill prepared. The completion of the legislation involves such separate steps as the preparation of the bill, the introduction of the proposed draft into one of the two Houses of the legislature, the reference of the draft to a committee, the discussion and revision of the draft by the committee, its introduction on the floor of the House, debate on the bill in the House, the signature and certification of the clerk, the repetition of these steps in the other House, the signature of the Governor-General or Lieutenant-Governor as the case may be, and finally publication.

This extremely formal and lengthy process is geared to test the efficacy and acceptability of the proposed legislation. When it becomes effective, it will represent the desires of the collective will but individual injustices are inevitable. These will be dealt with as they arise from time to time within the general framework or policy as laid down in the enactment by the legislature.

2. *Does the Judiciary Make the Law?*

The main function of the judicial arm of government is to interpret and apply the law.[13] To impartially fulfil these duties it is a fundamental principle that judges be completely divorced from and independent of the other branches of government. A considerable degree of independence of judges in the British judicial system is achieved by the assurance of security of tenure, income and personal immunity for official acts.[14] It is mainly because of this independence that the British judiciary has built through the centuries an enviable reputation as the protector of individual rights[15] and, by its inherent power to interpret statutes and apply the common law, as the upholders of the rule of law.[16]

In carrying out their functions, Canadian judges recognize the supremacy of the parliamentary enactment[17] and the hallowed principle of stare decisis. The former limitation on the judicial function is the result of the parliamentary

[13] *But* I. JENNINGS, THE LAW AND THE CONSTITUTION ch. 1 (1933), clearly explains the lack of a firm distinction between the legislative, executive (administrative) and judicial functions.

[14] Although appointment is still associated with political association of the appointee.

[15] See Laskin, *An Inquiry into the Diefenbaker Bill of Rights*, 37 CAN. B. REV. 77 (1959), for particular considerations of the Canadian judiciary in this respect.

[16] That is, in the sense of defining the limits of governmental action, particularly that of the executive.

[17] However, the application of the principle is limited in Canada by two facts. First, the Canadian Constitution is in statutory form, and the judiciary is charged with interpreting this fundamental law from which all governmental rights and powers are derived. Second, the legislation of Parliament and of the provincial legislatures is only valid if enacted pursuant to powers granted to them in the Constitution.

victory advocating the supremacy of the executive power of the King in the seventeenth century and the latter has been a firmly ingrained principle of judicial method for centuries. The force and effect of these limitations are questionable. No statute is perfect and inevitably the judge must interpret it. By choosing between different principles of interpretation and by the construction of words, application of techniques and the use of presumptions, he has considerable latitude in determining the force and effect of the statute. Likewise, judges have a number of choices of precedents, that is, principles extracted from previously settled analogous cases to apply in the particular case before the court.

Canadian courts have been dependent on English precedents for a long time. Up to the end of the first half of this century, the rigor of the doctrine of stare decisis and the idea of legislative supremacy continued to produce a mechanical application of the law.[18] However, discerning students of Canadian law have noted a change in the judicial attitude since this time. Speaking of the period after 1949, Dr. Read states: "Some of the abler judges in the Canadian provinces have shown a realization of the possibilities of a creative role and a quickening self-reliance in adjudication since appeals to the Privy Council were abolished, and have made deliberate departures from the course previously chartered by their own decisions and those made in England."[19]

Although it is generally stated that the judiciary interprets and applies the law, there is also the question of whether the courts should involve themselves in making the law, or if one concedes that they are already involved in this process the question then arises as to how far should they go.[20] It is not intended here to reopen the hoary discussion surrounding these questions and their attempted answers. It is sufficient to say that those who adhere to the "discovered law" doctrine and would apply a literal interpretation to the doctrine of separation of powers, which means that judges are mere automatic appliers of the law, have been rightly discredited. Judicial legislation may be secondary and incidental but one should not overlook its importance. All laws oscillate between the demands for certainty, which require authoritative and reliable guidance by rule, and the demands of justice, which require that the solution of the individual case should be equitable and conform to current social and economic ideals and conceptions of justice.

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[18] See Read, *The Judicial Process in Common Law Canada*, 37 CAN. B. REV. 265 (1959).

[19] *Id.*, at 289; Friedmann, *Stare Decisis at Common Law and under the Civil Code of Quebec*, 31 CAN. B. REV. 723, at 728 (1953), finds that: "A number of recent decisions show an increasing independence, not only towards English precedent, but towards earlier decisions of the same court, or of Canadian courts of co-ordinate jurisdiction." More recently, see MacGuigan, *Precedent and Policy in the Supreme Court*, 45 CAN. B. REV. 627, at 658 (1967), writes that: "In the light of the abandonment by the House of Lords of absolute *stare decisis*, it is now inconceivable that a rigid doctrine of precedent will retain sway in Canada."

[20] *See* Dr. MacGuigan's remarks, *supra* note 19, at 660-65, on these points.

Thus in applying precedents or where no precedents exist, there must be a degree of judicial legislation. [21]

But the process of judicial legislation is controlled by several important practices. A court will only lay down a norm in respect of a factual situation which is presented to it for decision. [22] If the norm is broader than necessary to settle the dispute, it will be dicta, and subsequent courts will not be bound to follow it. If there is no precedent on point, the judiciary is similarly confined in its selection of new norms. The judge must reason from the closest analogies and derive his results as far as possible from doctrines and policies which have been declared by statute and settled by the cases. [23]

In result, the opinion is offered that the Canadian judiciary should be expected only to legislate incidentally. It is divorced from policy decisions—decisions that promulgate new principles of social and economic action. The formulation of such principles demands much expertise, procedure flexibility, relaxation of old methods and concepts and, perhaps above all, extensive investigation.

3. *The Role of the Executive*

The actions of the executive branch of government go far beyond the execution of laws made by the legislature. The executive is the mainspring of the government. It provides the leadership and "runs the vast household" of the modern state. To perform adequately its duties, the executive must have knowledge of the range and objectives of all enterprises and activities carried on within and outside the state. By its concern with the execution of law, it gains a peculiar knowledge that is not available to the

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[21] Mr. Justice Holmes (dissenting on other matters) said in Southern Pacific Co. v. Jensen, 244 U.S. 205, at 221 (1917): "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." And in Stack v. New York R.R., 177 Mass. 155, at 158 (1900) the same judge, speaking for the court, said: "But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practices of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right." Another famous American jurist, the late Mr. Justice Frankfurter stated in Sherrer v. Sherrer, 334 U.S. 343, at 365-66 (1948): "Courts are not equipped to pursue the paths for discovering wise policy. A court is confined within the bounds of a particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution."

[22] Because our judicial proceedings, with minor exceptions, are conducted on an adversary basis.

[23] See a masterly treatment of this involved topic by Lederman, *The Common Law System in Canada, in* CANADIAN JURISPRUDENCE 34, particularly at 66-70 (E. McWhinney ed. 1958) and comments in this regard by Read, *The Judicial Process in Canada*, 37 CAN. B. REV. 265, at 277 (1959). As to judicial legislation in the field of constitutional law, see McWhinney, *Federal Supreme Courts and Constitutional Review*, 45 CAN. B. REV. 578 (1967).

legislature or to the judiciary. These latter branches of government are, as Professor Corry states, "the instruments of constitutionalizing"[24] the acts of the executive. It is primarily the executive that must accord the legislative act with the pulse beat of the people and organizations within the state.

Who comprises the executive? No doubt the Prime Minister, members of his cabinet and senior civil servants are members of the executive. But the term has no precise meaning, and it is used here to include the vast number of administrative officials, public corporations, regulatory boards, licensing authorities, marketing agencies and other governmental bodies that determine the rights, duties, privileges, immunities and liabilities of ordinary citizens. These emanations of the government do more than execute the law of the land. In many instances, they make it, adjudicate on it and, after performing research and study, advise on it.

It is difficult to categorize these executive bodies and no detailed examination of them will be made here. Since the 1930's the government has shown interest in governing by means of the so-called "public corporation," and since that time the number of public corporations has grown rapidly. Part VIII of the Financial Administration Act[25] divides public corporations into three classes. First are departmental corporations. These perform administrative, supervisory or regulatory services of a governmental nature, such as those performed by the National Research Council and the Unemployment Insurance Commission. Next are the agency corporations. These are engaged in trading or service operations on a quasi-commercial basis or in procurement, construction or disposal activities on behalf of the Crown. Examples of this type are the Atomic Energy Board of Canada and the Crown Assets Disposal Corporation. The last category comprises the proprietary corporations, that is, those engaged in financial, commercial or industrial enterprises and ordinarily conducting operations out of corporate income as distinct from parliamentary votes. Examples of such corporations are the Canadian National Railways and Polymer Corporation Limited.

The departmental agency appears to be headed for expansion as a powerful method of governing in a complex society. They have been well known in the United States for some time and are usually called regulatory agencies or commissions, and would include the Interstate Commerce Commission and the Federal Power Commission. The employment of this governing device in Canada has not been so widespread although a powerful regulatory agency, the Board of Transport Commissioners, has been in existence since 1904. Now, however, in order to deal with the complicated problems of national magnitude facing the government in the transportation and energy fields, powerful agencies, such as the Canadian Transport Com-

[24] J. CORRY, DEMOCRATIC GOVERNMENT AND POLITICS ch. 4 (1946).

[25] CAN. REV. STAT. c. 116, § 76(1)(*c*) (1952). A "Crown corporation means a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs. . . ."

mission and the National Energy Board, have been recently set up. They have powers analogous to those of the American regulatory commissions.

Public corporations were favoured, we are told, [26] because of the autonomy of management to hire and control their own staff. They were also a means of escape from central fiscal and personnel controls. They provided flexibility in headquarters arrangements and were, to a degree, politically neutralized.

These elements are, more or less, apparent in the creation of all executive agencies. But there are other reasons to favour the creation of regulatory agencies. First is the lack of expertise in the membership of the other branches of government to deal with the special and complex problems that must be considered by trained and experienced men in the field. Then there is the lack of flexibility of procedure to hear and receive the voluminous information upon which a report or a decision will be made. This is particularly true in respect of judicial procedure. How, for example, would present judicial procedure cope with the great mass of documentary, oral and other evidence which is required to determine the feasibility of the abandonment of a railway service or the construction of an interprovincial pipeline? Although rules and concepts of the common law do noble service in advisory preceedings before the regular courts, they are often inadequate in proceedings to determine the efficacy and legality of questions relating to projects of great social, economic and political import that come before regulatory agencies. How far, for example, should common-law principles of stare decisis, official notice, admissibility of opinion evidence and hearsay apply to such proceedings?

Another advantage of the regulatory agency is its investigatory power. Not only do these agencies have and should have large and competent research staffs but they are usually empowered to initiate independent studies before laying down a regulation, giving an opinion or rendering a decision. By these means, evils are often prevented and laborious and acrimonious legal determinations after the evils have arisen are precluded.

Another factor which, it is submitted, favours the establishment of regulatory agencies is that they divorce the administrative process from a close connection with the higher executive of the government. Judicial determinations of the regulatory agencies should be made as independently as possible. In essence, the membership of the agency should have the impartiality and independence of the regular judiciary.

The final reason for the regulatory agency concerns its purpose. Most of the regulations, opinions and decisions of these agencies must be conceived in terms of management of the area regulated rather than the supervision or policing of it. In other words, more is expected from and must be done by the agency than laying down permissive limits within which the regulated

[26] Hodgett, *The Public Corporation in Canada, in* THE PUBLIC CORPORATION: A COMPARATIVE SYMPOSIUM 51 (W. Friedman ed. 1954).

bodies may act. This brings up delicate policy and legal questions of powers of the agencies to interfere with private enterprise. If a railway line is to be abandoned, what are the alternative modes of transport available? If a pipeline is to be constructed, how is it to be financed? If an arbitral award is made compelling the payment of increased wages, from what source is the money to be obtained? The answers to these and similar questions at one time were truly management prerogatives. However, in the wake of more and more public regulation, it is inevitable that the agencies will become increasingly concerned with them.

There is no question that Parliament and the provincial legislatures can empower subordinate agencies to legislate, advise, execute and adjudicate on subject matters within the ambit of their respective powers.[27] It is a matter of policy or expediency whether particular areas of social and economic activity should be regulated and, if so, in what way. However, once the policy is determined to create a regulatory agency, sufficient legal and political controls must be retained to ensure that the agency exercises its powers within the concept of the rule of law.

There are many peculiar problems in respect of the operation of a regulatory agency in Canada. As Professor John Willis says: "In terms of administrative law, we have inherited from England the principle of ministerial responsibility and the common law of judicial review, but have borrowed the institution of the 'independent regulatory commission' and many of the matters regulated from the United States and have modified them to suit our own peculiar conditions."[28] We can profit, of course, by observing the principles employed in other legal systems but the laws applicable to the regulatory agency in Canada must be created and moulded to suit Canadian conditions and needs.

The exercise of the legislative function of the regulatory agency depends on the powers contained in the enabling act and it must act within these powers.[29] But the legislative function does not stop there; many of the agency's decisions may be more aptly described as legislative rather than adjudicative. In this respect, Professor Willis notes they "at first sight look like courts in that they hold hearings and apply statutory standards—such as 'fit and proper person', 'public convenience and necessity', 'just and reasonable rates', 'in the public interest' and so on—to the facts of individual cases coming before them but are in reality minor 'legislative' bodies pricking out a policy."[30] If the policy was clear-cut, there would be no need for other than an incidental exercise of this aspect of the legislative function.

[27] "There is nothing express in the B.N.A. Act about delegation but ever since Hodge v. The Queen, 9 App. Cas. 117 (P.C. 1883), it has been clear that the maxim *delegatus non potest delegare* has no constitutional significance relative to the delegation of legislative power by Dominion Parliament or provincial legislature to some other subordinate agency: . . . ." B. LASKIN, CANADIAN CONSTITUTIONAL LAW 39 (3d ed. 1966).

[28] Willis, *Administrative Law in Canada*, 39 CAN. B. REV. 251, at 254 (1961).

[29] *See generally*, Driedger, *Subordinate Legislation*, 38 CAN. B. REV. 1 (1960).

[30] *Supra* note 28, at 260.

Regulatory agencies would operate analogously to the regular courts; they would interpret and apply the law after determining rights and privileges in a judicial manner. But because of their expertise, procedural flexibility and wide investigatory powers, the legislature has conferred on them the role of "pricking out a policy." [31]

Advisory functions bestowed on regulatory agencies need special attention. When performed by the higher executive, the exercise of these functions bears a special relationship with the Crown and is in accordance with the principle that the Crown must accept the advice of the ministers who have the confidence of Parliament. What that advice shall be is a matter of concern solely to the Crown's advisers and is beyond the purview of the regular judiciary. [32]

Most regulatory agencies will have more or less advisory, legislative, judicial and administrative functions, and when the advisory function is vested in the same agency that has a judicial function with respect to the same subject matter, it is apparent that the former function may militate against the independence of the agency and the established common-law rule of judicial independence. If the government requests advice on certain matters which are or will become *sub judicii*, such advice may be considered a pre-judgment. Such advice may also be open to attack as being in contravention of the fundamental common-law principle that the deciding body must be strictly impartial and that the participants in the decision have no interest in the final outcome.

Another area of uncertainty may arise if advisory opinions are to result from public hearings. If the advice is given without a public hearing, the principle that certain decisions are reviewable by the legislature and not by the judiciary would probably apply. Also, if the advice is given after a public hearing, it would appear to be more analogous to a judicial decision and would probably fall into the "policy" category, not subject to judicial review.[33] But there are differences in giving advisory opinions with or

[31] Mr. Rod Kerr, Q.C., a former Commissioner of the Board of Transport Commissioners, has remarked on this aspect of the legislative function of the board in a pamphlet entitled: THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA: A REVIEW OF ITS CONSTITUTION, JURISDICTION AND PRACTICE (1957). He states that the board differs from other courts in Canada in several aspects, one of which is:

> (d) In many of the applications with which it deals it serves a dual purpose, for it must decide the case correctly as between the parties before it and it must also decide the case so as to best serve the public interest where such interest is a consideration to be taken into account—this is a forward looking function which differs from a purely judicial determination of present or past rights of the parties.

Id. at 6.

[32] Although the doctrine of sovereign immunity (and that of its agents) from judicial powers has been considerably restricted, the principle still applies generally to the higher executive, see Strayer, *Injunctions against Crown Officers*, 42 CAN. B. REV. 1 (1964), at least if, the advice is not given arbitrarily or in bad faith, Roncarelli v. Duplessis, [1959] Sup. Ct. 121.

[33] *See* Memorial Gardens Ass'n (Canada) Ltd. v. Colwood Cemetery Co., [1958] Sup. Ct. 353.

without a public hearing.[34]

There may arise important questions concerning appeals from the decisions of the regulatory agency. Although the courts have inherent powers to review acts of agencies with respect to keeping them within jurisdictional confines and compelling them to maintain adequate procedural safeguards, it is the legislature that must define the scope of appeal and the branch of government which will hear and decide it. References to the Railway Act[35] and the National Transportation Act[36] are illustrative. The Railway Act provides that the Governor in Council may vary or rescind any order of the board (now part of the Canadian Transport Commission). Secondly, an appeal may be taken from a decision of the board to the Supreme Court of Canada on any question of jurisdiction. Thirdly, by leave of the board an appeal may be taken to the Supreme Court on any question of law. The National Transportation Act contains an additional step. Section 18 provides that the applicant (or an intervenor) on an application to the commission, "may appeal to the Minister from a final decision of the Commission with respect to the application, and the Minister shall thereupon certify his opinion to the Commission and the Commission shall comply therewith." Thus the regular courts and the higher executive are both avenues of appeal from the decisions of the Canadian Transport Commission.

By a fundamental principle of our constitution, those to whom the administration of justice is entrusted are not responsible to Parliament, except for actual misconduct in office.[37] The more important agencies are courts

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[34] These were noted in Regina v. Minister of Labour, 47 D.L.R.2d 189 (Alta. Sup. Ct. 1964), where the minister requested the board for certain information prior to granting permission to prosecute. The board refused the applicant permission to view documents and to cross-examine on affidavits. On application to the court for certiorari, it was held that the documents should have been tested by cross-examination. Mr. Justice Milvain of the Alberta Supreme Court said: "The neat legal problem which now confronts the court, is whether an authority with power to do an administrative act without fear of judicial intervention, changes the situation by conducting an inquiry to which interested parties are asked to appear and make representations." *Id.* at 193.

[35] CAN. REV. STAT. c. 234 (1952).

[36] Can. Stat. 1966-67 c. 69.

[37] An authoritative treatise, 1 A. TODD, PARLIAMENTARY GOVERNMENT IN ENGLAND 574 (2d ed. 1887), states:

> Complaints to Parliament in respect to the conduct of the judiciary, or the decisions of courts of justice, should not be lightly entertained. "If there is a failure in the administration of justice, from whatever cause, affecting any judge, both Houses of Parliament may address the crown, to remove that judge from office." But "nothing could be more injurious to the administration of justice than that the House of Commons should take upon itself the duties of a court of review of the proceedings of an ordinary court of law;" or of the decisions of a competent legal tribunal,—or, that it should "tamper with the question whether the judges are on this or that particular assailable," and endeavour "to inflict upon them a minor punishment" by subjecting their official conduct to hostile criticism. Parliament should abstain from all interference with the judiciary, except in cases "of such gross perversion of the law, either by intention, corruption, or incapacity, as make

of record[38] which, in the British system of law, are independent and free from the interference of other branches of government. In those spheres where judicial action has been usually forthcoming in the past, such as in defining property, contract and tortious rights, and where the determination involves the sifting of contradictory evidence and the application of established principles, appeal should be made to the tribunal most familiar with handling these types of questions, namely, the judicial arm of government. With regard to appeals which would go to a branch of government, the main problem is which branch is best suited to hear the appeal. Generally, it would seem that the executive is in the best position to hear decisions of the agency involving policy, that is, those decisions where the public interest is paramount and the standards to be applied are new and of general application.

In order to fulfil its purpose, the agency will have wide powers to inquire into and report on varied and multitudinous conditions surrounding the subject matter of its mandate, to undertake studies and research on its own initiative and to collaborate and participate in the work of other organizations. Many of these duties will be fact-finding in nature and a long line of judicial case law has established that when such functions are conferred on an administrative agency, the findings are not judicially reviewable. However, if the examiners report on matters that involve determinations of law or make rulings on disputed questions of fact, such decisions would appear to be judicial in nature and subject to judicial control.[39]

IV. Government and Labour-Management Relations Law in Canada

I. *Legislation*

In the light of the legislative, judicial and executive roles, we now proceed to outline the present Canadian labour-management relations law and to mention the more important innovations of the Rand and Task Force Reports.

The policy of the federal and provincial governments as evidenced in the federal and in the ten provincial statutes dealing with labour-management relations is to create an equitable bargaining relationship, to compel the parties to bargain in good faith and, when an agreement is reached, to give legal force to it. That is, the legislation does not attempt to dictate terms upon which labour and management must live but is intended to provide

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it necessary for the House to exercise the power vested in it of advising the crown for the removal of the judge."

[38] *See* National Transportation Act, Can. Stat. 1966-67 c. 69, § 6(2) and National Energy Board Act, Can. Stat. 1959 c. 46, § 10(1).

[39] Some of the legal difficulties involved in the employment of examiners are noted by J. Finkleman, The Ontario Labour Relations Board and Natural Justice 8-11 (1965).

a machinery calculated to bring the parties to mutual agreement. It then makes the parties abide by the provisions upon which they have agreed.

In order to implement this policy, the legislation declares the right of workers to organize themselves into trade unions. It then attempts to protect this right by imposing duties on the parties not to interfere, such as by outlawing the "yellow-dog" contract, forms of intimidation and dismissal because of trade union membership. The legislation sets up administrative boards to administer the acts. The boards have a variety of duties, the major one being to certify a trade union as the representative of the bargaining unit to negotiate with the employers. The parties are compelled to bargain in good faith but the legislation does not compel management and labour to come to an accord. However, if and when an agreement is reached the law requires that it be put down in writing and sanctions are given to it. It must last for at least one year; the parties must abide by its terms, and all disputes arising under it must be submitted to a process of settlement. Strikes and lockouts are forbidden during its term and for a certain time thereafter.

The Rand Report says nothing about most of the fundamental characteristics of present legislation, such as the general principles of certification, "good faith" in collective bargaining and the duration of collective agreements.

> The principal purposes of the provisions recommended are, first, to confine legitimate economic pressures, so far as is reasonably possible, to the employer and his employees (represented by the union) involved in a dispute, to the exclusion of third persons; and, secondly, thereby to induce the parties to agreement with the minimum of disruption of their normal working activities and relations. [40]

The Task Force would also retain the general policy of the present legislation. However, it suggests minor changes, such as in requisite union membership for certification without a vote, and in the successor rights of the employer or union. The report would not "put the issue of good faith bargaining into such an elaborate jurisprudential container" [41] as has been done in the United States. It makes observations and recommendations on the structuring of bargaining units, greater decision participation by the rank-and-file and the right to strike on the termination date of the agreement. It also suggests that the parties consider the wisdom of regular negotiation throughout the term of the collective agreement and the opting out under certain conditions of the restraint on strikes and lockouts during the period when an agreement is in force.

The enforceability of collective agreements by civil action raises questions about the status of trade unions to sue and be sued. Although present labour-management legislation confers a limited legal personality for the purpose of its enforcement, the extent of the legal personality conferred for other

[40] RAND REPORT at 75. The report, however, does contain recommendations for certification of unions for employees in remote areas. *Id.* at 61, 99.

[41] TASK FORCE REPORT at 163. *See also id.* at 163-67.

purposes differs in the various jurisdictions. Ontario and Saskatchewan attempt to preserve the common-law status of trade unions with respect to their being sued by providing that a union may not be made a party to an action unless such action may be brought against it irrespective of any provisions "of this Act and the Labour Relations Act." [42] Other jurisdictions, such as Quebec and Newfoundland, expressly provide for a general legal personality for trade unions. Still others leave the limits of legal personality conferred by the statutes to judicial interpretation. [43]

The Task Force recommends that unions "have a legal status that is commensurate with their status in collective bargaining. It should be made clear what it is that unions should be accountable for, to whom they should be accountable, and by what procedures they should be accountable." [44] It then proceeds to make those areas clear in nine subparagraphs. The Rand Report simply recommends that "[e]very trade union in Ontario shall constitute a legal entity with capacity to sue and be sued in its name, and vested with civil rights and subject to civil liabilities in tort or contract under the general law, ..." [45]

Canadian labour-management relations legislation that affects economic action can be briefly stated. Although the legislation does not purport to create a statutory right to strike, it recognizes the common-law right to strike and, in so doing, limits it. [46] A strike is defined in general terms as involving a concerted cessation of work by all or by a substantial group of employees in a unit, but there is little statutory or judicial guidance as to when a strike occurs or when it ends.

All legislation decrees that there shall be no strike while a collective agreement is in force nor until the conciliation procedure has been exhausted. The legislation of some jurisdictions requires a strike vote and notice of the intention to strike; in others, it is unlawful to counsel or condone an unlawful strike.

Generally, labour-management relations legislation has left to the common law the legal constraints on economic action. However, the limits of lawful strike action have been hesitantly defined in a few jurisdictions. Thus the British Columbia Trade-unions Act of 1959 [47] declares the right of trade unions to picket in support of a lawful strike and then interdicts all other persuasion but "[w]hen the common law and the jurisprudence of Quebec are examined in specific instances of picketing the cases in other parts of

[42] The Rights of Labour Act, ONT. REV. STAT. c. 354, § 3(2) (1960).

[43] In Therien v. Teamsters Union, 6 D.L.R.2d 746 (B.C. Sup. Ct. 1956), the court concluded that a trade union in British Columbia was a legal entity not only for the purpose of the Labour Relations Act but under the common law. The reasoning of the court might well be applied in other jurisdictions, *see e.g.*, Chrysler, *Actions By or Against Trade Unions in Ontario*, 39 CAN. B. REV. 30 (1961).

[44] TASK FORCE REPORT at 154.

[45] RAND REPORT at 91.

[46] C.P.R. v. Zambri, 34 D.L.R.2d 654 (Sup. Ct. 1962).

[47] B.C. Stat. 1959 c. 90.

Canada seem to arrive at much the same conclusion on the facts." [48]

The Rand Report recommends that the Lieutenant-Governor in Council be empowered to designate any industry, business or service as essential and to ban a strike or order a resumption of work. If the dispute is not settled, it must be referred to the industrial tribunal for arbitration. In other than essential industries, businesses and services, the tribunal may, if it would not be unjust to the employer or the union, terminate the strike after six months. Further, when a strike or lockout has continued for ninety days, the union or employer, who has undertaken to accept it, may at any time thereafter request an award by the tribunal, and the tribunal would have the power to make such an award. Also, the tribunal may, at any time, fix the number of pickets, their locations, and the conditions of permissible picketing.

The Task Force Report analyzes the four aspects of picketing and boycotting.

> The laws of industrial torts have particular relevance to conduct relating to the "why", "where", and "when" of picketing. The general law of torts and delicts (civil wrongs), of general application to society at large and generally designed to protect persons and property, relates to the "how" of picketing. This distinction leads us into disparate recommendations for the "why", "where" and "when" and for the "how". Briefly, because conduct relating to the first three facts of picketing is peculiar to the industrial relations system of collective bargaining, we recommend a form of codification of the law respecting "why", "where" and "when", and a repeal of the common law of industrial torts in respect of cases where the code applies. We recommend also that adjudication under the code be assigned to a reconstituted Canada Labour Relations Board (see later) with a remedy, among other things, of restraining and mandatory orders to replace the equity injunction now available in the courts . . . . [49]

All labour-management relations legislation declares the right of workers to organize themselves into trade unions but it does not compel the unions to take anyone into membership. Further, the legislation gives the trade union the right to bargain for the employees it represents but it does not require the union to take all the employees into membership. Furthermore, Canadian legislation requires trade unions to fulfil certain functions on behalf of the workers they represent, yet it does nothing to ensure democratic procedure in union government. In the United States, undemocratic practices have been met by the Landrum-Griffin Act of 1959. [50] This act laid down a comprehensive scheme for the regulation of internal affairs. Among the subjects dealt with are the following: the rights of members of labour organizations to nominate and vote in union elections, freedom of speech and assembly, dues, reports by unions, their officers and their employers, union elections, trusteeships and fiduciary responsibilities of union officers. Canad-

[48] A. CARROTHERS, COLLECTIVE BARGAINING LAW IN CANADA 490 (1965).

[49] TASK FORCE REPORT at 180.

[50] Labour-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401-531.

ian legislation is not so ambitious, but the Corporations and Labour Unions Returns Act [51] requires, and most labour-management relations acts authorize, the board to compel unions to file certain particulars respecting their internal operations.

Thus labour-management relations has given the trade union wide powers in the bargaining process but has done little to define rules governing its relationship with its members. It is the trade union that determines the qualifications for membership, the conduct expected from its members and the disciplinary measures when the employee runs afoul of its rules. A particular difficulty arising from this lack of definition is the status of the individual and his grievance. Can an individual take his grievance to the employer without the interference or assistance of the bargaining agent? [52] Perhaps the worker is not a member of the trade union and does not feel that he will be fairly treated if his case is presented to the employer by the union representatives. Or possibly, for reasons of his own, the trade union member may not wish such representation. The right of the trade union to represent the employees in the bargaining unit often obscures the right of the individual employee to obtain effective justice.

The Rand Report advocates that "[n]o union shall refuse membership to an applicant and no member of a union shall be suspended, expelled, fined or in any manner prejudiced or discriminated against by the union or any officer thereof on any ground other than just cause." [53] It would outlaw discrimination against members under closed-shop provisions and require the union to maintain a just and fair distribution of work among all members. It would also make illegal such provisions in the constitution, by-laws or terms and conditions of membership in the union that tended to bar a course of action under the general law, or prohibited the assertion of administrative rights brought by a member before the tribunal. [54]

The Task Force considered the internal affairs of trade unions to be an important area for legislative intervention. Its recommendations cover such matters as access to union membership, equitable treatment of workers where a "hiring hall" operates and is an effective avenue to employment. Also, where professional bodies have exclusive licensing powers, it recommends that provision should be made for public participation in the licensing function and for a right of appeal. [55] Further, the report recommends that "legis-

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[51] Can. Stat. 1962 c. 26.

[52] Mr. Justice Laskin has stated recently: "Save as a collective agreement provides for individual grievances being lodged and processed, and subject to the *Labour Relations Act*, the conduct of relations with an employer is, under Ontario law, committed on behalf of employees to the bargaining agent certified as their exclusive representative or properly established as such by voluntary recognition." *Re* Hoogendoorn, 62 D.L.R.2d 167, at 177 (Ont. 1967).

[53] RAND REPORT at 91-92.

[54] *Id.* at 92-94.

[55] TASK FORCE REPORT at 149-51.

lation prescribe basic procedural rights in internal union affairs" [56] and "[i]n respect of industrial relations, we recommend that legislation guarantee a duty of fair representation, particularly in handling of rights acquired under a collective agreement." [57]

2. *The Judicial Role*

It has been mentioned that in the British governmental system, the judicial arm has acquired an enviable reputation as the protector of individual rights and as the upholder of the rule of law within the state. [58] The first aspect of the judicial role is evidenced in the interpretation and applications of common-law principles in accordance with age-old documents, such as the Magna Carta and the Bill of Rights, and fundamental principles that find their acceptance in the folkways and mores of the people. The second aspect of the judicial role arises from its inherent power to interpret statutes and to keep inferior courts and agencies of government within the limits of enabling legislation and from its position as supreme arbitrator of disputes in the state. [59]

With respect to the judiciary's role in keeping subordinate governmental agencies in line with the enabling statute, it disclaims an inherent power to review the merits of the decisions of these agencies and inquires into subordinate conduct only to ensure that they do not transgress limits of jurisdiction, that they comply with minimum standards of fair play and that no errors of law are apparent on the face of certain documents which constitute the record of the case heard and decided by the agency. [60]

With respect to its role as the protector of individual rights, the traditional attitude of the courts is to refrain from deciding individual rights arising under collective agreements. Most disputes involving individual rights are required by legislation to be finally settled by arbitration. Thus a particular remedy is given for their settlement. However, the courts have recently entertained a number of cases where individuals have preferred the regular judiciary to the arbitral process as the forum for the redress of the alleged infringement. The question of jurisdiction is still unsettled, although, in Ontario at least, the judicial position would appear to be that the employee may sue only in the courts where his right is apparent at common law or where it has been established in an arbitration award. [61]

There are substantive and procedural difficulties which will hamper

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[56] *Id.* at 151.

[57] *Id.* at 152.

[58] *Infra* at p. xx.

[59] *See* I. JENNINGS, THE LAW AND THE CONSTITUTION ch. 7 (1933).

[60] The TASK FORCE REPORT at 210, recommends that this right of review in courts of law be continued.

[61] Canadian jurisprudence on this point has been recently reviewed by Adell, Comment, 45 CAN. B. REV. 354 (1967)., *See also* Binavince & Chapman, *Recent Developments in Canadian Law: Labour Law*, 2 OTTAWA L. REV. 87 (1967).

judicial handling of disputes arising under collective agreements. If an employee wishes to circumvent the arbitral procedure and bring an action in the regular courts for an alleged violation, he must bear the legal expenses and wait a considerable period of time for the decision. Before the hearing, the agreement might expire or the bargaining agent might be replaced. How do such developments affect his rights? The collective agreement defines industrial rules for workmen unschooled in legal technology. Interpretive language should be directed to them in language that they understand and, indeed most often, in technical language that describes and defines their work. It may also be argued that the courts tend to lay down rules for general application rather than particular rules for the governance of the particular dispute. Furthermore judicial enforcement of individual rights involves delay when most disputes arising under collective agreements should be handled expeditiously on the spot. Moreover, active investigation, informal hearings, the admission of all relevant evidence and other means to get at the true circumstances are often beyond the pale of the regular courts. Also, there is much merit in the argument that rights and duties arising under collective agreements should be settled by the parties themselves and shaped and moulded to suit their needs. Finally, judicial intervention in collective agreements would inevitably lead to judicial determinations of the adequacy of the provisions themselves. This would include such items as the wage rates paid and the hours worked. The Task Force Report in effect limits the power of the regular judiciary with respect to collective agreements by recommending the continuance of the present collective bargaining process which, theoretically at least, envisages no judicial interference. The Rand Report would empower the industrial tribunal to make such determinations.

Similarly, the role of the courts as adjudicators of disputes arising from economic action of the parties is subject to many considerations. If a trade union calls a strike and sets up a picket line and by these actions the employer is injured, are the courts the most effective agencies to determine liability?

Suppose I own the only barber shop in the block and after a while a person comes along and opens up a barber shop across the street. I am injured by the loss of business, but do I have a cause of action? The answer is no, provided no illegal means are used to cause my loss. The common law approves of competition. It is an application of the hoary principle that the law recognizes my right to do as I please so long as I do not infringe on the rights of others. Thus by opening the shop across the street the person might injure me but I have no right to trade exclusively. It is a privilege subject to the privilege of others to do likewise.

So in all business there is the difficulty of balancing the privileges of individuals and groups; of defining, on the one hand, limits of action (rights) and, on the other, prohibited acts (duties). Although the legislature has acted to prevent certain types of unfair competition, such as price-fixing

agreements, generally it has not defined the limits of these privileges.

At the beginning of the nineteenth century all combinations of workmen formed to regulate conditions of work were regarded as criminal conspiracies. However, during the course of the century the British Parliament removed many of the restrictions and, aided by the prevailing "laissez-faire" thinking of the times, the English judiciary displayed a more lenient attitude towards both trade and labour combinations. In a leading case in 1891, [62] the English House of Lords sanctioned the privilege of traders to enter into combinations so long as their purpose was in their self-interest. This judicial position was refined during the next fifty years and approximately a half-century later the same august group of legal talent held that if the real and predominant purpose of the combination is to forward the interest of the combination (the right) and not to injure (the duty) and no unlawful means are used, any injury sustained as the result of the acts of the combination is not actionable. [63]

Traditionally, English courts have not the inclination of American courts to associate themselves with these conflicting interests. [64] Thus, for example, English law knows of no theory of prima facie liability where the intentional infliction of harm is actionable unless justified. [65] This theory involves a determination of the merits of conflicting interests, and the English courts have preferred to state justiciable problems in terms of rights, duties, privileges and the protection of rights. [66] The task of defining particular types of permissive conduct is more in accord with the judicial role, whereas the determination of conflicting social and economic interests smacks of policy, the traditional role of the legislature. But the line is thin. At present, the courts generally employ the principles of three well-known torts: civil conspiracy, inducing breach of contract, and illegal means to determine liability for injuries sustained in the broad areas of economic conflict. [67] When they apply these principles to factual situations that come before them, the courts will inevitably make a choice of competing interests. It is an assessment "generally inarticulated and perhaps on occasion unconscious" [68] of the values to be applied to them. Are the regular courts the agencies to make such assessments? As we have noted, the Task Force would severely restrict the judicial process in industrial torts. The Rand Report envisages "that matters of civil rights arising out of industrial disputes should preferably be dealt

[62] Mogul S.S. v. McGregor, Gow & Co., [1892] A.C. 25 (1891).

[63] Crofter Hand Woven Harris Tweed Co. v. Veitch, [1942] A.C. 435 (1941).

[64] "The American development in the labour law area focused on the issue of 'justification', recognizing that the conflicting interests of labour and management render inevitable the deliberate infliction of harm." Arthurs, *Tort Liability for Strikes in Canada*, 38 CAN. B. REV. 346, at 374 (1960).

[65] See Goodhard, *The Foundation of Tortious Liability*, 2 MODERN L. REV. 1 (1938), in which he describes the origin and probable fallacy of the proposition.

[66] See I. CHRISTIE, THE LIABILITY OF STRIKERS IN THE LAW OF TORTS 158-95 (1967).

[67] *Id. passim.*

[68] A. CARROTHERS, COLLECTIVE BARGAINING LAW IN CANADA 458 (1965).

with, at least initially, by the Tribunal." [69]

3. *The Executive and Labour-Management Relations*

Montesquieu believed in the separation of functions of government for the preservation of liberty. In his opinion, the executive should only execute the law, it should not legislate or adjudicate. But even in Montesquieu's time, this proposition was not true in the United Kingdom as pointed out by Ivor Jennings. [70] The executive of a modern state, besides executing the law, advises, legislates and adjudicates it. An agency endowed with all these functions is not necessarily an autocratic monster nor is it a new development. With careful consideration given to the reason for its existence, the powers bestowed on it, its ability to perform the functions assigned to it and the political and legal controls that constrain it, the regulatory agency is an effective governing device.

At present, all Canadian labour-management legislation bestows specific powers and functions on the labour boards. These boards vary in size, are generally representative equally of employers and employees, and the members usually hold office during the pleasure of the Crown. The powers bestowed on the Canadian Labour Relations Board by the federal Industrial Relations and Disputes Investigation Act [71] are illustrative:

> [The Board has power to determine]
>
> (a) [whether] a person is an employer or an employee;
>
> (b) an organization or association is an employers' organization or a trade union;
>
> (c) in any case a collective agreement has been entered into and the terms thereof and the persons who are parties to or are bound by the collective agreement or on whose behalf the collective agreement was entered into;
>
> (d) a collective agreement is by its terms in full force and effect;
>
> (e) any party to collective bargaining has failed to comply with paragraph (a) of section 14 or with paragraph (a) of section 15;
>
> (f) a group of employees is a unit appropriate for collective bargaining;
>
> (g) an employee belongs to a craft or group exercising technical skills; or
>
> (h) a person is a member in good standing of a trade union; . . . . [72]

These powers relate only to the collective bargaining relationship. They pertain to policing the parties in arriving at a collective agreement. They go no further. Although these policing powers of the boards are very important in the determination of bargaining rights, they do not approach the broad powers of a regulatory agency.

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[69] RAND REPORT at 96.

[70] *Supra* note 55, at ch. 1.

[71] Industrial Relations and Disputes Investigation Act, CAN. REV. STAT. c. 152 (1952).

[72] CAN. REV. STAT. c. 152, § 61 (1952).

The tribunal proposed in the Rand Report shall consist of a president and two deputy presidents, to be appointed by the Lieutenant-Governor in Council. They shall possess the qualifications of members of the Supreme Court of Ontario and they "shall be of the highest qualifications." They shall be appointed until the age of seventy and "shall be removable for cause" upon the vote of the legislature on the recommendation of the Lieutenant-Governor in Council. The president and deputy presidents shall have the same salary and pensions as the Chief Justice and puisne judges of the Supreme Court of Ontario.

Associated with the tribunal and subject to its general direction will be eight commissioners. The tribunal would be aided by a staff, including economic and labour relations advisers, statisticians and accountants. The report recommends a very broad jurisdiction. This body would have the power, *inter alia*, to intervene, at the request of the government or on its own initiative, in any labour-management conflict of importance; to impose its own terms of settlement, at the request of the government, in essential industries; to inquire, at the government's request, into matters of wages, hours of work, fringe benefits and cost of living; to act, at the request of the parties, as a board of arbitration, and to make orders of termination of strikes continuing more than six months. [73]

The Task Force Report makes extensive recommendations for changing the:

> [R]oles and remedies of the Canada Labour Relations Board: in the areas of bargaining-unit determination and redetermination, and in the regulation of internal union affairs, unfair labour practices, including unlawful strikes and lockouts, and picketing and boycotting. To bring the structure and powers of the Board into line with its changed role, we recommend that the Board be reconstituted to consist of five persons who are representative of neither unions nor management and who are available for service on a full time basis. The Board should be authorized to sit in three-man panels and should have power to delegate quasi-judicial powers to commissioners located at its headquarters and across the country. [74] The Board should also have a field staff to carry out administrative and investigatory functions. [75]

[73] RAND REPORT at 102-10.

[74] The TASK FORCE REPORT at 199 states: "It may be advantageous to combine the work of the Public Service Staff Relations Board and the Canada Labour Relations Board."

[75] TASK FORCE REPORT at 207.