

### *Symposium: Rights, Work, and Collective Bargaining*

## Management Rights Revisited: How the Good Ship Warrior & Gulf Sailed Up the Potomac River and Wound Up in Metropolitan Toronto

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## Management Rights Revisited: How the Good Ship "Warrior & Gulf"\* Sailed Up the Potomac River and Wound Up in Metropolitan Toronto:\*\*

M. R. GORSKY\*\*\*

### 1. RESERVED RIGHTS AND IMPLIED LIMITATIONS — THE GENERAL SCHEME

Prior to collective bargaining legislation in Canada and the United States, management's legal obligations to consider the interests of employees was limited only by common law, a small number of statutes affecting the employment relationship, statutes imposing health and safety obligations, workmen's compensation statutes, and the willingness of employees to work under the conditions imposed.<sup>1</sup> A common philosophical tenet among representatives of management was that matters such as wages, hours and working conditions should be determined by market conditions and that any intervention by government is an unwarranted interference.<sup>2</sup>

After the adoption of collective bargaining legislation, serious questions arose as to how the new labour statutes might limit management's actions and how they might affect unions and bargaining unit

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\* The *Warrior & Gulf* of the title is a water transportation company operating as a contract carrier of vessels along southern waterways in the United States. It became famous as a result of a landmark decision of the U.S. Supreme Court involving the scope of arbitral authority and management rights: *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The case is associated with two other cases, making up the Steelworker's Trilogy: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

\*\* The competing philosophies of arbitration considered in the Trilogy cases also were the focus in the Ontario Court of Appeal case of *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Ass'n et al.* 33 Ont.2d 476 (1981). The purpose of this article is to examine the way in which the American doctrine of collective bargaining interpretation has affected Canadian jurisprudence in the same area. While recognizing the differences that exist, I have concluded that similarities have been obscured as a result of the failure to appreciate the more limited meaning of *Warrior & Gulf* and the more expanded interpretation of which *Metro-Police* is capable. My conclusions support a philosophy of collective bargaining interpretation which rejects the extreme positions of proponents of the rival philosophies of the reserved rights and implied limitations schools of collective agreement interpretation.

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1. *Warrior & Gulf*, 363 U.S. at 583. This statement is also applicable in Canada and is implicit in the judgment of the Court of Appeal in *Metro-Police*, 33 Ont.2d at 478. Cf. *Falconbridge Nickel Mines Ltd.*, 8 L.A.C. 276, 281 (1958).

2. See Chamberlain, *The Union Challenge to Management Control*, 16 INDUS. & LAB. REL. REV. 187-89, 191 (1963).

employees.<sup>3</sup> The developing statutory pattern imposed an obligation on the parties in a collective bargaining relationship to bargain in good faith; one of the stated goals of the legislation was to create viable collective bargaining relationships whereby the company and the union would execute collective agreements binding on the company, the union and the members of the bargaining unit. As a result of the new statutory pattern, a new era began in which the battle lines were quickly drawn.<sup>4</sup>

For extreme adherents to the traditional union position, the collective agreement was not even close kin to the traditional contract of employment. As harbinger to a new era in the employment relationship, the collective agreement, unless it specifically provided otherwise, put the parties on an equal footing. If the agreement did not specifically address a particular subject, then management was deprived of the unilateral right to act in relation to that subject without achieving an agreement with the union.<sup>5</sup> To the similarly extreme advocates of the management position, the union approach was seen as looking at things the wrong way. In the union philosophy, collective agreements were products of historical and sociological forces which sought by statute to remove much of management's former power to act unilaterally. In management's view, however, the statutory purpose was more narrowly directed toward the establishment of a collective bargaining regime; it did not seek to impose on the parties any particular agreement or, for that matter, any agreement should the parties, while bargaining in good faith, pursue a bargaining position to an impasse. From an extreme management perspective, an agreement retained for management its pre-collective bargaining rights unless those rights had been specifically altered by the bargain.<sup>6</sup>

That such extreme positions could not co-exist was obvious, and it was inevitable that adjudication would ensue. It is not surprising that when the issue first arose there would be a difference in approach and a difference in result among cases tried before judges, those tried

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3. *Id.* at 190.

4. As to the duty to bargain in good faith with a view to concluding a collective agreement, see *LABOUR RELATIONS LAW*, QUEEN'S UNIVERSITY, INDUSTRIAL RELATIONS CENTRE (3d ed. 1981).

5. See Vladek, 16 *INDUS. & LAB. REL. REV.* 218-20 (1963). Professor Vladek, in his customarily blunt manner, suggested that theorists tended to use the terms "reserved rights" and "implied limitations" as if they knew what they "are talking about." Certainly, different theorists have different views on the subject of what those terms mean.

6. See Landau, 16 *INDUS. & LAB. REL. REV.* 215 (1963). As will be demonstrated, the same debate arose in Canada at about the same time.

before arbitrators and those first tried before arbitrators and subsequently reviewed by judges.<sup>7</sup> Judges, with their historical attachment to the principles of the common law of contract interpretation, tended to view the collective agreement as merely another kind of contract to which they applied the knowledge and analytic approach that they employed in cases subject to the traditional rules of contract.<sup>8</sup> Arbitrators of grievances arising under collective agreements, although usually more sensitive to the position of unions as outlined above, tended not to accept the more extreme union position. Nor did those arbitrators who were more receptive to the management position accept its most extreme articulation.<sup>9</sup>

Everything I have said thus far applies to both Canada and the United States as the labour legislation in the two countries is quite similar.<sup>10</sup> A union is afforded legal legitimacy and the capacity to obtain recognition and certification as the exclusive bargaining agent for a unit of employees deemed appropriate for this purpose. Labour relations tribunals have been established to adjudicate whether a union ought to be certified as bargaining agent or to be continued as such once certified or voluntarily recognized. They also deal with unfair labour practice complaints alleging that either management, unions or others have unlawfully interfered with the right of employees (and in some cases non-employees) to join unions or participate in lawful union activities.

The above provisions would be of little significance without further statutory enactments which oblige the parties to bargain in good faith with a view to concluding a collective agreement governing their relationship, especially with respect to wages, hours and working conditions. By making bargaining in bad faith an unfair labour practice and by reposing in a labour relations board the remedial authority

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7. See Dash, *The Arbitration of Subcontracting Disputes*, 16 INDUS. & LAB. REL. REV. 209, 211 (1963). Although Dash was dealing with the subject of subcontracting, the method of treatment would be identical in the case of arbitration involving any aspect of management functions. Cf. Seward, *Arbitration and the Functions of Management*, 16 INDUS. & LAB. REL. REV. 265 (1963) and Landau, *supra* note 6, at 217.

8. See the judgments of the District Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 168 F.Supp. 702, 705 (1958) and the Court of Appeals, *United Steelworkers of America v. Warrior & Gulf*, 269 F.2d 633, 635 (1959).

9. See Dash, *supra* note 7, at 224-25 (Tables 1 and 2).

10. Because most Americans appear to have as much interest in the Albanian as in the Canadian legal systems, I would refer the interested American reader to the Canadian work, *LABOUR RELATIONS LAW*, *supra* note 4, where there are numerous references to comparable Canadian labour legislation and where a suitable debt is paid to those attributes of the Canadian legislation which have been influenced by the experience in the United States.

to deal with breaches of the statutory duty, the chances of concluding an agreement are enhanced. Recognition of the right to strike or lock-out, usually after the expiration of an existing agreement and subject to other time limitations, further enhances the likelihood of an agreement being reached.

In most jurisdictions, the means of dealing with questions arising out of unresolved disagreements pertaining to the interpretation, application or alleged violation of the collective agreement will be through arbitration. The award of an arbitrator or board of arbitration is final and binding on the parties and on anyone else subject to it.

When the issue of management rights, or viewed from a union perspective, management limitations, first arose in the United States, it was in the context of collective agreements which either did not specifically address the matter in issue, for example, subcontracting, or whose language was unclear as to whether the agreement applied. Such a basis for an arbitrator's jurisdiction over disputes regarding the extent of a management right has often been lost sight of because of the relative inviolability of the arbitral award in the United States. As a result, it has frequently been found that limitations on management's exercise of its authority exist regardless of the presence of a provision in the agreement, particularly in the management rights clause, that relegate its exercise exclusively to management's discretion.<sup>11</sup>

## 2. ENTER THE WARRIOR & GULF CASE

The paradigm American case on arbitrability of labour-management disputes is *United Steelworkers of America v. Warrior and Gulf Navigation Company*.<sup>12</sup> This case arose out of an action by the union to compel arbitration of a grievance. There are certain statements contained in the headnote which may distort what was said by the majority of the Supreme Court:

Action by union to compel arbitration by employer. The United States District Court for the Southern District of Alabama, 168 F.Supp. 702, entered judgment for employer and union appealed. The United States Court of Appeals for the Fifth Circuit, 269 F.2d 633, affirmed and Supreme Court granted certiorari. The Supreme Court, Mr. Justice Douglas, held that where collective bargaining agreement

11. See Dash, *supra* note 7, at 224-25 (Table 2).

12. 363 U.S. 574 (1960).

provided that if differences arose or any local trouble of any kind arose a grievance procedure including arbitration should be applicable, notwithstanding inclusion of a clause that matters which were strictly a function of management should not be subject to arbitration, grievance arising because of employer's action in contracting out maintenance work previously done by its employees was subject to arbitration.<sup>13</sup>

The clause in question stated:

Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.<sup>14</sup>

If the court had not found that clause to be "not susceptible of an interpretation that covers the asserted dispute," then it would have treated the subject as exclusive to management's discretion and not within the jurisdiction of the arbitrator.<sup>15</sup> Put another way: In the *Warrior & Gulf* case, if the language "strictly a function of management" had been spelled out so as to leave no real doubt that it covered the matter in dispute, that is, subcontracting, then the court would have held that management had "complete control and unfettered discretion" to act in the disputed area.<sup>16</sup> The Supreme Court did not say that the collective agreement had to specifically exclude the disputed power from the grievance procedure; it was only necessary that the language employed, even if included in a written collateral agreement, "make clear" that the matter in dispute "was not a matter for arbitration."<sup>17</sup> In the *Warrior & Gulf* case, the exclusion clause was found to be too vague to permit a peremptory finding of non-arbitrability.<sup>18</sup> The headnote misleadingly suggests that a management rights clause is irrelevant.

Another holding of the *Warrior & Gulf* case, also frequently overlooked, is the Court's pronouncement that where there is doubt concerning the arbitrable nature of the dispute, the arbitrator may yet find that management, "under particular circumstances prescribed

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13. *Id.* at 576.

14. *Id.*

15. *Id.* at 582-83.

16. *Id.* at 584.

17. *Id.*

18. *Id.* at 585.

by the agreement . . . is permitted to indulge" in the disputed conduct free of limitations.<sup>19</sup> In fact, such deference to arbitration may lead to an opposite conclusion: that management may not indulge in the disputed conduct.

The Supreme Court, in *Warrior & Gulf*, did not deal with a management rights clause as such, but the clause under review concerned management rights nonetheless. And, after all, what's in a name? Certainly, it is not the name "management rights clause" that matters, but, as the court noted in *Warriors & Gulf*, the nature and extent of the right given management by the clause under review.

Perhaps one of the significant reasons why the arbitrability question has remained more or less dormant in the United States is due to another holding of the Supreme Court in *Warrior & Gulf*. With the benefit of the doubt to be given to arbitrability, which question is to be decided by the arbitrator, there was also bestowed on the award of the arbitrator, both as to arbitrability and on the merits, a shield against subsequent review by the courts. Such a bulwark against judicial intervention enabled arbitrators to develop a jurisprudence of "implied limitations" where a decision was made in favour of arbitrability.<sup>20</sup>

As there is no magic in the term "management rights clause," there is no reason to restrict the message of *Warrior & Gulf* to subcontracting cases. It was only fortuitous that subcontracting was the subject of *Warrior & Gulf*. The subject could have been any power to act claimed by management.

What remains somewhat a mystery is why the panoply of "implied limitations" discovered by arbitrators, after they ruled in favour of arbitrability, was deemed appropriate.<sup>21</sup> Some of the choices are clearly applicable and have even secured acceptance from die-hard proponents of an extreme reserved rights approach to contract interpretation. Thus, good faith, in the sense of a genuine desire to rely on the power in question, would be necessary to justify the power's exercise.<sup>22</sup> A purported exercise of the power for purposes extraneous

19. *Id.*

20. *Id.* See also *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567 (1960); *United Steelworkers of America v. Enterprise Wheel and Car*, 363 U.S. 593, 599 (1960).

21. See Dash, *supra* note 9. Professor Vladek's comments appear appropriate, as well, to the particular "implied limitations" found to exist by arbitrators. Vladek, *supra* note 5.

22. "[Management's] decision should be in good faith . . . Management should

to its recognized uses would be improper as having been resorted to in bad faith. Where the evidence disclosed that the real purpose for relying on the clause in question was to achieve a result incapable of realization because of the existence of rights created by other contract provisions, then such exercise would also be improper as having been carried out in bad faith.

The Supreme Court, in *Warrior & Gulf*, recognized that the extreme implied limitations and reserved rights theories were inapplicable.<sup>23</sup> Management is neither unrestricted in the exercise of its functions nor completely restricted, in the absence of contract provisions which can be interpreted as an agreement with the union. The extent of management's powers is to be derived from the agreement. Thus, in the absence of a provision which leaves a particular subject matter to management's "complete control and unfettered discretion,"<sup>24</sup> the extent of management's power to act freely, except as limited by public law and the willingness of employees to work under the conditions imposed, will be determined by the arbitrator.<sup>25</sup>

Where the language of the agreement does not preclude arbitration with respect to the disputed management power, the matters which may be considered by the arbitrator, according to the majority opinion in *Warrior & Gulf*, are much broader than those which would apply in the case of conventional contract interpretations:

- (1) The collective agreement "is more than a contract."<sup>26</sup>(2) The collective agreement creates "a new common law—the common law of a particular industry or a particular plant."<sup>27</sup>
- (3) Because "[g]aps may be left to be filled in by reference to the practice of the particular industry and various steps covered by the agreement,"<sup>28</sup> and because "many of the specific practices which underlie the agreement may be unknown except in hazy form, even to the negotiators," the arbitrator is to be permitted to fill in the gaps in the agreement by reference to practice.<sup>29</sup>(4) The courts are seen

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never be permitted to exercise its rights for the purpose of destroying or harming the Union. . ." Landau, *supra* note 6, at 218.

23. *Warrior*, 363 U.S. at 583-84.

24. *Id.* at 584.

25. *Id.* at 583.

26. *Id.* at 578.

27. *Id.* at 579.

28. *Id.* at 580.

29. *Id.* at 580-81.



merely as a vehicle to "bring into operation the arbitral process" leaving to the arbitrator the question of whether the agreement has been violated, including the interpretation of the agreement.<sup>30</sup>

Buttressing the jurisdiction of arbitrators to interpret collective agreements without threat of judicial review is the pronouncement of the United States Supreme Court in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*,<sup>31</sup> which prohibited a court from interfering with the award merely because the court's interpretation of the contract would be different.<sup>32</sup> The Supreme Court decreed that only doubt as to arbitrability, as well as any decision on the merits, should be left to the arbitrator. The inevitable result was a jurisprudence pertaining to management rights which is more sensitive to the concerns of the Supreme Court and of many arbitrators than was formerly the case.<sup>33</sup>

A revolution in the philosophy of collective agreement interpretation was wrought by the Supreme Court in *Warrior & Gulf*. Therefore, it is useful to examine what philosophy was replaced. On its face, the judgment of the Court of Appeals in *Warrior & Gulf* appears strongly to accord with an extreme management rights position:

[W]hatever subjects are not covered by an employment contract are left to the parties to act upon as they see fit. The contract before us does not deal with the power of the employer to perform services previously done by its employees. Since this is a matter as to which an employer may, except as limited by a specific collective bargaining agreement, act without violating either state or federal law it remains, so far as it relates to this agreement, strictly a matter of management.<sup>34</sup>

However, this holding was unnecessary, as it was held that by the agreement of the parties the subject of subcontracting was made

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30. *Id.* at 585.

31. 363 U.S. 593 (1960).

32. *Id.* at 599. This is not the rule in Canada where the award is often subject to judicial review where there has been an error of law on the face of the record, often described in terms of a finding which the language of the agreement will not reasonably bear.

33. See Browne, *The Impact of Supreme Court Decisions on The Collective Bargaining*, 51 A. B. A. J. 139 (1965).

34. *Warrior*, 269 F.2d at 636.

"strictly a matter of management."<sup>35</sup> It is also interesting to note the statement of Chief Justice Rives (dissenting), who observed that the management rights clause in the *Warrior & Gulf* agreement could not, by its terms, sustain the premise that subcontracting was "strictly a management function."<sup>36</sup>

In understanding the message of the Supreme Court in *Warrior & Gulf*, it is important to note that where the union characterizes management's actions as being "unreasonable, unjust and discriminatory," as was the case before the Court of Appeals in *Warrior & Gulf*, the epithets cannot advance the union's position. Employing the language of fairness "cannot change the fact that the criticized action, by whatever name called," where it is excluded from review through arbitration, "remains exempted from the range of arbitration."<sup>37</sup> If, as was decided by the Supreme Court, the employer's action was not excluded from arbitral review, and if the arbitrator then decided that the matter was arbitrable,<sup>38</sup> the basis for concluding that the right to act was a limited one rested not on abstract grounds of fairness (unreasonable, arbitrary, discriminatory, bad faith) but on somewhat more concrete grounds.<sup>39</sup> Fairness, while a factor in assessing the complained of conduct, is not the only criterion whereby the scope of the right to act is assessed.

### 3. MANAGEMENT RIGHTS IN CANADA

Given the similarities between the Canadian and American labour statutes and the functioning of labour relations in both countries, it was inevitable that Canadian arbitrators and courts would be called upon to address problems similar to those faced in *Warrior & Gulf*. As arbitration developed in Canada, arbitrators similarly gravitated toward positions on a spectrum ranging from an extreme reserved rights approach to an implied limitation of rights approach. In the case of the latter, I have never encountered a Canadian arbitrator subscribing to the implied limitation of rights view who would go

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35. *Id.* at 639.

36. *Id.* at 637.

37. *Id.*

38. It is of interest to note that after the matter was remitted back to the arbitrator (*Warrior & Gulf Navigation Co.* 36 LA 696 (J. Fred Hally, 1962)), the arbitrator first found in favour of arbitrability on the basis of negotiating history, and then held in favour of the grievance on the basis, among others, of the parties having recognized by their actions, some limitations upon the employer's right to subcontract work.

39. See Dash, *supra* note 9, at 224-25 (Tables 1 and 2). As will be seen, in Ontario, although concrete factors are referred to, the jurisprudence is couched in the language of fairness.

beyond imposing a rather moderate restriction on management's actions when these actions were otherwise not affected by the agreement. The philosophy articulated by the late Chief Justice Laskin of the Supreme Court of Canada, when he was an arbitrator and law professor, has found favour with those who accept the moderate imposition of limitations on management's freedom to act. In *Re Falconbridge Mines Nickel Ltd.*,<sup>40</sup> Professor Laskin, as he then was, set out the two competing views of reserved rights and implied limitations. The positions set out by Laskin are virtually indistinguishable from their moderate American counterparts. Laskin placed himself firmly in the implied limitations camp.

The extreme management rights position as set out by Laskin<sup>41</sup> was articulated by Thomas, C.C.J., sitting as an arbitrator in the *Re Electric Auto Lite* case.<sup>42</sup>

The company has the right to manage its business to the best of its ability in every respect, except to the extent that its rights are cut down by voluntary abrogation of some of these rights through contract with the union. The reservations (not restrictions) to management clause which appear in most contracts are nothing but a gratuitous acknowledgement by the union of this fundamental right. If the board is unable to find anything in the contract between the parties which takes away from the company's rights to conduct its own business, then it cannot be concerned with the quality of the action taken by the company, nor whether it results in loss of jobs for employees of the company, nor whether the action which produced such results was exercised inside the four walls of the plant or elsewhere.<sup>43</sup>

The opposing view, favoured by Laskin, was set out as follows:

There is an opposing view which was noted but not followed by Lane, C.C.J., in the *Duplate* case, . . . where he spoke of the theory that 'both parties, the union on one side and the management on the other, approach the bargaining table without fetters and as equals, and there is no such thing as a residual right in either party, and the parties by mutual agreement set out the whole contract either by specific agreement or by implied agreement which is implied by

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40. 8 L.A.C. 276 (1958).

41. *Id.* at 280-81.

42. *Re Electric Auto Lite*, 7 L.A.C. 331 (1957).

43. *Id.*

those parts of the agreement set out and according to the spirit of the whole agreement itself.' This theory or philosophy of approach, that a collective agreement is an expression of limited powers (or rights and obligations) of the respective parties, and that differences between them must be resolved not only within the terms, but in accordance with the purposes of a collective agreement, is the concept which was reflected by Roach, J.A., in the *Standard Sanitary* case, . . . More recently it was deliberately applied by Cross, C.C.J., in *Re U.A.W. & Studebaker-Packard* (1957), 7 Lab. Arb. Cas. 310, who held that the company had violated its agreement with the union in contracting its janitor work to an outside firm even though the existing janitorial staff had been transferred to other bargaining unit work so that no loss of jobs was involved.<sup>44</sup>

For reasons which will, I hope, become clearer when I deal with the current state of the law in some Canadian jurisdictions, Laskin placed some reliance on a rule of conventional contract interpretation: Where it is "necessary, give practical or business efficacy to the collective agreement."<sup>45</sup>

Laskin had previously stated in the *Peterboro Lock*<sup>46</sup> case a view parallel to that of the United States Supreme Court in the *Steelworker Trilogy*.

In this board's view, it is a very superficial generalization to contend that a collective agreement must be read as limiting an employer's pre-collective bargaining prerogatives only to the extent expressly stipulated. Such a generalization ignores completely the climate of employer-employee relations under a collective agreement. The change from individual to collective bargaining is a change in kind and not merely a difference in degree. The introduction of a collective bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist. Just

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44. *Falconbridge*, 8 L.A.C. at 281.

45. *Id.* at 282.

46. *Peterboro Lock*, 4 L.A.C. 1499 (1953) (quoted in *Falconbridge*, 8 L.A.C. at 282-83).

as the period of individual bargaining had its own common law worked out empirically over many years, so does a collective bargaining regime have a common law to be invoked to give consistency and meaning to the collective agreement on which it is based.<sup>47</sup>

It is of the greatest significance that Laskin, in *Falconbridge*, did not discount the possibility of the management rights clause qualifying the application of implied limitations in the case before him. He examined that clause and concluded that it lacked the specific language necessary to "qualify the propositions enunciated herein."<sup>48</sup> I regard the following views of Laskin as consistent with the opinion of the United States Supreme Court in *Warrior & Gulf*: (1) that there is no absolute reservation of rights to management where the subject at hand has not been addressed in the collective agreement; (2) that in order to remove the subject from review at arbitration there must be language in the agreement to that effect; (3) that such language may be found in a properly drafted management rights clause; (4) that implications may be made in order to give "practical or business efficacy" to the agreement, thereby imposing restrictions on management's power to act; and (5) that a collective agreement is unlike a conventional contract and the differences require the development, where necessary, of special rules of interpretation. How far the then accepted Laskin philosophy of collective agreement interpretation differs from the current pronouncement of Canadian courts can be seen from an examination of some recent cases.

#### 4. METROPOLITAN TORONTO POLICE ET AL.

It seems that every few years many Canadian arbitrators voice disapproval of some decisions by the Ontario Court of Appeal or the Supreme Court of Canada. Recently, the case of *Re Metropolitan Toronto Board of Commissioners of Police and Toronto Metropolitan Police Association et al.*<sup>49</sup> has received such attention. The arbitrators disapprove of the Court's position that management may exercise powers given to them in a management rights clause without being fair or non-discriminatory if these powers are not required to be exercised in a designated manner under some other provision of the collective agreement. There is said to be no jurisdiction to have management's exercise of such powers reviewed by an arbitrator.<sup>50</sup>

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47. *Id.*

48. *Falconbridge*, 8 L.A.C. at 284.

49. 33 Ont.2d 476 (1981).

50. *Id.* at 479.

Although couched in the language of fairness, the *Metro-Police* case concerned the extent to which a matter is arbitrable where the collective agreement failed to address the subject in dispute except in the management rights clause. The dispute concerned the taking of inventory and the distribution of overtime for this work, and it was alleged that management's denial of the overtime work to the grievors was "arbitrary, discriminatory, and in bad faith."<sup>51</sup> There was a management rights clause, as follows:

3:01 The Association and the members recognize and acknowledge that it is the exclusive function of the Board to:

(a) Maintain order, discipline and efficiency;(b) Hire, discharge, direct, classify, transfer, promote, demote and suspend or otherwise discipline any member, provided that a claim of discriminatory promotion, demotion or transfer or claim that any such member has been discharged or disciplined without reasonable cause, may be the subject of a grievance and dealt with as hereinafter provided;(c) Generally to manage the operation and undertaking of the Metropolitan Toronto Police Force and without restricting the generality of the foregoing, to select, install and require the operation of any equipment, plant and machinery which the Board in its uncontrolled discretion deems necessary for the efficient and economical carrying out of the operations and undertakings of the Metropolitan Toronto Police Force.

The Board agrees that it will not exercise the foregoing functions in a manner inconsistent with the provisions of this Agreement.<sup>52</sup>

There was no provision in the agreement specifically dealing with the assignment of such overtime; however, the Court considered the matter included in the powers exclusively granted to management in the management rights clause.<sup>53</sup>

An arbitral statement providing the basis for a broad fairness obligation in a *Metro-Police* fact situation is found in the case of *The International Nickel Co. of Canada Ltd. and United Steel Workers of*

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51. *Id.* at 477.

52. *Id.* at 478.

53. *Id.* at 478-79.

*America Local 6500*,<sup>54</sup> decided by a board of arbitration chaired by O.B. Shime, Q.C.<sup>55</sup> In that case the issue concerned the obligations of management to be fair in dealing with an employee who was incarcerated. Was management obliged to consider fairly granting a leave of absence to save the employee from being deemed to have quit his employment under a provision which would have automatically produced that result on a certain number of day absences without a valid excuse? The agreement dealt with leaves of absence, but not in the circumstances of the case. There was also a management rights clause, but its contents were neither set out nor discussed in the award.

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54. 14 L.A.C.2d 13 (1977).

55. In the *I.N.C.O.* case, Mr. Shime stated:

It is also our view that in assessing or analyzing and remedying 'differences between the parties' pursuant to s. 37 of the *Labour Relations Act*, R.S.O. 1970, c. 232, it is appropriate, subject to the express language of the collective agreement, to infer that the parties have negotiated terms into a collective agreement which contain the element of reasonableness.

The collective agreement is a document which governs the everyday life in the work place. It is trite to say that the parties do not negotiate so as to cover every conceivable situation that may arise during the life of the agreement. Not only is such a collective agreement totally impracticable to construct, but also such an agreement would harden the unspoken and assumed into work rules and thereby create an industrial milieu, which would have little flexibility or tolerance for the normal human work day experiences in the plant.

Also, one must be sensitive to the nature of collective negotiations where parties for negotiating position or on the verge of an agreement, in order not to upset balances that have been struck both as the result of prior conduct in the plant and through negotiations, deliberately avoid clear and specific language preferring to have the matter resolved at arbitration should it become necessary. Often matters are left for the express purpose of being arbitrated should the occasion arise. Unlike other agreements the parties understand that arbitration will form an integral part of a collective agreement and this enters into their contemplations and expectations when negotiating. The normal practice of the Courts in interpreting contracts by asking 'What is the intention of the parties to create legal relations?' is not totally realistic when interpreting collective agreements. That is not to say that a board of arbitration has complete rein to do as it pleases with the language of a collective agreement. There are limits to an arbitrator's function, and these limits may be found by examining not only the collective agreement but also the past experience between the parties, the statutory context of collective bargaining, as well as accepted industrial norms.

While there has been some attack by the Courts on the use of past practice as an infringement of the parol evidence rule—which briefly may be stated as the rule prohibiting extrinsic evidence to contradict, vary, add to, or subtract from, the terms of a written agreement—the difficulty lies in properly understanding the context in which such evidence is admitted. Extrinsic evidence of past practice or industrial practice is often

admitted not for the purpose of contradicting, varying, adding to or subtracting from a document, but rather as a part of the background or historical context against which the collective agreement is negotiated, and enables a board of arbitration to better understand the context; Courts have always taken the view that such evidence is admissible.

We are also of the view that the recent decisions of the Supreme Court of Canada in *Re McGavin Toastmaster Ltd. v. Ainscough et al.* (1975), 54 D.L.R. (3d) 1, [1975] 5 W.W.R. 444, 4 N.R. 618; and *Syndicat Catholique des Employes de Magasins de Quebec Inc. v. Compagnie Paquet Ltee* (1959), 18 D.L.R. (2d) 346, [1959] S.C.R. 206, as well as *Re Polymer Corp. and Oil Chemical & Atomic Workers Int'l Union, Local 16-14* (1962), 33 D.L.R., (2d) 124, [1962] S.C.R. 338 sub nom. *Imbleau et al. v. Laskin*; *C.P.R. Co. v. Zambri* (1962), 34 D.L.R., (2d) 654, [1962] S.C.R. 609, require arbitrators to view the collective agreement not only as the boundaries of the bargain struck by two equal parties who become co-authors of the collective agreement and responsible for its administration, but also as containing without those boundaries an implicit assumption that the terms and provisions of the agreement must be construed so as to operate reasonably and with good faith during the life of the collective agreement; and this implicit assumption of reasonableness and good faith negates any theory which suggests that a collective agreement which must be fleshed out by arbitration is cast in the context of an implied management rights theory.

The decisions of the Supreme Court of Canada which hold that the collective agreement determines the relationship between employer and employees, defines the perimeters of that relationship and forecloses both an external theory of management's residual rights as well as an internal theory of management's residual rights. We are confirmed in our view by both the statutory context of labour relations as well as the decision of the Supreme Court of Canada in the *Polymer Corp.* case . . . which we shall deal with later in these reasons.

In our view the requirement of the *Labour Relations Act* to 'further harmonious relations between employers and employees' as well as the requirement to bargain in good faith (which ought to transcend the signing of the document), requires an objective standard of collective agreement interpretation, and places the union as the collective bargaining agent for the employees on an equal basis with the employer for the purpose of defining the relationships under the collective agreement. Harmonious relationships are not developed by subordinating one of the parties to the agreement to the other, and it is in that context and on that premise that assumptions, if any, are to be made. It is for those reasons that we hold that the company's discretionary right to grant a leave of absence must be exercised on a rational or reasonably objective basis, rather than on the premise that there is in the collective agreement an internally implied management's rights theory which results in granting to management a complete discretion in matters which it is compelled to administer.

The theory of reasonable administration and interpretation is supported by the arbitration award in *Re Oil, Chemical & Atomic Workers and Polymer Corp. Ltd.* (1958), 10 L.A.C. 31 (Laskin), at p. 36, which imposed a theory of reasonable behaviour on union officials in administering the no-strike provision of the collective agreement. We read the *Polymer* case as imposing an obligation on the union to reasonably administer the collective agreement in so far as its obligations are concerned.

In arriving at its decision it is apparent that both the board of arbitra-



Most of Mr. Shime's position is consistent with the majority opinion of the Supreme Court of the United States in *Warrior & Gulf* and with that of Professor Laskin, as he then was, in the *Falconbridge* case. What Mr. Shime said, however, was in one respect fundamentally different. He would appear to regard the usually broadly worded management rights clause as having the status of the usually broadly worded recognition clause.<sup>56</sup> Whatever the complete meaning of the internally implied management rights theory as used by Mr. Shime, he regards it as not being a grant to "management [of] a complete discretion in matters which it is compelled to administer."<sup>57</sup> As is noted above, Laskin found that the management rights clause in the *Falconbridge* case did not contain any authority for management to subcontract over and above its right in the absence of the management rights clause. In *Warrior & Gulf*, the Supreme Court addressed the provision respecting the reservation of certain matters to the exclusive jurisdiction of management, and found it lacking in specificity.<sup>58</sup> Shime appears to require fairness in the administration of the collective agreement by management whatever rights were given it unless the agreement spelled out that management could act in the manner disputed by the union.<sup>59</sup> This is not what the United States Supreme Court held in *Warrior & Gulf*<sup>60</sup> nor what Laskin said in *Falconbridge*.<sup>61</sup>

The two philosophical approaches to the interpretation of collective agreements, the reserved rights and the limitation of discretion theories, came to be examined by the Ontario Court of Appeal in the *Metro-Police* case, because the Court had to consider two decisions of the Divisional Court which could not be distinguished in any material aspect and which were referred to the Court pursuant to

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tion as well as the Supreme Court of Canada assumed that the parties to the collective agreement are required to engage in reasonable behaviour during its currency. There is nothing in the language of the *Polymer* agreement that specifically required union officials to act reasonably or in accordance with the standards set out in that case. Their behaviour was examined against an implicit standard of reasonable behaviour. In our view this same theory must apply equally to the company as to the union, and the company must likewise administer its obligations in a reasonable manner.

*Id.* at 17-19.

56. *Id.* at 19; *Cf. Re Studebaker-Packard*, 7 L.A.C. 310, 311 (1957) (Cross, C.C.J.).

57. *I.N.C.O.*, 14 L.A.C.2d at 19.

58. *Warrior*, 363 U.S. at 584.

59. *I.N.C.O.*, 14 L.A.C.2d at 19. Shime concludes that both an external and internal theory of management's residual rights are foreclosed. *Id.* at 18. In "fairness" to Shime, I note he never expressly used the word "fairness" but did use the word "reasonable," which is one element of fairness.

60. *Warrior*, 363 U.S. at 584-85.

61. *Falconbridge*, 8 L.A.C. at 284.

section 35 of *The Judicature Act*.<sup>62</sup> The appeal was by the Metropolitan Toronto Board of Commissioners of Police, pursuant to an order of the Divisional Court. The two cases involved were *Re Municipality of Metropolitan Toronto and Toronto Civic Employees' Union Local 43 et al.*,<sup>63</sup> referred to as the "Stinson" case, and *Re Municipality of Metropolitan Toronto and Toronto Civic Employees' Union Local 43 et al.*,<sup>64</sup> referred to as the "Marsh" case. In these latter two cases, the Divisional Court took conflicting philosophical views of the way in which a collective agreement ought to be interpreted.

In the *Marsh* case, the question before the court was whether there was "an overriding duty on an employer to act fairly toward his employees in the administration of the collective agreement. . ."<sup>65</sup> Some of the same concerns felt by Mr. Shime in the *I.N.C.O.* case were referred to by Mr. Justice Weatherston J. in the *Marsh* case when he observed that the changes made by the labour legislation had created a new relationship between employees and employers which gave rise to an implied term in the collective agreement that it be administered fairly.<sup>66</sup>

62. ONT. REV. STAT. ch. 223, § 35 (1980).

63. 10 Ont.2d 37, 62 D.L.R.3d 53 (1975).

64. 16 Ont.2d 730, 79 D.L.R.3d 249 (1977).

65. *Id.* at 731, 79 D.L.R.3d at 250.

66. At common law, the power of a master over his servant was such that there was very little opportunity for a charge by a servant of unfairness. If he did not like the terms of his employment, he could look for a new job. Now, where the relations between employees and their employer are defined by a collective agreement, the situation is much different. The union, as an independent contracting party, negotiates the terms of employment of all of them. There is no room left for private negotiations between employer and employee, but the collective agreement tells the employer on what terms he must in the future conduct his master and servant relations: see *Le Syndicat Catholique Des Employes De Magasins De Quebec Inc. v. La Compagnie Paquet Ltee.*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346; *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, 54 D.L.R. (3d) 1, 5 W.W.R. 444 [affirming 45 D.L.R. (3d) 687, [1974] 3 W.W.R. 114; affirming 36 D.L.R. (3d) 309, [1973] 4 W.W.R. 505.

The majority members of the arbitration board relied on *Re H.K. (An Infant)*, [1967] 2 Q.B. 617, where it was held that an immigration official was required to act fairly. In that case, the official was acting in performance of a statutory duty. However, the same general principles apply to domestic bodies as to statutory bodies. In *Breen v. Amalgamated Engineering Union (now Amalgamated Engineering & Foundry Workers Union) et al.*, [1971] 1 All E.R. 1148, Lord Denning said, at 1154:

Does all this apply also to a domestic body? I think it does, at any rate when it is a body set up by one of the powerful associations which we see nowadays. Instances are readily to be found in the books, notably the Stock Exchange, the Jockey Club, the

In the *Stinson* case, the Ontario Divisional Court upheld the position of management, and read the management rights clause which conferred on management the exclusive function to,

(a) Maintain order, discipline and efficiency;

. . . . .

(c) Generally to manage the operation and undertakings of the Metropolitan Corporation and without restricting the generality of the foregoing to select, install and require the operation of any equipment, plant and machinery which the Metropolitan Corporation in its uncontrolled discretion deems necessary for the efficient and economical carrying out of the operations and undertakings of the Metropolitan Corporation.<sup>67</sup>

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Football Association, and innumerable trade unions. All these delegate power to committees. These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking. They can make or mar a man by their decisions. Not only by expelling him from membership, but also by refusing to admit him as a member; or, it may be, by a refusal to grant a license or to give their approval. Often their rules are framed so as to give them a discretion. They then claim that it is an "unfettered" discretion with which the courts have no right to interfere. They go too far. They claim too much. The Minister made the same claim in the *Padfield* case, and was roundly rebuked by the House of Lords for his impudence. So should we treat this claim by trade unions. They are not above the law, but subject to it. Their rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. But the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the courts just as much as a code laid down by Parliament itself. If the rules set up a domestic body and give it a discretion, it is to be implied that that body must exercise its discretion fairly. Even though its functions are not judicial or quasi-judicial, but only administrative, still it must act fairly.

I think the same language can be applied to an employer in the administration of a collective agreement. He is dealing, not with individual employees employed under separate contracts of service, but with employees whose terms of employment are set out in an agreement negotiated on behalf of them all. Any discretion to be exercised by the employer must be exercised in the knowledge that each employee is only one of many; no one of them should be singled out for special treatment. This obviously implies that the agreement should be administered fairly.

*Id.* at 732-33, 79 D.L.R.3d at 251-52.

67. *Stinson*, 10 Ont.2d at 39, 62 D.L.R.3d at 55.

as including the power to schedule vacations. In the absence of something "elsewhere in the agreement or by necessary implication [that] confers the right on an employee to challenge management's decision on the subject of when he should take his vacation."<sup>68</sup> The matter was not arbitrable.

The *Stinson* case did not follow an extreme management rights position. It found in the management rights clause an unfettered delegation to management of the right to schedule an employee's vacation, while recognizing that the agreement might by "necessary implication" affect the extent of management's discretion. Nevertheless, *Stinson* is clearly at odds with the philosophy of the *Marsh* case which accords with that of Mr. Shime in the *I.N.C.O.* case.

In the *Metro-Police* case, the Court of Appeal rejected the proposition that an arbitrator can review management decisions made pursuant to a management rights clause and which do not contravene any other provision of the agreement, because the management decision was not made fairly and without discrimination. It also held that Weatherston, J., in the *Marsh* case, is supposed to have relied on procedural fairness decisions before a domestic and statutory body and not on cases dealing with the interpretation of a collective agreement.<sup>69</sup> The court concluded:

The *Stinson* and *Marsh* cases were decided on different factual situations and on different collective agreements from the present one. If, however, the majority of the Divisional Court in the *Marsh* case were purporting to lay down a general rule, that all decisions of management pursuant to a management rights clause which do not contravene any other provisions of the agreement must stand the further test whether in the opinion of an arbitrator they were made fairly and without discrimination, then with respect we do not agree. The decisions relied on by Weatherston J. in the *Marsh* case, as that learned Judge rightly pointed out, dealt with procedural fairness in proceedings before domestic and statutory bodies; they did not deal with the interpretation of collective agreements. In our opinion, the management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause, unless those powers are otherwise circumscribed by express provisions of the collective agreement. The

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68. *Id.*

69. *Metro-Police*, 33 Ont.2d at 478.

power to challenge a decision of management must be found in some provision of the collective agreement.<sup>70</sup>

Houlden J.A., speaking for the Court, could not have been more clear in his rejection of the position taken by Mr. Shime and by Weatherston.

The length and detailed nature of the collective agreement were also factors which caused the Court in *Metro-Police* to conclude that there was "no necessity in this case to imply a term that the management rights clause will be applied fairly and without discrimination." The court stated that within the exclusive authority of the management rights clause, management may act unfairly and "discriminatively." Not only may the employer behave unfairly and discriminatively, but the Court of Appeal also reinforced its opinion by stating that the board of arbitration had "no jurisdiction to deal with the dispute because of an alleged and improper exercise of management rights." The Court of Appeal was remarkably persistent in advancing its position. It followed, of necessity, that:

when the arbitrator determined that there was no provision in the collective agreement that governed the taking of inventory, the work in dispute, and the distribution of overtime, she should have ruled that she had no jurisdiction to deal with the dispute because of an alleged improper exercise of management rights.<sup>71</sup>

There is a danger that too much will be made of *Metro-Police* by those who support it, and too little by those who oppose its findings. Significantly, the Court of Appeal did *not* adopt an extreme reserved rights theory of contract interpretation. Management's powers were seen by the Court of Appeal to be derived from the management rights clause found in that agreement and not from management rights external to the agreement. In *Warrior & Gulf*, the trial court and the appellate court accepted the theory of rights reserved to management external to the collective agreement. This view was rejected by the Supreme Court of the United States, which did not, however, discount the possibility of an internal mandate to management on the subject. However, on examination, the Court found

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70. *Id.* at 478-89.

71. *Id.* at 479. Nevertheless, my interpretation of *Metro-Police* is that management must still, at the very least, behave with honesty of purpose and this has been the view of subsequent cases. See, Her Majesty the Queen in the Right of Ontario (Minister of Health) and Ontario Public Service Employees Union, G. R. Linehan and the Grievance Settlement Board, unreported case of Ontario Divisional Court dated Sept. 3, 1982.

none sufficiently clear so as to enable it to withdraw the dispute from arbitration.

If the Court of Appeal in *Metro-Police* had subscribed to an extreme reserved rights theory of collective bargaining interpretation, it could have found the existence of a management rights clause irrelevant. Where the agreement is completely silent on the subject, it is still open to the Court, in another case, to develop a theory of management's obligations beyond those stated in *Metro-Police*. Because of the Canadian courts' relegation of reliance on the practice of the parties largely to cases where the agreement is ambiguous or to cases where a promissory estoppel arises, it is most unlikely that the act in dispute would have to conform with past practice not previously objected to by the union. It is clear, however, that the act would have to be undertaken in good faith and not as a subterfuge to suppress express terms of the agreement. The latter obligation survives *Metro-Police* where, it will be noted, that question was remitted back to the arbitrator.<sup>72</sup> It could also be argued that even under the *Metro-Police* rule the act would not be a genuine exercise of rights under the management rights clause if it was demonstrably not dictated by requirements of the business for efficiency, economy, or expeditious performance. Hence, such an act would be undertaken *mala fides* and should suffer the same fate which would befall an act intended to evade substantive provisions of the collective agreement. In the absence of *any* treatment of the subject in the agreement, there should be less difficulty in demonstrating bad faith.

A recent case decided by the Ontario Court of Appeal, *Re Council of Printing Industries of Canada and Toronto Printing Pressmen and Assistants Union No. 10 et al.*<sup>73</sup> is consistent with my interpretation of *Metro-Police*. There, the Court held that a clause outside the absolute restrictions of a management rights clause fell to be interpreted by employing certain conventional rules of contract interpretation. In that case it was held that the clause in dispute should be read along with other clauses in the agreement and that an attempt

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72. In an unreported award, released in May of 1983, the arbitrator, M. K. Saltman, at page 3 noted that the issue remitted back to her by the Court of Appeal was whether the action of the Board of Commissioners of Police was disciplinary in nature, the position of the Board being that the denial of overtime was not a matter of discipline. The arbitrator found the true nature of the denial of overtime to be disciplinary, and it was acknowledged by the Board that if this were the case, there was no just cause for having imposed it. This is an example of the purported exercise of a right under the management rights clause being a subterfuge. The real reason for the act was to avoid the requirements of another provision of the agreement. In such case the act was not engaged in *bona fides*.

73. 42 Ont.2d 404 (1983).

should be made to harmonize competing clauses.<sup>74</sup> In so doing, the arbitration board majority concluded that certain obligations of fairness were imposed on management in its administration of the disputed clause so as to harmonize it with seniority rights granted employees under the agreement. In the absence of a clear right to exercise unfettered discretion, as might be granted by a properly worded management rights clause, it could be argued that to give "practical and business efficacy" to the agreement, the exercise of a right by management ought to accommodate certain employee and union rights contained in other provisions of the agreement. This is what the Court of Appeal appears to have enunciated in the *C.P.I.* case.<sup>75</sup> It would require some reasonable accommodation by management of job security rights of employees, including seniority rights, if only by way of the imposition of a requirement that the act not be unreasonable, arbitrary, discriminatory nor intended to harm, prejudice or undermine the union. Unreasonableness would exist if the company were intent on depriving a substantial number of employees of work covered by the agreement.<sup>76</sup>

##### 5. THE FUTURE OF FAIRNESS IN CANADA

I conclude that neither Canadian nor American jurisprudence supports either an extreme reserved rights or an extreme implied limitations theory. In the absence of a clause granting unfettered discretion to management, the American position, as enunciated in *Warrior & Gulf*, is that management's power to act is limited and that the extent of such limitations is to be derived from the collective agreement as interpreted by the arbitrator. If the matter is arguably arbitrable, the doubt is to be resolved in favour of the arbitrator making that decision. The ultimate decision on the merits, except in extraordinary cases, should be left to the arbitrator, and the court

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74. *Id.* at 411. Although the Court reproduced extensive portions of the award, which clearly indicated that the Board majority supported the Shime approach to contract administration as set out in the *I.N.C.O.* case, the Court rested its decision on the Board's being able to conclude that the seniority rights provisions of the agreement would be "seriously affected" by the exercise of the act in dispute. The Court held that the conclusion of the Board majority as to management's fairness obligations in the administration of the collective agreement was one it was entitled to arrive at. *Id.*

75. *Cf.* the statements to this effect of Laskin in *Falconbridge*, 8 L.A.C.2d at 282.

76. I would emphasize that the latter comments deal with a case unlike *Metro-Police*. In *Metro-Police* the arbitrator was found by the Court of Appeal to have decided that the power in dispute (to award overtime during the plant shut-down) was provided for in the management rights clause which was in terms of an "exclusive" grant of authority to management. *See Metro-Police*, 33 Ont.2d at 478.

should intervene only reluctantly, if at all. In arriving at a conclusion, arbitrators have available to them a wider array of interpretive devices than in a conventional case involving contract interpretation. Most important of these is the common law of the plant, referred to in *Warrior & Gulf*, especially the unwritten practices governing the parties' relationship.

*Metro-Police*, too, avoids taking any extreme position. As did the United States Supreme Court in *Warrior & Gulf* and Professor Laskin in *Falconbridge*, the Ontario Court of Appeal in *Metro-Police* examined the agreement and found no specific reference to the subject at issue. The Court did find, however, as the U.S. Supreme Court and Laskin did not, the existence of an unfettered discretion in the management rights clause, governing the disputed power.<sup>77</sup> Hence, the court found what was, in effect, non-arbitrability: the same issue as existed in *Warrior & Gulf*. To me, the significance of *Metro-Police* is that it cannot be read as permitting management to act with unfettered discretion where the rights granted to it in the collective agreement do not make this clear, whether these rights are found in the management rights clause or elsewhere in the agreement. Subsequent cases make it clear that even in a *Metro-Police* fact situation, a good-faith exercise of management rights is required. Where an apparent good-faith exercise of those rights results in a decision which is one that the arbitrator concludes could not be consistent with the exercise of the right, then it would be open to declare the act to have been carried out in bad faith. Such a situation could exist, for example, where hospital orderlies were required to have one year of medical school training as a pre-requisite for appointment to their position.

Finally, in rejecting the *Marsh* decision, the Court of Appeal in *Metro-Police* did so with reference to that case's seeming pronouncement of a rule that fairness was required of management in the administration of collective agreements, even where the act in question was, by the terms of the agreement, capable of being exercised by management in its unfettered discretion.<sup>78</sup> This left for further decision a case like *Warrior & Gulf*, where the agreement is completely

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77. In fact it was a finding made by the arbitrator and accepted by the Court: Since the collective agreement contained no express provisions dealing with the matters in dispute, the arbitrator then proceeded to consider if they constituted a violation of the management rights clause. On the basis of the decision of the majority of the Divisional Court in the *Marsh* case, the arbitrator held that the board had to exercise the rights conferred by art. 3.01 fairly and without discrimination.

*Metro-Police*, 33 Ont.2d at 477-78.

78. *Id.* at 478.



silent on the subject.

Given the "track record" of Canadian courts and their rejection of "law of the plant" theories, the most that may be expected is the maintenance of a theory of contract interpretation consistent with that pronounced in the *C.P.I.* case. There, in accordance with conventional rules of contract interpretation, an attempt would be made to harmonize other clauses in the agreement with management's right to manage, in order to give the agreement what Laskin referred to as "practical and business efficacy."<sup>79</sup>

The number of factors of fairness required of management to be developed by arbitrators in Canada will, no doubt, be fewer than in the United States because of the more restricted rules of interpretation available to Canadian arbitrators and because of the greater availability of judicial review in Canada. Nevertheless, the possibilities for development of a jurisprudence of fairness in Canada, in a *Warrior & Gulf* fact situation, are still alive notwithstanding the decision in *Metro-Police* which is restricted to cases where unfettered discretion to act has been vested in management by the provisions of the collective agreement.

#### 6. RESCUING LASKIN FROM HIS DEFENDERS AND INTERPRETERS<sup>80</sup>

Some commentators regard the Laskin philosophy of collective agreement interpretation to be closer to the Shime position than I do. My reason for differentiating their closely related views is based on Shime's unwillingness to be moved by either the external or internal view of an implied management rights theory.<sup>81</sup> That Laskin would be moved by a sufficiently clear management rights clause seems clear. This is supported by his reference in *Falconbridge*<sup>82</sup> to the award of the late Judge Cross as an arbitrator in *Studebaker-Packard*.<sup>83</sup> Judge Cross differentiated the management rights clause in the case before him from the one with which the late Judge Lang was faced as an arbitrator in *Canadian Westinghouse Co.*,<sup>84</sup> a management rights clause

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79. *Falconbridge*, 8 L.A.C. at 282.

80. In writing this article I accept the risk of joining this number. However, Chief Justice Laskin has only himself to blame. In 1965, he discussed with me the prospects in law teaching. Unwittingly, he influenced my decision to become a law teacher and to engage in such exercises as led me to prepare this paper.

81. *I.N.C.O.*, 14 L.A.C.2d at 18.

82. *Falconbridge*, 8 L.A.C. at 282.

83. 7 L.A.C. 310 (1977).

84. 4 L.A.C. 1536 (1953).

viewed by Judge Cross as being "broader and more general in its terms than in the case before me."<sup>85</sup> Judge Cross stated: "Apart from the *Westinghouse* decision, I must decide in any event what the particular management rights clause means."<sup>86</sup> His interpretation was that it did not include the bringing of outside contractors into the plant to do work ordinarily done by members of the bargaining unit at the time the collective agreement was signed. Of further interest is the relevant portion of the clause in question: "Except as otherwise expressly provided in this agreement nothing contained in this agreement shall be deemed to limit the company in any way in the exercise of regular and customary functions of management."<sup>87</sup> As in the *Warrior & Gulf* case, these "functions" were not elaborated upon in the collective agreement. Nor was there any proof of a regular and customary contracting out in the manner attempted by management. I do not believe it is possible to miss Laskin's point that the management rights clause cannot be ignored. But there is no magic in the name "management rights" clause. The force of the clause will depend on its language.

The so-called Laskin school has been placed in opposition to the reserved rights school. A prominent Canadian arbitrator, Harry Arthurs, took such a position in *Re Russelsteel Ltd.*<sup>88</sup> He identified the reserved rights school as permitting "contracting-out in the absence of some express prohibition in the collective agreement." Protagonists of this school were said to rely on "the typical management rights clause [as reserving] to the employer all his pre-collective bargaining rights, save those which have been expressly bargained away in collective negotiations."<sup>89</sup>

The Laskin philosophy identified by Arthurs is taken from a *Peterboro Lock* extract.<sup>90</sup> This is only part of the Laskin philosophy, for as is evident from the extracts which I have quoted from the *Falconbridge* case, Laskin does not ignore the management rights clause as a possible source of unfettered discretion.<sup>91</sup> The most that can be said is that Laskin's view of the collective bargaining process would predispose him to be more demanding in finding in a management rights clause the unfettered power to act as claimed by management. Before finding in its often general language that the particular

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85. *Studebaker-Packard*, 7 L.A.C. at 310, 312.

86. *Id.* at 312-13.

87. *Id.* at 311.

88. *Re Russelsteel Ltd.*, 17 L.A.C. 253 (1966).

89. *Id.* at 254.

90. *Id.* at 254, citing *Peterboro Lock*, 4 L.A.C. 1499 (1953).

91. See *supra* note 45 and accompanying text.

power claimed by management had been granted, he would likely require more direct and precise language than would often be the case where the same clause fell to be interpreted by an arbitrator of the reserved rights school.

When the union in *Metro-Police* applied for leave to appeal to the Supreme Court of Canada, included in the three judge panel hearing the matter was Chief Justice Laskin. To the surprise and shock of some, he joined in the unanimous decision to reject leave.<sup>92</sup> The reasons for refusing leave are not recorded; however, I do not believe too much should be read into that refusal. The Court of Appeal in *Metro-Police* acted on the basis that the arbitrator had found in the management rights clause the unfettered right in management to assign overtime during the period of inventory taking. Management rights clauses, being somewhat unwieldy instruments, leave considerable leeway for those interpreting them. That the management rights clause in *Metro-Police* could be read as reposing the particular unfettered power in management does not appear to have been contested, and the conclusion of the arbitrator does not conflict with the Court's view of the clause. That being the case, what was there left for the Supreme Court to review? In order for the appeal to succeed, the Shime view, as represented in the *Marsh* case, would have to be accepted: that even in the face of a management rights clause granting an unfettered discretion to management in carrying out the disputed act, management would have to act fairly, in some sense beyond mere *bona fides*. The Supreme Court judges hearing the application appear to have concluded that was not a matter requiring further elaboration. In doing so, they did not, in my view, depart from the position of the United States Supreme Court in *Warrior & Gulf*. At least there is left open a basis for a finding not inconsistent with that in *Warrior & Gulf*.

The above examination does not, in my view, disclose any change in the philosophical approach to the interpretation of collective agreements on the part of Chief Justice Laskin from the days when he was an arbitrator. Any conclusion to the contrary is based on a misreading of his earlier position. As to that position, which is not at all out of harmony with that of the United States Supreme Court in *Warrior & Gulf*, no one would pretend that it is favoured by a majority of judges. Nevertheless, as was demonstrated in the *C.P.I.* case, conventional contract rules can be used inventively to discover the existence of limitations on the discretion of management to do

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92. Leave to appeal dismissed October 19, 1981 (Laskin C.J.C., Dickson and McIntyre J.J.). See comments of the editors of *Labour Arbitration News*, Sept. 1982, at 5.

as it alone sees fit. While not as extensive as those devices available in the United States in cases subject to the Supreme Court's ruling in *Warrior & Gulf*, they may, nevertheless, be meaningful. They are unlikely to be so, however, if those who argue cases for unions endeavor to ignore the real messages of *Metro-Police* and *C.P.I.* (and by osmosis, *Warrior & Gulf*) and continue to argue for the acceptance of the broadest view of the Shime approach.<sup>93</sup>

#### 7. THE JURISPRUDENCE OF MANAGEMENT RIGHTS: SOME CONCLUDING OBSERVATIONS

As a result of my analysis of the Canadian and American jurisprudence, I have concluded that the United States Supreme Court and the Court of Appeal of Ontario have arrived at a number of similar conclusions:

(1) that the extreme reserved management rights theory does not apply. In the absence of an unfettered right granted to management with respect to the exercise of a particular right, management is not free to act as it pleases. The nature and extent of the limitations will depend on the provisions of the collective agreement that may be affected by the exercise of the right and there can be no "one size fits all" rule. While the validity of this conclusion is clearer in the American jurisprudence, the *Metro-Police* case can be seen to be consistent with my view. This is because it would be irrelevant, in that case, whether the unfettered power was found in the management rights clause, if the extreme reserved management rights theory applied. If the Court of Appeal considered such a theory as applicable it would have been unnecessary for it to stress the effect of the unfettered power having been granted in the management rights clause. The *C.P.I.* case is also consistent with my conclusions.

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93. My position does not ignore the fact that when management rights clauses are interpreted, the presence or absence of unfettered discretion may lie in the eye of the beholder. In the United States, a finding of unfettered discretion is less likely to be arrived at. Given the findings in *Metro-Police* and *C.P.I.*, should an arbitrator in Ontario find that the language of the management rights clause does not grant an unfettered discretion to management with respect to the matter in dispute, how willing will a reviewing court be to find that interpretation one that the language of the agreement will not reasonably bear? Where the court does not quash the award in such a case, there will be a considerable basis for arbitrators to further develop a jurisprudence of implied limitations but with less abandon than has been the case in the United States.

(2) Where an unfettered power to act has been granted to management, it is still subject to being exercised *bona fides*. If exercised with a view to achieving a prohibited goal, for example, discharge or discipline in the absence of just cause, the power could not be said to have been exercised genuinely. Where the aim of management, in exercising its power, is to achieve a purpose unrelated to the management of the enterprise, a serious question would arise as to the *bona fides* of management: Was it really acting pursuant to a provision directed at the management of the enterprise or was it attempting to achieve a prohibited goal?

(3) The law does not unduly interfere with the carrying out of necessary management functions. In avoiding the extreme positions, the law affords management the authority to manage the enterprise without the need to secure union consent at every turn, provided that such exercise does not conflict with rights granted to the union in the agreement.

(4) Similarly, the union will not be subject to the whim or caprice of management. The courts, in rejecting the more extreme management position, restrict management's unfettered power to act to cases where such power has been granted by the collective agreement. Unfettered power to act, subject always to the power being exercised *bona fides*, will be a result of the agreement. Where competing clauses in the agreement conflict with the exercise of an unfettered power, an honest attempt must be made to harmonize competing provisions in accordance with conventional rules of contract interpretation.

I am supported in my conclusions by the fact that David Feller, who was counsel for the United Steelworkers of America in the *Trilogy* cases, has acknowledged the fact that the law in the United States does not interfere with management's right to manage the enterprise as long as it is pursuing business purposes which do not interfere with union rights under the agreement.<sup>94</sup>

I would characterize the response of the courts in the two countries as a reasonable and realistic accommodation to the goals inherent in the relevant collective bargaining legislation. The fairness achieved

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94. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 633 (1973). "On matters covered by the agreement and within the limits imposed by it either expressly or impliedly, management is free to manage, without either immediate or ultimate restraint. . . ." *Id.* at 770.

in carrying out the dictates of the courts may not meet an ideal standard of justice or the realization of rights viewed from a more theoretical perspective. I have, however, made no attempt to develop a more general and abstract theory of management rights more consistent with employees having a greater role in collectively deciding the nature of the life they will lead with each other in and through their work. In doing so:

(1) I have tried to follow Dworkin's admonition that jurisprudence should relate to the real problems of the legal profession.<sup>95</sup>

(2) I was also mindful of Fried's observation that it is too often the case that jurisprudential studies fail to be relevant to the problems of lawyers, because they end too far off the ground.<sup>96</sup> As a result, they may fail to reach that potential audience of lawyers and others with an interest in jurisprudence but no special expertise in the area.

(3) I was also affected by Fried's statement that the knowledge and experience of judges tends to reduce the role of formal philosophical analysis as a vital element in judicial decision making.<sup>97</sup> Justice Blackmun of the Supreme Court of the United States, in a very candid interview reported in the New York Times, acknowledged as much. While admitting to an interest in the writings of Rawls and Nozick, he stated frankly that the more abstract jurisprudential literature was usually beyond his comprehension.<sup>98</sup> I do not believe Justice Blackmun is untypical of judges.

(4) I agree with Coval and Smith, although they wrote in the context of tort law, that the goal or purpose of a statute is important in determining the operation of that statute.<sup>99</sup> Solutions to problems of interpretation may be obtained by employing a lower level of abstraction. Underlying the process may be "a complex set of orderings," yet the resolution is "ideally . . . consistent with the ongoing processes of social life. The matrix of the law . . . is the accumulation

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95. DWORKIN, *THE PHILOSOPHY OF LAW* 1 (1977).

96. Fried, *The Artificial Reason of the Law: or What Lawyers Know*, 60 *TEX. L. REV.* 57 (1979). In fairness, I should note that he also included Dworkin in that number.

97. *Id.* at 73.

98. *N.Y. Times*, Feb. 20, 1983, § 6 (Magazine), at 61.

99. Coval & Smith, *Rights, Goals and Hard Cases*, 2 *LAW AND PHILOSOPHY* 465 (1983).

100. *Id.* at 468-69.

of wisdom from generations of experience in coping with social conflict . . . ."100

(5) Judges, in surveying the "matrix of the law," would necessarily have to be affected by the dominant economic theories prevalent in society, if only as part of their "accumulation of wisdom." Although theories of market economics continue to represent the dominant economic theme for most judges in deciding labour law cases, modern Canadian and American labour legislation has reflected the impact of Keynesian economics. This impact does not appear to have been lost sight of by the courts in deciding *Warrior & Gulf* and *Metro-Police*. With the growth in acceptance of neo-classical economics and the relative decline of support for Keynesian economic theories, it may be that future developments in labour law will also reflect this change.