Recent Developments in Labour Law in Nova Scotia

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I. Introduction

The past two years have been a fruitful time for those in Nova Scotia interested in labour law. During this period, the Supreme Court of Canada has handed down several decisions of relevance in this province, while the Nova Scotia Supreme Court itself has had cause to decide issues of considerable significance. Even more important, the number of written decisions published by the Nova Scotia Labour Relations Board has increased somewhat, with the result that some detail as to the day to day practice of the Board and its interpretation of the Act is now available. This comment will review as many of the new authorities as is possible in an attempt to provide an indication of the current legal status of labour relations in Nova Scotia. For the most part these cases involve the Trade Union Act. However, it must be remembered that the common law does have an impact on labour relations and accordingly several such decisions are discussed.

II. Constitutional Issues

The question of whether a provincial Labour Relations Board has jurisdiction over a particular group of employees has not caused too many problems in Nova Scotia. Apart from the decision of the Supreme Court in J. P. Porter Co. v. Industrial Union of Marine and Shipbuilding Workers of Canada, Local 13 the matter does not appear to have been judicially considered in recent years.

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1. The writers would like to thank Professor Innis Christie for his comments on the first draft of this article and Mr. Michael Gardiner for the use of his paper on cease and desist orders in Nova Scotia written for the Trade Union Law course in 1974. All comments and conclusions herein are, however, the sole responsibility of the writers.
2. Trade Union Act, S.N.S. 1972, c. 18.
This is in sharp contrast to many other parts of the country where cases have been arising with some frequency before various Courts and Labour Relations Boards. In light of the absence of local jurisprudence, two decisions, one by the Supreme Court of Canada and another by the Nova Scotia Labour Relations Board, should be commented on.

The unanimous conclusion reached by the Supreme Court of Canada in CNR v. Canada Labour Relations Board & Canadian Brotherhood of Transport and General Workers that provincial labour legislation applied to employees of Jasper Park Lodge was hardly surprising. Jasper Park Lodge is located on an area of land leased by the CNR from the federal government and is part of a national park. The Lodge, which is owned by CNR in its own right, is part of the hotel complex that the company is authorized to carry on under its charter and is not restricted to, indeed, appears to have very little connection with, passengers travelling on the CNR railway system. The appellant CBRT had applied to the CLRB in 1970 for certification as bargaining agents for a unit of employees employed at the Lodge. The Board rejected the challenge by CNR to its jurisdiction on the grounds that the Alberta labour relations legislation applied to such employees and duly certified the union. On eventual appeal to the Supreme Court of Canada the decision of


7. Id. at 549; 45 D.L.R. (3d) at 3.

8. Id.
the Appellate Division of the Alberta Supreme Court\textsuperscript{9} quashing the certification was upheld in a judgment delivered by the Chief Justice.

In the Supreme Court counsel for the appellants relied on two arguments. The CLRB submitted that the employees fell within the scope of s. 53(g) of the \textit{Industrial Relations & Disputes and Investigation Act}\textsuperscript{10} as being the subject of the federal declaratory power by virtue of s. 18(1) of the \textit{Canadian National Railways Act}.\textsuperscript{11} The CBRT, supported by the Board, argued that s. 54 of the \textit{IRDI Act} justified the Board’s certification in that the CNR was wholly-owned by the federal government and had thus been established to perform the function, \textit{inter alia}, of operating Jasper Park Lodge on behalf of the Government of Canada.\textsuperscript{12}

The submission of the CLRB was shortly dealt with by the Chief Justice. Counsel’s argument rested on the premise that the Lodge fell within the phrase ‘other transportation works’ in s. 18 of the \textit{Canadian National Railways Act}. In the words of Laskin C.J.:

\textellipsis

His Lordship answered this question in the negative. While the empowering Act permitted the CNR to acquire \textit{inter alia}, hotels as it found it ‘\textit{necessary and convenient for the purposes of National Railways’},\textsuperscript{14} to have concluded that this automatically brought any hotels within the scope of ‘other transportation works’ would have meant that any properties that CNR acquired pursuant to such power would fall within the federal jurisdiction. This would be the case even though the property was in fact not incidentally connected with the railway system.\textsuperscript{15} Laskin C.J. felt the argument was

\textsuperscript{12} [1974] 1 N.R. 547 at 553; 45 D.L.R. (3d) 1 at 6.
\textsuperscript{13} \textit{Id.} at 552; 45 D.L.R. (3d) at 5.
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.}
The contention by counsel for the CBRT based on s. 54 of the IRDI Act caused the Chief Justice a little more difficulty. Laskin C.J. traced the history of the CNR briefly and examined the financial and shareholding structure of the company. He concluded that "the ownership and control in the Crown and in the federal Government under legislation of Parliament is thus abundantly evident." Nevertheless, he found that Jasper Park Lodge was not run "on behalf of" the Government of Canada.

His Lordship approached this issue on the basis that the words "on behalf of" were words of agency and was clearly influenced in his decision that an agency relationship did not exist by the somewhat surprising concession by counsel for the appellants to this effect. However, Laskin C.J. also supported his conclusion by reference to the Financial Administration Act and the Canadian National Railway Act. The former described the CNR as a "proprietary company" as distinct from an "agency corporation". His Lordship decided that while this was not determinative of the status of a Crown Corporation, in the absence of any express provision in the applicable legislation creating an agency relationship the disclaimer of the existence of an agency by the CLRB was reinforced. Accordingly, since the Canadian National Railways Act, unlike several other statutes, did not expressly create such a relationship the CNR did not fall within the scope of s. 54.

Presumably, the decision in the present case will make it extremely difficult to argue that crown corporations fall within s. 54 of the IRDI Act in the future. While in subsequent cases counsel may make their position easier by not disclaiming the existence of an agency, it would seem that Laskin C.J.'s uncharacteristically technical approach to the issue would preclude many alternative findings. To this end, it is unfortunate that the Chief Justice constrained himself to the strictness of legislative language and did

16. Id.
17. Id. at 553; 45 D.L.R. (3d) at 7.
18. Id. at 554; 45 D.L.R. (3d) at 8.
19. Id. at 553; 45 D.L.R. (3d) at 7.
23. Id.
24. Id.
25. Id. at 556; 45 D.L.R. (3d) at 9.
not adopt a more realistic analysis of the relationship between the parties. Nevertheless, having regard to the inherent reluctance of the Courts to pierce the corporate veil by finding a dependent relationship, particularly between the Crown and a corporation, his Lordship’s conclusion appears correct.

It should not be concluded, on the other hand, that every hotel run by CNR or CPR will automatically fall within the provincial jurisdiction as a result of this decision. The Supreme Court did not have to consider the effect of s. 53(b) of the IRDI Act as counsel no doubt felt the matter was precluded by the decision of the Privy Council in CPR v. Attorney-General of British Columbia (The Empress Hotel Case). Nevertheless, there would appear no reason why this case and the present decision might not be distinguished in appropriate circumstances.

Consider, for example, the case of the Hotel Nova Scotian in Halifax. Unlike both the Empress Hotel in Victoria and Jasper Park Lodge this is situated directly over the railway station and to this extent is an integral part of the railway operation. While physical proximity is obviously not an adequate criterion in itself, it is arguable that when first established the Nova Scotian was primarily intended to accommodate those travelling on the railway system and not primarily as a tourist resort or a hotel for the general public. The question remains whether the fact that the hotel is open to the public at large should be determinative of jurisdiction. Apparently Laskin C.J. would think so, at least in the context of s. 53 of the IRDI Act. The response of the Privy Council in CPR v. Attorney-General of British Columbia is not, however, quite so restrictive:

It may be that, if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, the hotel would be a part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on

26. Section 53:
Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, but not so as to restrict the generality of the foregoing,

(b) railways, canals, telegraphs and other works and undertakings connecting a province with any other or others of the provinces, or extending beyond the limits of a province.

the appellant's system may be a part of its railway undertaking whether that provision is made on trains or at stations and such provision might be made at a hotel.\(^{29}\)

Here the Council was prepared to look for a principal 'rationale'. With respect, this appears to be the preferable approach. The basic question should be whether the hotel is an integral part of the railway operation or whether it is just a separate business which is convenient and advantageously placed for the transportation system. Such factors as the nature of the people staying at the hotel \(i.e.\) their mode of travel, or service arrangements in the hotel \(i.e.\) whether a special attempt to accommodate train travellers is made, might be indicative of what side of the line a particular case fell. Based on these criteria, the Nova Scotian may be a bad example. Nonetheless, the question of jurisdiction in this context is by no means a dead issue.

The problem before the Nova Scotia Labour Relations Board in *Bread, Cake, Biscuit, Crackers, Candy, Confectionary & Miscellaneous Workers' Union, Local 446 & Machine Warehousing & Transport Co.*\(^{30}\) was both argued and resolved on more traditional grounds. At issue was whether employees employed in the company's warehousing and distribution division fell within the legislative jurisdiction of the federal Parliament and thus outside that of the Nova Scotia Board on the basis that it was part of an interprovincial undertaking within s. 92 of the *British North America Act.*\(^{31}\)

The company had two operations at its location in Dartmouth. One was the moving and storage division which naturally was involved in business throughout the country and across provincial boundaries. The Board was of the opinion that this operation fell within the jurisdiction of the federal Government. The second operation involved the warehousing and distribution of goods unconnected with the moving division. Having made the finding that the two divisions were not, from a constitutional point of view, integral parts of the same operation, the Board accepted jurisdiction over such employees.

Several points might be made about this decision. First, the Board held that the warehousing and distribution operation did not


\(^{30}\) L.R.B. No. 2173.

have a "federal aspect" merely because it made some shipments across provincial boundaries by common carrier. This conclusion is consistent with earlier jurisprudence developed especially by the Ontario Courts and Boards to the effect that if the primary business in question is not that of a common carrier, the question of jurisdiction will depend on whether the transportation operation was an integral part of the primary business. Had the interprovincial shipments been made on a regular, albeit infrequent, basis on the employer's own vehicles rather than by common carrier, a contrary finding might well have resulted.

Second, it is important to recognize that the warehousing and distribution operation handled goods distinct from those in the moving and storage division. In this way the Board was able to separate the operation. Had this not been so, the employees must have been regarded as part of a federal undertaking. The case would have been indistinguishable from those involving truck drivers who pick up mail, mechanics maintaining trucks used in interprovincial carrier work, or stevedores who load ships. All are integrally connected with a federal operation.

Finally, it must be assumed that there was no integration of employees in the two operations in question. No doubt the movement of a minimal number of employees from division to division would not have proved fatal to the question of jurisdiction. However, it is submitted that had there been evidence that employees frequently worked in both operations the Board would have had no option but to refuse jurisdiction over any of the company's employees.

III. Certification

Without doubt the certification procedure set out in s. 24 of the

Trade Union Act has produced more problems for the Labour Relations Board than the remainder of the Act put together. For the most part the controversy has centered around the issue of certification without a vote under s. 24(2) (c) and the relevance of petitions filed by intervening employees. The latest steps in this saga have been the decision of the Appellate Division of the Supreme Court in the Schwarz case and the Board's new policy of prehearing votes. Section 24, however, contains several subsidiary points which are of some importance and which the Board has had cause to comment on recently. Before turning to the question of certification and votes it is, therefore, intended to mention two other issues.

The first concerns the obligation of the Board to find under s. 24(2) that a specified number of employees in a unit "are members in good standing". The Regulations governing the procedure of the Board define "member in good standing" as a person who at the date of application for certification has joined or signed an application for membership in the applicant trade union and has paid, on his own behalf, at least $2.00 to the union in union fees within the prescribed time limits. While this requirement is readily satisfied and causes few problems, it is important for the Board to ensure that those who sign a union card and pay the $2.00 do so as part of a genuine desire to become union members. Just as it is important that the Board protects employees from employer influences, so should union pressure and chicanery be effectively dealt with.

The clear cases of union coercion can usually be dealt with under the unfair labour practices provisions of the Act or the use of the

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36. Section 24(2):

When, pursuant to an application for certification under this Act by a trade union, the Board has determined that a unit of employees is appropriate for collective bargaining

(c) notwithstanding clause (b) hereof, if the Board is satisfied that the applicant trade union has as members in good standing more than fifty percent of the employees in the appropriate unit and the Board is satisfied that no useful purpose will be served by conducting a vote among the employees in the unit, it may certify the trade union as the bargaining agent of the employees in the unit.

40. Id. at Regulation 10.
41. S.N.S. 1972, c. 19, ss. 51-56.
Board's discretion not to certify. Less obvious techniques of signing up doubting members, including those carried out in good faith, present a more difficult problem. To this end, the "policy statement" of the Board in Retail Clerks International Association and Dominion Stores Ltd. is a very important indication of Board practice. In this case one employee, claimed as a member of the union, testified that he had never paid the $2.00 required under the Regulations. The Board was not satisfied that this fact was known by responsible union officials. However, it was established that several "keys" had adopted the practice of not collecting the $2.00 from employees at the time of signing but they would collect it later. In fact, the "key" actually paid the money to the union and, with one exception, collected it from the employee at a later date.

The Board found that this practice did not satisfy the requirement of Regulation 10 that the $2.00 fee be paid by an employee "on his own behalf". While the Board held that on this occasion the practice would not mean the dismissal of the application for certification, the decision makes it clear that strict standards will be applied in the future. The Board stated that their policy was to distinguish between two situations:

Where it is established that, unknown to union officials, proper payment has not been made in respect of persons claimed as members of the union, those persons are simply not counted as members. On the other hand, where it is established that the union officials who signed the affidavit knew or should have known that the $2.00 was not properly paid the matter is much more serious. The application will be rejected outright because knowingly signing a false affidavit is to commit a fraud on the Board.

At first sight this statement may appear very harsh. However, the distinction drawn is consistent with jurisprudence developed by the Ontario Labour Relations Board and is backed by very strong policy reasons. Regulation 10 appears to be the only practical means by

42. Id. at s. 24(3). See, however, infra, at note 49.
43. L.R.B. No. 2155.
44. Id. at 3. The rationale for the Board's approach in the instant case lies in the fact that most union officials appeared to think this was a legitimate method of enlisting support.
45. Id. It appears basic to the Dominion Stores case that the $2.00 was lent by the person signing up members. Quaere what the approach of the Board would be in a case where a fellow employee not involved in the membership drive lent the $2.00 to a prospective member. Apart from the problems of proof, there would seem to be nothing wrong with this provided that the borrower repays the money.
which the Board can judge the number of "members in good standing".\textsuperscript{46} The receipts and affidavits accompanying the union's application are prepared by the union and relied on as \textit{prima facie} proof of the stated number of members. Accordingly, the possibility for abuse is very real and the Board must adhere strictly to the requirements of Regulation 10 insofar as they provide for an indication of the real wishes of the employees. Moreover, in that the Board would find it impossible to examine every union member about his application to join the union, it has to rely heavily on the integrity of those claiming the membership. Non-disclosure by a responsible union official should therefore be fatal to the application since the Board would not know the incidence of improper membership and the whole application will be tainted.

The second decision of interest arose in \textit{Nova Scotia Government Employees Association and the Izaak Walton Killam Hospital for Children}.\textsuperscript{47} Briefly, the facts were that the Association applied for certification of a group of employees who were not eligible for membership under the constitution establishing the organization. The Board, following recent Ontario practice,\textsuperscript{48} accordingly exercised its discretion\textsuperscript{49} and rejected the application.

It must be stressed that the union constitution involved here was incorporated in a statute.\textsuperscript{50} There is no reason to suppose that the Board policy with respect to normal constitutions would be any

\textsuperscript{46} It should be noted that it is the fraud on the Board which leads to the severe result in such cases. If there is a technical breach of the Act which is disclosed to the Board at the time of the hearing there would seem to be no reason for rejection of the union application in the absence of evidence of widespread use of the practice. In such a situation the improperly obtained memberships should simply be disregarded. See the practice of the Board in Retail Clerks International Association and Dominion Stores Ltd. L.R.B. No. 2169, aff'd in Dominion Stores Ltd. v. Labour Relations Board (N.S.), S.H. No. 08072 at 28.

\textsuperscript{47} L.R.B. No. 2116.


\textsuperscript{49} While the Board does not state from where it derives this discretion, it appears reasonably clear that the word "may" in s. 24(3) of the Trade Union Act is being relied upon. Without wishing to become involved in a lengthy discussion, it does appear to the writers that this discretion may only be utilized \textit{after a vote of the employees has been taken and not as the Board pleases}. Thus, in the instant case, it would seem a strong argument could be mounted that the Board was acting in excess of its jurisdiction.

\textsuperscript{50} The Act involved was An Act to Incorporate the Nova Scotia Government Employees Association, S.N.S. 1973, c. 136.
different from that formerly adopted by the Ontario Board which is to look at the admission practices of the union. If, despite the technical ineligibility of certain employees under the constitution, the practice of the union has been to admit such employees, the Board would not be bound by the constitutional language. Only where the practice of the union had been to apply the constitutional language strictly in the past would the Board refuse to certify. The refusal, of course, was based on the premise that a union should not be certified for a unit of employees unless all the employees concerned could be members of the union. Otherwise, proper representation by the union of all the employees’ wishes could not be guaranteed.

Assuming that this is indeed the policy of the Nova Scotia Board, and there is no reason to suspect otherwise, it is interesting to compare it with the decision of the Construction Industry Panel in the first application for accreditation by the Construction Association Management Labour Bureau Ltd. Under s. 94(3) of the Trade Union Act the Panel, even where it concludes that the applicant organization has satisfied all other requirements of the accreditation procedure, has a discretion in deciding whether to accredit. In the course of refusing to grant the accreditation application in this case the Board stated:

We note that in the exercise of this discretion the Panel would be reluctant to accredit an employers’ organization to bargain on behalf of any employer who could not, if he wished, join the accredited organization.


52. “Members of the union” presumably meaning full members of the union with all rights attached thereto. For Ontario jurisprudence see the CSAO and Maine Lumber cases, id.

53. See Trade Union Act, S.N.S. 1972, c. 19, s. 91.

54. L.R.B. No. 293c.

55. Supra, note 53, s. 94(3):

Where in an application for accreditation the Panel is satisfied either..., the Panel may accredit the employees’ organization as the sole bargaining agent to bargain for all unionized employers in the area and sector.

56. Supra, note 54.
Here, the Panel appears to be saying that if the practice was to refuse membership the discretion not to accredit would be exercised. Later in the decision, however, the Board rejected counsel’s argument to the effect that by virtue of s. 90(2) any such provision would be null and void and proceeded to restate the proposition much more forcefully:

In summary on this point, the Panel will be reluctant to accredit an employer’s organization which on the face of its constitutional documents denies membership to any employers for whom it would bargain after accreditation.57

On the face of it, this statement would appear in conflict with the policy suggested supra, and it might appear that there was one rule for unions and another for employer organizations. However, the two situations may be distinguished. First, it is important to note that the Board practice with respect to unions is based on past practice. In the case of the Management Labour Bureau there was, of course, no past practice. Secondly, while in the case of a well-established union the Board might be able to accept a commitment from the union to adopt a liberal eligibility practice, in the circumstances of the present application one can understand the Board being reluctant to adopt this course. Accreditation would give the employer’s organization the power to bargain not just on behalf of one plant but all the unionized employers in the commercial and industrial sector of the Construction Industry.58 It was, therefore, vital to ensure that the power was exercised under the auspices of all of those employers. This particularly is so where the whole accreditation process up to the date of the hearing had made it clear that there were numerous potential personal conflicts between employers covered by the application.59 Proper representation had to be ensured. The case does not, therefore, stand as authority for a strict eligibility approach in the case of unions.

As commented earlier, it is the question of the relevance of petitions to the certification process that has caused the most

57. Id.
58. S.N.S. 1972, c. 19, s. 94(1).
59. See Boilermaker Contractors Association case, L.R.B. No. 333c and Canadian Automatic Sprinkler Association case, L.R.B. No. 332c. These cases were heard together in the Nova Scotia Supreme Court on application for review as Canadian Automatic Sprinkler Association v. Labour Relations Board (N.S.), S.H. No. 05071 and Boilermaker Contractors Association v. Labour Relations Board (N.S.) (1976), 14 N.S.R. (2d) 36 (S.C., T.D.).
perplexing problems in the area. When the revised Act came into force in 1972, s. 24(2) effected a major change in the legislative power of the Board to deal with certification applications. The section provides that the Board must dismiss the application if the union cannot prove to the Board's satisfaction that 40% of the employees in the unit are members in good standing. If the Board is satisfied that more than 40% but less than 60% are members in good standing a vote "shall" be ordered. However, s. 24(2) (c) provides that:

If the Board is satisfied that the applicant trade union has as members in good standing more than 50% of the employees in the appropriate unit and the Board is satisfied that no useful purpose will be served by conducting a vote among the employees in the unit, it may certify the trade union as the bargaining agent of the employees in the unit.

This provision was clearly designed, inter alia, to permit the Board to take into account the effect of employer influence and interference in the formation of the union. In other words, where the Board felt that owing to such factors there could be no certainty that the employees would vote freely and express their true wishes, they could certify without a vote. Unfortunately, as evidenced by the recent decisions of the Supreme Court of Nova Scotia in *Aerovox Canada Ltd. v. IBEW Local 625 and the Nova Scotia Labour Relations Board*, *W.H. Schwartz & Sons Ltd. v. Nova Scotia Labour Relations Board and Bread, Cake, Biscuit, Crackers, Confectionary & Miscellaneous Workers' Union, Local 441*, and *Dominion Stores Ltd. v. Labour Relations Board (N.S.)*, the exact meaning of the subsection is still quite unclear.

In the *Aerovox* case the Board had certified the respondent union without a vote, deciding that no useful purpose in determining the employees' true wishes would be served in taking a vote. The applicant sought an order in the nature of *certiorari* to quash the

60. See formerly, Trade Union Act, R.S.N.S. 1967, c. 311, s. 9.
61. S.N.S. 1972, c. 19, s. 24(2) (a).
62. Id. at s. 24(2) (b).
63. Presumably, this section is also designed to permit the Board to take the unions' numerical strength into account and thus to certify without a vote where the union has over 60% of employees in the unit as its members and all else is in order.
64. (1975), 12 N.S.R. (2d) 55 (S.C., A.D.).
66. S.H. No. 07063.
award on the basis that the Board should have ordered a vote. In the Trial Division, Hart J. dismissed the application, concluding that the Board had jurisdiction to decide that question. An appeal to the Appellate Division was unsuccessful.

In giving judgment for the Appellate Division, MacKeigan C.J. N.S. directed his enquiry to one point; the fact that there were no petitions filed by any of the employees in the unit under Regulation 2.68 This reads as follows:

(1) In considering whether any useful purpose will be served by conducting a vote among the employees under s. 24 of the Act the Board shall have regard only to evidence as to the true wishes of the employees, expressed by petition filed not later than the terminal date fixed in accordance with subsection (2).

(2) . . .

(3) For purposes of this section, a petition is any evidence in writing of an honest and voluntary statement by an employee or employees either that they wish to be represented by the applicant trade union or that they no longer wish to be represented by the applicant trade union provided the Board is satisfied that it has been

(a) signed by each employee so signifying and

(b) supported by oral testimony in the personal knowledge and observation of the witness as to the origination of the petition and the manner in which each signature was obtained.

The Chief Justice simply concluded that since there were no petitions filed the Board had "no basis . . . to consider whether a vote should be held."69 Accordingly, it had the "sole discretion" to decide the question it did and was acting "fully within its jurisdiction."70

The writers agree with this conclusion insofar as it permits the Board to exercise the power they have been specifically granted under s. 24(2) (c) and thus, to this extent, is a realistic recognition of the latter's role under the Act. One wonders, however, how his Lordship reached the conclusion that the Board had the power to exercise its discretion when he had expressly found there was no basis on which to do so. On a literal reading of s. 24(2) as a whole, the presumption would appear to be that a vote shall be ordered unless the Board exercises its discretion under s. 24(2) (c).71 If,

68. This regulation became effective December 7, 1973.
69. (1975), 12 N.S.R. (2d) 55 at 58.
70. Id. at 58.
71. This is particularly the case where the union has between 50% and 60%
then, there is no basis for exercising the discretion surely a vote should be held?

Despite these logical difficulties, the decision is a satisfactory one from a purely industrial relations perspective. A hint of things to come was evidenced, however, in a passage in which the Chief Justice demonstrated just how strictly he was likely to construe Regulation 2:

The Board is required by Regulation 2(1) to consider only petitions of employees in determining whether any useful purpose would be served in holding a vote.\textsuperscript{72}

The full effect of these words was soon to be realized in the \textit{Schwartz} decision.

In \textit{Schwartz}\textsuperscript{73} the Board once again had certified the union without a vote.\textsuperscript{74} On this occasion, however, the Board expressly stated that certain actions of the employer constituted interference with the expression of the true wishes of the employees such that no useful purpose would be served by conducting a vote. The acts involved were the distribution to the employees by the employer of a letter received from the latter's solicitor setting out how employees could make their views as to certification known to the Board. Accompanying the letter were three separate forms which the employees could fill out and send to the Board as a petition; many in fact did so.\textsuperscript{75} Nonetheless, as stated, the Board certified without a vote. An application for orders in the nature of \textit{certiorari} and \textit{mandamus} quashing the order of the Board and requiring it to order a vote of employees in the unit was dismissed by Hart J. in the Trial Division. An appeal from that decision was, however, upheld in the Appellate Division.

\textsuperscript{72} (1975), 12 N.S.R. (2d) 55 at 58.
\textsuperscript{73} (1975), 12 N.S.R. (2d) 606.
\textsuperscript{74} \textit{Id.} at 608.
\textsuperscript{75} \textit{Id.} at 611.

The Board had before it twenty-five letters which were prima facie 'petitions' within the meaning of Regulation 2. Nineteen employees had written the Board apparently on the form supplied by the employer, that they were not members of the union and did not wish to be represented by it, and are shown on the record as intervenors. Six other employees had sent in 'petitions' on another of the employer's forms stating that they had joined the union but no longer wished to be represented by it. Eight 'petitioners' gave evidence before the Board and many, if not all, of the others attended the Board hearing and were available to give evidence.
The appellant's main contention was that in deciding the "no useful purpose" issue on the basis of the employer's distribution of his solicitor's material, the Board was applying an incorrect construction of s. 24 (2) (c) and, in particular, failing to observe the requirements of Regulation 2(1). The Chief Justice agreed with this submission. His Lordship found that the Board had not directed itself to the proper question: i.e., whether the petitions were in fact "honest and voluntary". Moreover, Regulation 2 instructed the Board to take into account only petition evidence when considering the use of its discretion under s. 24(2) (c). By largely ignoring the effect of the petitions and deciding the case on other factors the Board had introduced legally irrelevant material and had thus exceeded its jurisdiction.

There can be little doubt that the interpretation placed on Regulation 2(1) by the Chief Justice runs quite contrary to the "legislative intent" behind its enactment and the common belief by management and labour as to its meaning. The regulation would appear to be the final attempt to nullify the potential of the decision in Re Sobeys Foodstores Ltd. and Canada Food and Allied Workers' Union, Local P-1157 to the effect that the Board might have been obliged to take into account any petitions received after the date of application in deciding what the true wishes of the employees were. Thus, the intent of Regulation 2(1) was to restrict the Board in ascertaining the true wishes of the employees to looking at petitions filed in the requisite manner. In no way was it intended to restrict the Board's ability to consider other evidence before it when in deciding whether any useful purpose would be served in conducting a vote, it was considering matters other than the true wishes of the employees.

Two points support this initial assessment of Regulation 2. First, the current regulation was preceded by another regulation which expressly stated that the Board, in deciding whether no useful

76. Id. at 610-611.
77. Id. at 613.
78. Id. at 615-616.
79. It is understood that the government is presently working to develop a new regulation to overcome the difficulties presented by this decision.
82. The former regulation came into force on June 14, 1973 and was amended December 7, 1973.
purpose would be served in ordering a vote, was to have regard to "honest and voluntary" petitions and any other evidence. The writers are not aware of any attempt to change the general intent of this regulation when it was amended save to eliminate its potential effect of appearing to require a vote where even one "honest and voluntary" petition was received.\(^3\)

Secondly, Regulation 2 specifically recognizes the existence of Regulation 15(1). This provides that any 'person' who believes he has an interest to be considered in connection with a certification proceeding may file a notice of intervention. One might well ask what the Board was supposed to do with any anti-employer evidence received from the intervenors if they were not permitted to take it into account in deciding the very issue that such evidence would often be related to.

The supporters of MacKeigan C.J.'s decision will no doubt answer that of course account may be had of the intervenor's evidence; the Board may use it to assess the honest and voluntary nature of the petitions. With respect, such an argument evidences a somewhat superficial analysis of the potential effect of such a stand. Two short illustrations should suffice to demonstrate this. In the first example, assume a situation where there is a 52% membership at the time of application and there are no petitions; here, of course, the Board would normally order a vote. An intervenor testifies, however, that a further 15% of the employees in the unit would have joined the union but for illegal employer interference. Thus, the true wishes of the employees are that nearly 70% desire the union and there would, accordingly, be no reason to order a vote. Yet, in light of Schwartz it appears the Board could not have regard to the intervenor's evidence because it is not petition evidence nor evidence going to the "honest and voluntary" nature thereof. Presumably, the Board could hide behind Aerovox and say that even ignoring the external evidence they were going to exercise their discretion but this is hardly an appropriate manner for a quasi-judicial tribunal to proceed. In other words, Schwartz breaks down completely when there are no petitions.

Secondly, assume that there is an application with a 65% membership but 10% file petitions withdrawing their support for the union. The petitions are "honest and voluntary" and the Board is well aware of the true wishes of the employees; a situation where a

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83. Christie, supra, note 81 at 2.
vote would normally be ordered. However, intervenors' evidence shows to the Board's satisfaction that the employer, subsequent to the filing of petition, has threatened to discipline any employee who votes for the union. Surely, this is the typical situation when the Board should exercise its discretion and certify without a vote? But, once again, it would seem that this is impossible because the evidence does not go to the "honest and voluntary" nature of the petitions, nor it might be added, to the employees' true wishes. The decision in *Schwartz*, then, does not contemplate the distinction between ascertaining the employees' true wishes and determining their *ability to express* those true wishes in a vote. Both of these factors are valid and must be taken into account by the Board in exercising their discretion under s. 24(2) (c); indeed, the latter will often be the more important in cases of employer interference. Accordingly, from a purely technical point of view, the best advice an unscrupulous lawyer might give his client would be to delay any pressure until after the petitions have been filed. Obviously, this is a ludicrous situation.

For all this, it is easy to understand the Chief Justice's interpretation of Regulation 2. There can be no doubt that his Lordship's interpretation is grammatically correct. Any effort by the Appellate Division to give effect to the legislative intent in construing the regulation would be straining the language. This, it is suggested, is the crunch issue. How far can you go in ignoring basic principles of English in trying to apply the 'Golden Rule' principle of interpretation and could MacKeigan C. J. have taken this approach in the instant case? The writers consider an interpretation consistent with the legislative intent is possible and could have been justified by the Appellate Division but to a large extent this is the result of our conception of the role of the courts in supervising the activities of the Labour-Relations Boards. Others may draw the opposite conclusion and it is this significant difference in perception which probably accounts for the conclusion reached by David Mullan elsewhere in this journal; nor, we would admit, can the latter's analysis be faulted in the final resort except in that he is not prepared to stretch the concept of viable statutory interpretation far enough. What is important is that the Chief Justice appears to have failed to take the potential effect of his interpretation into account in

making his decision and thus has foreclosed any opportunity to balance the obvious difficulties against linguistic certainties. This failure is not, with respect, justified even by a badly drafted Regulation like the one in question.

An even more substantive criticism of his Lordship's decision is his almost cursory dismissal of the respondent union's argument. Counsel contended that the effect of the Board order was that the petition had in fact been found by the Board not to be "honest and voluntary". This would, of course, mean that there were no petitions to consider and would have brought the case within Aerovox. MacKeigan C. J. refused to accept this interpretation of the order on the basis that he could not:

... find a word in the Board's decision which [suggested]... that it directed its attention to whether the petitions were in fact voluntary or the effect of the petitions.  

In refusing to consider the substance of the Board's order and instead concentrating on the technical wording, it is suggested that the Appellate Division completely ignored the role of the Labour Relations Board as constituted under the Trade Union Act. Surely its job is to administer the legislation effectively and give substance to provisions designed to promote peaceful collective bargaining which includes as its basis the concept of certification. It can be claimed that the Board order was badly drafted; while the Board was presumably proceeding on its interpretation of the regulation it could have reasonably forseen the difficulties such an approach would lead to and just possibly this may have been the time to sacrifice the principle of proceeding in accordance with the legislative intent and protect itself from review. On the other hand, an administrative tribunal charged with the administration of a statute should arguably not be forced into this position. Whatever the responsibility of the Board, it is suggested that the Court would not have strained the wording of the Board order to give it the effect contended by the union. Nor would such a result have necessitated a strained interpretation of Regulation 2. All that was required was what has been described elsewhere as "sufficient judicial respect

85. (1975), 12 N.S.R. (2d) 55.
86. (1975), 12 N.S.R. (2d) 606 at 613.
87. The words 'badly drafted' are used in the sense that it may have been possible for the Board to refer in the order to the fact that it had found the petitions to be, for example, involuntary. This more defensive approach would surely have made its position a little more secure before the Courts.
for the role and expertise of the Board”. 88 It is apparent that on this occasion such respect was distinctly lacking. 89

Even at this stage, it appeared as though there may be an “out” for the Board on future occasions. It is implicit in the Chief Justice’s reasoning in Schwartz that the Board could have used non petition evidence to assess whether the petitions were in fact “honest and voluntary”. Indeed, his Lordship specifically states that if the Board makes such a determination and there is evidence to support the finding, the Courts would have no right to review its decision. 90

The Chief Justice’s view of what constitutes an involuntary petition may not, however, provide much encouragement for the Board to adopt this approach:

If the Board’s decision can be construed, which I very much doubt, as a finding that mere distribution of the solicitor’s letter and forms were _per se_ an act which made involuntary any petitions using such forms, such a contention would, in my opinion, clearly be illogical and wrong. The mere fact that an employee uses a form supplied by the employer does not prove that the employee, in using that form letter, was necessarily not expressing honestly and voluntarily his true wishes. Suspicion may well arise in an employer-employee relationship that an employee may, out of fear or out of desire to curry favour, do what he thinks his employer may want him to do, even though contrary to his true desire. Suspicion, however, is far short of proof. 91

In fact, it appears that MacKeigan C.J. believes that an employee’s action must virtually amount to an unfair labour practice before a petition would not be voluntary 92 and that, in the absence of such a finding, where a material number of employees signed anti-union petitions a vote should probably be ordered. 93 Moreover, if a majority sign such petitions then it would seem that the Board will certify without a vote at its peril. 94

88. Mullan, _supra_, note 84.
89. Compare the quotations _infra_, notes 116 and 117. Nor are the writers encouraged by the more recent decision of Cowan C.J. in _Dominion Stores v. Labour Relations Board_, S.H. 07063. In this case evidence of employer interference was more extreme than in Schwartz and the transcript of the Board hearing demonstrated that the Board did proceed to some extent in terms of evaluating the “honest and voluntary” nature of the petitions. Despite these factors Cowan C.J. simply applied Schwartz and quashed the Board order.
90. (1975), 12 N.S.R. 606 at 612.
91. _Id._ at 613.
92. _Id._ at 613-614.
93. _Id._ at 615.
94. _Id._
The writers' argument is not with the "numbers game" played by the Chief Justice but with his Lordship's apparent equating of an involuntary petition with an employer's unfair labour practice. With respect, this approach is in accord with neither the policy or terminology of the Act. In the case of unfair labour practices the element of intent is expressly incorporated into the relevant provisions. This is not at all surprising in that they are designed to impose a fairly substantial penalty on the more flagrant employer and union activities. There is no such requirement in Regulation 2 or s. 24(2) (c). The words used in the former are "honest and voluntary"; the Board here is concerned with the state of mind of the employee and it is not the motive of the employer but the effect of his actions on the employees that is important. In a more general sense, s. 24(2) (c) permits the Board to ensure that any vote will represent the true wishes of the employees. Accordingly, the Board concerns itself with an objective assessment of employer activity and attempts to gauge its likely effect on employee voting patterns. In any one case, the facts that lead the Board to conclude that the petitions were not "honest and voluntary" or that voting rights might not be exercised freely, may or may not amount to an unfair labour practice⁹⁵ and the Act does not require that they should.

In the case at bar, the Board found that the distribution of material by the employer would likely have unduly influenced the employees. It is submitted that there was sufficient evidence to justify that conclusion. One might well ask, for example, why the employer took the initial step of distributing the material when the proper form sent out by the Board itself was displayed in an appropriate place. Would this step not influence the employees or at least convince them that their employer had a very real interest in the certification application. This impression is reinforced when it is realized that although the Board notice had been posted for three days, no material petitions were received by the Board until after the material had been distributed by the employer.

It will be interesting to see what the reaction of the Supreme Court will be in future cases should the Board start deciding that petitions are "involuntary".⁹⁶ In the meantime the only thing that appears certain is that where there are no petitions the Board, so long as it does not have regard to other evidence, can exercise their

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⁹⁵. S.N.S. 1972, c. 19, s. 51.
⁹⁶. See Dominion Stores, supra, note 89.
discretion under s. 24(2) (c) as intended. This, of course, is the effect of combining *Aerovox* and *Schwartz*. Yet, even if the Board has regard to the membership figures, is this not having regard to extrinsic evidence? The answer in *Aerovox* would appear to be no. Accordingly, the Board can play a "numbers game" but that is about all.

Fortunately, it appears that the number of petitions in future cases may well become few and far between as a result of the Board’s recent policy statement adopting the concept of pre-hearing votes\(^\text{97}\) and yet another regulation. Regulation 2(2) (a) was amended on May 23, 1975 to read:

Upon the filing of an application for certification the Chief Executive Officer shall:

(a) fix the terminal date . . .

Since the pre-hearing vote will normally be held five days after the application for certification and only three days after the employer has received notice, and the terminal date will be set before the date of the pre-hearing vote, it is likely that the opportunities for petitions are going to be minimal. If a substantial number do materialize during the available short period, the Board’s suspicions could be justifiably aroused as to why, less than three days after the peak of an organizing campaign, so many union members changed their mind. While this is not a particularly satisfactory way of improving the present situation\(^\text{98}\) at least it may avoid the confusion engendered by *Schwartz* and *Aerovox*. Obviously, if the present Regulation 2 does not on its clear wording accord with legislative intent the provision should be amended. Till then, the current state of the law is very much up in the air.

Two final points might be made. First, one has to wonder what all this confusion about certification is about. It is time consuming and costly and potentially destructive of the Trade Union Act and the

\(^{97}\) Policy Statement of the Nova Scotia Labour Relations Board, June 1975.

\(^{98}\) Over the past months there has been considerable discussion as to whether or not the policy statement is, in fact, valid. This is not the appropriate forum to discuss the matter fully. The arguments commonly made are, however, as follows: (1) The policy statement actually amends s. 24 of the Act which lays down a particular order which must be followed by the Board. Thus, for example, the question of an appropriate unit must be settled before a vote is ordered. Under the pre-hearing vote procedure the vote would take place before the appropriate unit issue was even considered. (2) The pre-hearing vote constitutes a denial of natural justice and (3) that this sort of change should be made by regulation and not simply by a policy statement.
Labour Relations Board as an effective administrative tribunal. Surely, if a union is certified without adequate support it will not be an effective bargaining agent. In other words, certification is merely a hinge-pin granting a licence to bargain and is certainly no guarantee of success in the latter. Secondly, it must always be remembered that an employer is guaranteed the right to "free speech" in s. 56 (2) of the Trade Union Act. One wonders why employers do not utilize this opportunity to put their views in an open and straightforward manner to their employees. If this manner is adopted and so long as the employer's acts are not excessive, the Board must accept the exercise of his rights. To use more subtle methods of communication as evidenced by the facts in Schwartz and Dominion Stores is simply to invite the suspicion of the Board and the subsequent problems.

Further problems with the certification provisions have arisen of late in the Hawker Siddeley and Dominion Stores cases. The main questions on these two decisions have not revolved around the issue of certification without a vote, however, but on the acceptability of the applicant for certification. In Dominion Stores Ltd. v. Labour Relations Board (N.S.), the Retail Clerks' International Association was certified as bargaining agent for the appellant's employees without a vote. Inter alia, the appellant alleged that the Labour Relations' Board had proceeded to certify without jurisdiction in that the application had not been signed by a person authorized in accordance with the provisions of s. 4(d) of the Trade Union Act. Section 4(d) provides that:

For the purposes of this Act, an application to the Board or any notice or any collective agreement may be signed, if it is made, given or entered into

... (d) by a trade union or employers' organization, by the president and secretary of the trade union or employers' organization or by any two officers thereof or by any person authorized for this purpose by resolution duly passed at a meeting of the trade union or employers' organization.

Regulation 9, dealing with applications for certification, then provides that an application shall be verified by statutory declaration.

100. Unreported decision of the Supreme Court (T.D.) of Nova Scotia, October 21, 1975, S.H. No. 07063.
101. Id. at 2.
of a person or persons authorized in accordance with s. 4(d). Unlike many International Unions, the Retail Clerks' Association does not form a local before the application is made. The application is made initially by the International Union, as contemplated by the Act, and a local formed thereafter. In the instant case, the application was made by an International Representative authorized to so act by a resolution of the Association's Executive Board.

Cowan C. J. held that this procedure did not satisfy Regulation 9 and, therefore, since a valid application was not before the Board it had no jurisdiction to hear it. The Chief Justice found that the resolution of the Executive Board was not a 'resolution duly passed at a meeting of the trade union' within s. 4(d). That meeting would be the meeting of all delegates, in other words, the International Convention.

With respect, while this conclusion may be justified by precedents and technical interpretation, the result it leads to is ludicrous. The International Convention meets once every five years and to expect a policy meeting of this nature to be responsible for the passing of such day to day resolutions is to ignore completely the structure and organization of international unions. The reason that the words 'meeting of the trade union' are used in s. 4(d) is simply that when this section was originally drafted it was not the practice for International Unions to make the application; a local would normally be formed first. But in that the Act contemplates the form of application made in the present case, surely the Court should have made some accommodation to avoid its complete nullification.

It is suggested that the Chief Justice had two possible alternatives open to him. The first is suggested by his Lordship himself. Cowan C.J. implies that had the constitution provided that the Executive Association could pass such a resolution it might have satisfied s. 4(d). He found, however, that in the instant case there was no such authorization, express or implied. It is suggested that without unduly stretching the language, s. 9A of the Constitution empowering the Executive Board to 'have such full power during the intervals between International Conventions to make such laws as may be needed in the interest and for the benefit of the International Association', could have been held to provide such

102. See the definition of trade union, R.S.N.S. 1972, c. 19, s. 2.
103. Supra, note 100 at 12.
authorization. Moreover, in that in reality the Executive Board, as
with all International Unions, administers the union activities, it
must surely have been possible to assume an acquiescence by the
International Convention in favour of the Executive Board.

In the final analysis one wonders why Cowan C.J. did not make
use of s. 7 of the Act which provides that no proceedings under the
Act “are invalid by reason of any defect in form or technical
irregularity.” It is no doubt true that:

All wording in a statute should be interpreted and where possible
given a meaning. Clause [(d)] must therefore be interpreted as
exclusive and meaning those named in the clause and no other or
others can sign an application for certification. 104 Nevertheless,
so long as the substance of s. 4(d) is satisfied why should a
technical defect be destructive of any application? Nor can there
be any doubt that the substance was satisfied in the instant case.
Section 4(d) can have only two possible rationales. First, to
ensure that those making the application are representing the
wishes of their organization. Secondly, and more importantly, s.
4(d) is necessary to ensure that at the early stage of application
there is a viable entity which the Board can hold responsible for
any fraud or other reprehensible activities. The provision of
responsible officials provides a means for attaching liability to
the union. Without doubt, both these factors were satisfied in the
present case. In light of these factors, it is submitted that the
quashing of a certification and the resultant destruction of a
$400,000 organizing campaign can hardly be justified.

Integrally connected with the question of a valid resolution is the
effect of Regulation 9(3) which provides for the confidentiality of
all documents filed by the union before the Board in an application
for certification. Amongst these documents is the authorization
resolution referred to above. Notwithstanding the specific wording
of Regulation 9(3), Cowan C.J. held that Civil Procedure Rule
56.08 required the document to be forwarded to the Court as part of
the Board record and then disclosed it to the parties. 105 In the first
place, one would have thought that the specific nature of Regulation
9(3), assuming its validity, 106 would have overridden the general

104. Id. quoting from Retail Clerks International Association (1973), 8 N.B.R.
(2d) 452 at 453 (C.A.). The reasoning of the New Brunswick Court of Appeal in
this case and in Re Keddy’s Motor Inn (Fredericton) Ltd. and Teamsters,
Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local Union
76 (1974), 9 N.B.R. (2d) 642; 52 D.L.R. (3d) 10 (C.A.) were expressly adopted
by Cowan C.J.
105. S.H. No. 07063 at 4-6.
106. Cowan C.J. did, in fact, ‘doubt’ the validity of at least part of Regulation 9(3)
effect of the Civil Procedure Rules. Secondly, the Chief Justice’s conclusion would appear to ignore the reason for the confidentiality of such documents. While not a particularly important issue in the instant case, the confidentiality of the application and accompanying documentation is essential in that it frequently contains the names of union members. Thus, the same rationale applies to the resolution as to union membership lists. Indeed, in many cases, confidentiality of the resolution may be of greater importance, since the latter will presumably contain the names of the principals behind the organizing campaign. In short, the rationale for confidentiality is to prevent employer interference and, infrequent as the latter might be, such rationale is legitimate. It can be argued that this is an unnecessary fear. Cowan C. J. only disclosed the resolution to the parties at the conclusion of the court proceedings, and thus, confidentiality at the hearing stage was maintained. But this approach ignores the fact that with the certification being quashed the whole procedure may be begun again with the need for confidentiality still present. Moreover, it must be remembered that the union officials will be left unprotected on the many occasions when another application is not made. While such officials still would have recourse to the unfair labour practice provisions of the Act, it does not appear that they have been used very often.107 From the point of view of effective operation of the Act it must be able to be assured during the organization campaign that the names of the union officials involved will never be revealed.

One point, however, remained unclear from the Chief Justice’s decision. His Lordship did not specifically state that the parties had access to the documents covered by Regulation 9(3) as of right. Although they were part of the Court record, it is possible to read his judgment as conferring a discretion of publication of such documents on the presiding judge. Even this minimal protection appeared to disappear a matter of weeks later when Dubinsky J. ordered a similar resolution to be disclosed to the parties two days before the case in question came on for trial.108 This implied that

in Dominion Stores and maintained his ‘reservations’ in Hawker Siddeley, S.H. No. 08080.

107. It must be remembered that active union protection of its ‘members’ and supporters may well diminish in the absence of a certification application.

108. The order was granted November 28, 1975. See the Hawker Siddeley case, S.H. No. 08080.
the parties had an automatic right of access to the documents as part of the Court record.

In Hawker Siddeley Canada Ltd. v. Labour Relations Board (N.S.),\textsuperscript{109} the effect of Regulation 9(3) came up for consideration by Cowan C.J. again. Acting in accordance with the decision in Dominion Stores, the Chief Executive Officer of the Board had sent a copy of the resolution to "the presiding judge in a sealed envelope for his information only." As outlined above, Dubinsky J. then, at the hearing of a pre-trial motion by the applicant for certiorari, disclosed it to the parties.\textsuperscript{110} At trial, the Chief Justice appeared to restrict the potential effect of Dubinsky J.'s ruling:

It seems to me that the procedure followed by the Chief Executive Officer of the Board is the proper one, in the circumstances. It may be that, in some cases, the exhibits in question should not be open to inspection by the parties. If such exhibits are placed in a sealed envelope and are opened only by order of a judge, the necessary safeguards are provided.\textsuperscript{111}

While his Lordship appears to be saying that disclosure should be the rule and not the exception, this passage demonstrates an appreciation of the potential dangers of unfettered access to confidential information and, one suspects, a realization of the rationale of Regulation 9(3). It is to be hoped that "some cases" become the rule in future.

The remaining grounds for the application for certiorari in Hawker Siddeley were also disposed of by the Chief Justice in a manner that proffers some hope of an increased appreciation by the Courts of the role of the Labour Relations Board. The application for certification by the Marine, Office and Technical Employees' Union, Local No. 28 was accompanied by a constitution and statutory declaration as required by Regulation 9. However, the constitution filed by the applicant was that of the Marine Workers' Federation and it was alleged that this had not been adopted by the local. Moreover, the signatures to the application were the President and Secretary-Treasurer of the Federation and it was alleged they had not been elected by the members of the local as officials of the latter; nor had they been authorized by that entity to make the application.

\textsuperscript{109} Id.
\textsuperscript{110} Supra, note 108.
\textsuperscript{111} S.H. No. 08080 at 3.
The applicant employer alleged on the above facts that a proper constitution had not been filed in that the local should have filed its own constitution, and thus both the definition of a trade union in s. 1(w) and Regulation 9 had not been satisfied. This argument was shortly dealt with by Cowan C.J.. His Lordship found that the question of whether there was a “trade union” was a matter for the Board to determine within its jurisdiction and not reviewable even without recourse to s. 18, the privative clause in the Trade Union Act. Similarly, the Chief Justice found that the constitution should not be investigated in the context of Regulation 9. This was a matter going to whether there was a “trade union” and so long as a constitution of the applicant was filed this was a question for the exclusive determination of the Board.

The applicant’s alternative argument was again based on the claim that the signatories to the application for certification had not been authorized by a resolution in accordance with s. 4(d). It appears as though no authorization had been given by the applicant trade union as required but Cowan C. J. did not find it necessary to answer this question. Relying on s. 11 of the Federation’s constitution which provided that certain officials of the latter shall be pro tempore officials of the local, his Lordship concluded that the application had been signed in accordance with s. 4(d) by the President and Secretary-Treasurer of the applicant trade union.

Accordingly, no resolution was necessary.

With respect, this decision of Cowan C. J. is the most enlightened for some time in the labour law field in Nova Scotia. For once there is demonstrated an appreciation of the real issues involved in certification applications and a reluctance to confuse things by resorting to technicalities. It is true that the Chief Justice had to resort to technicalities to justify his conclusion. However, even in the absence of such avenues it is submitted that the same conclusion should have been reached on the issue of the constitution. At the risk of repetition, it should be emphasized that all the Board should be concerned with is that there be a viable entity applying for certification. One way of measuring the viability is that the union has a constitution. Article 4 of the Federation constitution provides that that constitution is mandatory for all

112. Id. at 8.
113. Id. at 10.
114. Id. at 11.
115. Id. at 12.
locals. Likewise, the by-laws of the local must not conflict with those of the Federation. Accordingly, whether or not the constitutional documents had been formally adopted by the local at the time of certification or the application therefor, it had no alternative but to treat the Federation's constitution and at least the basic by-laws as its own. The requirement of a viable entity is satisfied.

In the final analysis, Cowan C.J.'s enlightened approach is demonstrated by his implicit approval of the following passages from earlier decisions of the Nova Scotia Supreme Court:

I venture to remark that any proper reading of union constitutions must have regard to the twin — fact that they are practical documents, written for the grievance of workmen and their various units of organization, and couched in language appropriate to the laymen who compose and manage those units.116

Whatever a Court could or would do or not do, a tribunal such as a Labour Board need not conduct an inquiry as if it were a trial: Bd. of Education v. Rice, [1911] A.C. 179. Some latitude must be given such tribunals. They have to deal with very practical questions in a common sense and often in an expeditious way. There is a danger that lawyers and Judges with their profession preconceptions may seek to impose upon them technical requirements never contemplated by the legislation setting up the tribunals. I feel that to quash the Board's order in this case would be to disregard that danger.117

Such sentiments have been sadly lacking in the past two years in these very same Courts. It is to be hoped that when the Hawker Siddeley case reaches the Appellate Division, the Court will continue the move towards a more sensible balance established by Cowan C.J.

IV. Untimely Strikes

As one might expect in times of rapid inflation, the number of illegal strikes in Nova Scotia, and indeed Canada, has been on the increase. As a result there have been several decisions in this area

116. Re United Mineworkers of America, District No. 26 (1960), 44 M.P.R. 270 at 275; 23 D.L.R. (2d) 328 at 333 per MacDonald J. (N.S.S.C., A.D.).
during the last eighteen months. Perhaps the most important, certainly the most publicized, is the discussion of the cease and desist order by the Appellate Division of the Supreme Court in the Tomko case\(^\text{118}\) and very recently the Supreme Court of Canada on appeal in the same decision. In addition, however, both the Supreme Court of Canada and the Nova Scotia Labour Relations Board have had cause to consider the validity of strike votes which are a prerequisite to legitimate collective action under the Trade Union Act.

In Tomko v. N.S. Labour Relations Board,\(^\text{119}\) the plaintiff sought an order in the nature of *certiorari* to quash a cease and desist order issued by the Construction Industry Panel under s. 49 of the Trade Union Act. The order was directed against Local 115 of the Labourers' International Union and against the plaintiff and ordered the employees of Canatom Mon-Max represented by the union "who had participated in an illegal work stoppage to forthwith cease and desist from participating in the illegal work stoppage" and the plaintiff to "direct all employees, members of the union . . . who are participating in the illegal work stoppage to return to work forthwith", and the plaintiff and the union to "cease and desist from causing and condoning the illegal work stoppage". The plaintiff and members of the union chose to ignore the Board's order and the Attorney General commenced an action against the plaintiff under the Trade Union Act for breach of the order.\(^\text{120}\)

For the purposes of this discussion\(^\text{121}\) mention need only be made of two of the plaintiff's arguments. First, he claimed that the Panel was improperly constituted and thus the order invalidated because MacNeil, a member of the Panel, was biased and disqualified from acting. Secondly, he claimed that there had been a denial of natural justice in that the plaintiff and employees to whom the order had

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119. *Id.*

120. S.N.S. 1972, c. 19, s. 82.

121. The third ground of appeal, which was dismissed by the Court concerned the validity of the cease and desist order. Tomko claimed that s. 49 of the Trade Union Act pursuant to which the order was issued was *ultra vires* the Provincial Legislature and unconstitutional because it purported to confer on the Board judicial powers and practices which under s. 96 of the *British North America Act* could only be exercised by and conferred upon a Court whose members are appointed by the Governor-General in Council. See *supra*, note 118 at 282.
been directed were given no adequate notice of the matters alleged against them and no opportunity to answer the complaint by presenting evidence or otherwise making representations to the Panel. The Appellate Division dismissed the application for certiorari on all grounds.

The first argument based on bias rested on MacNeil's participation in a series of meetings at the time of the illegal work stoppage, and certain statements he was alleged to have made encouraging Tomko to send the men back to work and to adopt the arbitration procedure. MacKeigan C. J. dealt with this submission very quickly:

This does not mean, however, that the standards of what constitutes disqualifying interest or bias are the same for a tribunal like the Panel as for the Courts. The nature and purpose of the Trade Union Act dictate that members "bring an experience and knowledge acquired extra-judicially to the solution of their problems" (Lord Simonds in John East [1949] A.C. 134 at 151, [1948] 4 D.L.R. 673 at 682).

The many unions and many subcontractors and suppliers involved in any single construction project make it inevitable that union representatives on the Panel and most employer representatives would each have at least an indirect interest, much knowledge and many preconceptions and prejudgments respecting any matter coming before the Panel. Thus, mere prior knowledge of the particular case or preconceptions or even prejudgments cannot be held per se to disqualify a Panel member.

His Lordship then found that the knowledge and opinions demonstrated by MacNeil's opinions would no way be likely to lead him from exercising his duties impartially as a Board member. The writers respectfully agree with this finding. To have held otherwise on the facts would have placed the Panel in an impossible position. As MacKeigan C. J. noted, there is a great likelihood that one of the Panel member's union or organization will be connected or interested in any dispute that arises. To require of members like Mr. MacNeil that they neglect their union's interest in a particular dispute merely because they may be required to participate in a consideration of it at a later date would in large part diminish their usefulness. Such members are selected because they have been heavily involved in union activities and understand the process.

122. Id. at 297.
123. Id. at 298.
Moreover, it must be remembered that the Nova Scotia Board is part-time and therefore envisages that the members will be engaged in their normal activities much of the time. If a member of a full time Panel chose to go out and actively participate in discussions he knew would be likely to come before him the matter might well be different. In the Nova Scotia context, however, the end result of upholding the plaintiff’s contention would be to prohibit appropriately qualified personnel from serving on the Panel.

This is not to say that a member of the Panel is immune from a finding of bias. His Lordship made it abundantly clear that in the presence of “a prejudiced attitude of mind displayed by the member before the proceedings or during the proceedings”, i.e. “prejudice of a highly personal and unreasoned distortion of judgment”, actual bias would be shown. Thus, where both the plaintiff and the member in question were involved in a serious jurisdictional dispute which came before the panel it would presumably be advisable for the member not to sit.

The second ground for the application, the absence of notice and lack of opportunity to present evidence and make representations, raises a more difficult problem. Section 49(2) of the Act provides that the Board may “after investigation of the complaint that section 48 has not been complied with . . . issue an interim order requiring any person named in the order to forthwith cease and desist any activity or action or perform any act or commence any activity or action stated in the interim order.” Section 49(3) permits the Board “before or after the making of an interim order” to authorize an official “to enquire into the acts complained of, to endeavour to effect a settlement and to make a report to the Board”. If a settlement is not effected or a person named in an interim order requests so in writing, the Board by s. 49(4) “shall conduct a hearing for the purpose of considering evidence and making representations . . .” Section 49(5) then provides for the issuance of a final order.

Counsel for the defendants argued that the provision in s. 49(4) for a final hearing negatived any requirement to give notice. They also claimed that while natural justice governed the procedure of the

124. Id. at 299.
125. The circumstances in which a Board or Panel would utilize this apparent discretion are not at all clear but presumably it might be utilized where work conditions are unsafe or where an order to cross established picket lines would result in physical violence.
Board by s. 15(9), it was excluded with respect to interim cease and desist orders by virtue of s. 15(10).

MacKeigan C.J. rejected both these arguments. He found that s. 15(10) had nothing to do with the Board’s power to grant the order but only with the procedure leading to the decision to grant. His Lordship then supported his conclusion by reference to ss. 91(9) and 93(2). The former is the equivalent of s. 15(10) and in addition applies it to the “speedy certification” in s. 92 used in the construction industry. The latter specifically provides that s. 15(9) shall not apply to s. 92 applications. Why, his Lordship contended with some force, did the legislature not also specifically omit ss. 49 and 50 from the scope of s. 15(9) if this was what was intended? With respect to the argument based on s. 49(4), the Chief Justice found that while in some situations provision for a subsequent hearing may negative any implied requirement of notice and opportunity to be heard, this was not the case where there was an express provision to this effect in s. 15(9).

Accordingly, MacKeigan C.J. found that the rules of natural justice did govern the granting of an interim cease and desist order. He also found, however, that any requirements had been satisfied on the facts of the case. Taking an exceptionally realistic view of the situation, the Chief Justice held there was no requirement for a hearing in fact or that an opportunity need be given to talk personally to the Panel members. The legislation specifically contemplates in s. 15(10) that the Chief Executive Officer might make an investigation and then report his findings to the members individually. If a full hearing was required then arguably ss. 15(10) and 49(4) would be redundant or at least their object frustrated. The basic question before the Court was therefore:

126. Section 15(9) reads as follows:

The Board shall determine its own procedure, but shall, subject to subsection 10, in every case give an opportunity to all interested parties to present evidence and make representation.

127. Section 15 (10) reads as follows:

Upon application for an interim order pursuant to section 49 or section 50 and in any case where a hearing is not requested, if the Chairman deems it appropriate, the Board may deal with any matter by each member conferring separately with the Chief Executive Officer and each deciding the matter.

128. (1975), 9 N.S.R (2d) 277 at 300.

129. Id.

130. Id. at 301.
whether the plaintiff was in fact fairly treated, having regard to the nature of the legislation and the facts of the particular case.\textsuperscript{131}

There can be little doubt that the Chief Justice was correct in concluding that Tomko had been fairly treated. The Chief Executive Officer followed normal procedure in contacting the plaintiff by telephone to verify the complaint which meant that, like all people named in an interim order, Tomko had ample opportunity to deny the complaint and for making representations. Moreover, while not specifically required by the legislation, it had been the practice of the Board to afford a hearing in any case where a person named in an order made a plausible denial that a work stoppage existed or he was involved in such stoppage. The plaintiff was well aware of this opportunity; indeed, in his own words, he knew "what it was all about"\textsuperscript{132} but refused to direct the members of his union to cease their walkout.

The one point that did remain a little unclear about the Board's procedure is the position of those persons not named individually in the order but to whom it is directed as a class. Does notice and an opportunity to make representations have to be granted to such individuals? The Chief Justice appears to suggest that there is no such requirement on the Board because of the obvious impracticalities involved.\textsuperscript{133} Nevertheless, in practice the Board does adopt the procedure currently of announcing the issuance of cease and desist orders over the radio and television and occasionally places advertisements to this effect in newspapers in the area. Moreover, for what is apparently enforcement purposes, a registered letter containing the information will be sent to the union local concerned. Whether this is sufficient remains to be seen.

From a technical point of view one would think the procedure was satisfactory since the Board makes the order in a form which only applies to those people who are actually participating in an illegal work stoppage. Perhaps more importantly, having regard to the scheme and intent of s. 49 it would be unfortunate if strict notice requirements were placed on the board in such situations. While the general order may at first glance appear toothless in that it is only telling the employees to stop doing what they were already

\textsuperscript{131} Id.
\textsuperscript{132} Id. at 303.
\textsuperscript{133} Id.
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prohibited from doing, i.e., breaching the Act, and thus may be inappropriate in a situation where the union officials are participating in the strike, it may well be that the speedy written order is of some assistance to union officials when they are attempting to get the men back to work. To have the opportunity for a hearing and notice under s. 15(9) would completely undermine the latters’ efforts.

The Supreme Court of Canada decision in the Tomko case was handed down on December 19th, 1975.134 The Court, with de Grandpré J. dissenting, dismissed the appeal on both constitutional and administrative law grounds. To a large extent the judgment of the Supreme Court, delivered by Laskin C.J., merely confirms the view of the Nova Scotia Appellate Division. The administrative law questions relating to the procedure of the Board were relatively quickly disposed of. In fact, the Court refused to even hear the appellant’s argument on the question of bias. However, in that the Chief Justice took a different approach to the requirements of notice and hearing than did the Nova Scotia Court some comment must be made.

It will be remembered that in the Appellate Division MacKeigan C.J. did not accept the argument by the respondent that s. 15(9) of the Act was inoperative with respect to cease and desist orders. His Lordship found that it was applicable but that having regard to both the statutory context and the realities of the instant case the Panel’s procedure satisfied the requirements of natural justice. Thus, notice and the right to make representations were an important part of the cease and desist practice. Laskin C.J., however, takes a different and, it is suggested, more correct approach. The Chief Justice agreed with the Nova Scotia Court that s. 15(10) was not drafted clearly enough to override the express terms of s. 15(9)135 but then proceeded to solve the problem in more precise fashion:

I am prepared to agree that section 15(10) may not have been drafted clearly enough to exclude the application of section 15(9) to complaints leading to an interim cease and desist order and to the making of an order ex parte. In my opinion, however, the emergency nature of the proceeding is undermined by the terms of section 49 which in subsection 4 makes provision for a hearing at the request of a person named in an interim order. Above this, however, there are the key words in section 49(2) that

134. Supra, note 118.
135. Id. at 16.
“notwithstanding any provision of this Act” the Board (or Panel) may issue an interim order if satisfied after investigation of a complaint that section 48 has not been complied with. This means notwithstanding section 15(9) and none of the Regulations upon which the appellant relies can supersede this statutory qualification.\textsuperscript{136}

The immediate impression one gets when reading this passage is that, on account of s. 49(2), there is no requirement of a hearing unless a party named in the order requests it and likewise that notice is not a prerequisite to the issuance of an order. It is submitted that this extreme view is incorrect. It must be borne in mind that s. 49 requires the Board to investigate the complaint before issuing an order and it would seem that in order for the investigation to be properly conducted the parties named in the order would have to be contacted and their views on the matter taken into account. How, for example, can a proper investigation be carried out into a complaint that union X is causing a strike unless the responsible union officials are contacted. The union is, after all, only guilty of a breach of the Act when its responsible officials have undertaken or failed to undertake certain acts. To omit to take their evidence into account, and possibly their denial, is hardly a proper investigation. The same rationale would apply to all named parties in the order. Accordingly, the Board would be well advised not to think that the decision of the Supreme Court of Canada enables them to take short cuts. It is, moreover, worthwhile pointing out that Laskin C.J. expressly approved of the investigation “in this case”.\textsuperscript{137} This, if nothing else, is a warning that the quality of the Chief Executive Officer’s preliminary inquiries must not be diminished.

The \textit{Tomko} case is now finally settled and, not unexpectedly, the powers of the Labour Relations Board have been strongly sanctioned. There will still be problems in the future, particularly the difficulties of enforcing orders against those anonymous employees named as a class in the order, but this is of relative unimportance. What is vital is that an extremely effective power in reinforcing the structure of collective bargaining legislation in Nova Scotia has been upheld. When one views the alternatives of a simple declaration or an injunction there can be no doubt but that all parties are better off.

\textsuperscript{136} \textit{Id.} at 16-17.
\textsuperscript{137} \textit{Id.} at 17.
The policy and practice of the Trade Union Act is quite clear. Once a collective agreement is no longer in force, and the procedures relating to questions of timeliness have been satisfied, a union or employer may legitimately take action in the form of a strike or lockout. In the Trade Union Act one of these procedural requirements is the taking of a strike vote "by the unit affected."^138

Not surprisingly, very little jurisprudence is to be found on the validity of strike votes; not surprising, of course, in that if the system is operating properly and both parties accept the possibility of collective action as an integral part of that system, there would seem to be no long term advantage in nullifying what is in substance legitimate action on a technicality. Recently, however, both the Supreme Court of Canada and the Nova Scotia Labour Relations Board have had cause to consider this very question.

In *Terra Nova Motor Inn Ltd. v. Beverage Dispensers and Culinary Workers' Union, Local 835,*^139 the appellant union was certified as bargaining agent for employees of two British Columbia hotels in 1968 and 1970 respectively. In 1971 at the request of the British Columbia Hotels Association, the union agreed that they would bargain with the two hotels jointly on behalf of employees of both hotels as a single group. Following negotiations a collective agreement was signed. At the expiry of this agreement in 1973 negotiations were entered into by the union and the two hotels on the same basis as for the previous agreement. Eventually negotiations broke down and the union, in order to comply with s. 25 of the *Mediation Services Act*^140 requiring a strike vote, took a secret ballot of the employees as one group. A majority of the employees voted to strike and the required notice was served on both hotels. However, before the joint strike eventuated a conciliation report was placed before the parties. The employees of both hotels voted to accept the proposals as did one of the employers who signed a collective agreement with his employees. The second employer rejected the report and without conducting another strike vote the employees of this hotel commenced striking.

The basic issue before the Supreme Court of Canada was the validity and effect of the joint strike vote. Two questions had to be answered. First, did the union have the legal right to conduct a joint strike vote at all. Secondly, if the original vote was valid, did

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^138. S.N.S. 1972, c. 19, s. 45(3) (c).


majority support in this joint vote entitle the employees of one employer to go on strike after the other had signed a collective agreement, without taking a separate vote. The Supreme Court decided the first issue in the affirmative. The second was decided by the majority in the negative. In both issues the validity of the joint strike vote centered on the meaning of s. 25 of the Mediation Services Act:

No person shall declare or authorize a strike, and no employee shall strike, until after a vote has been taken by secret ballot of the employees in the unit affected as to whether to strike or not to strike and the majority of such employees who vote have voted in favour of such a strike.

In deciding the first issue affirmatively, the Supreme Court was unanimously of the opinion that the word "unit" in s. 25 of the Act was not restricted to the unit decided at the time of certification. The word was defined generally as meaning "a group of employees on whose behalf a trade union is, or has been, engaged in collective bargaining" and quite clearly the group concerned was the combined certified units. In other words, the Supreme Court was stating that through the process of voluntary recognition the initially certified units had been merged with the consent of the employers into a single new unit for the purposes of multi-party bargaining. This affirmation of the effect of voluntary recognition is particularly evident in the judgment of the Chief Justice.

What we are being asked to do in this case is to unscramble an omelette. If it is the case that unions that have bargained with more than one employer cannot lawfully take a strike vote of the composite employee force if they have not been certified for a multi-employer unit, what then becomes of voluntary collective bargaining and voluntary collective agreements? I see no difference that makes industrial relations sense between a situation where a union has initially bargained with more than one employer without having been certified in any way and a situation where it has bargained with a group of employers jointly after having been certified (and perhaps bargained) separately with each of them before entering into one composite collective agreement covering the employees of all employers.

These strongly-worded sentiments did not, however, convince the majority of their Lordships that they should also decide the second issue in the affirmative. Spence J. appears to treat the strike

141. Id. at s. 2(1).
actually commenced by the individual unit of employees as being quite distinct from that proposed and voted on by the joint group.\textsuperscript{143} Beetz J., adopting a slightly different line of reasoning, found that the voluntary joint unit had been voluntarily dissolved the moment that one component of that unit and one employer entered into a collective agreement.\textsuperscript{144} Both of their Lordships concluded, however, that the "unit affected" in s. 25 was that consisting of the employees who actually went on strike. Accordingly, the strike vote had to be taken among this group and the joint vote was not satisfactory.

Laskin C.J. and Dickson J. adopted similar lines of reasoning in their dissenting opinions. The Chief Justice concluded that so long as the strike was undertaken within the procedural requirements of s. 25(2) of the Act it was legal and dismissed the contention of the majority that the validity of the procedure adopted by the union could change between the time when the vote was taken and when the strike actually commenced.\textsuperscript{145} In what was perhaps the clearest proposition of this approach, Dickson J. simply stated:

In my view the proper time to determine the validity of a vote is at the time the vote is taken, and not at the time some of the employees affected by the vote actually go on strike. Validity should not depend on the course of, or be invalidated by, subsequent events.\textsuperscript{146}

With respect, the view of the dissenting Justices seems more convincing. There is something illogical in the concept of a voluntary unit being voluntarily dissolved and then possibly reconstituted next time bargaining commences. Moreover, it would be nice to know the response of the majority had the joint strike commenced and then after one day those employed by one hotel signed a collective agreement. Would the strike vote have been taken amongst the "unit affected" in this case? If so, why should one day, one hour or whatever the length of the strike make any difference?

This is not to say that there is no force in the arguments relied on by the majority. Spence J. argued that in the case of a strike by the employees of an employer directed only against the latter, a small firm might be disadvantageously placed if the strike vote was taken

\textsuperscript{143} Id. at 300.
\textsuperscript{144} Id. at 301.
\textsuperscript{145} Id. at 306.
\textsuperscript{146} Id. at 309.
by all employees in a unit, most of whom were employed elsewhere. It is submitted, however, that this approach, taken literally, is an incorrect interpretation of the legislation. The British Columbia legislation contemplated multi-party bargaining and there is no reference in the Act to any obligation on the part of a union to take all its members out on strike at the same time. Surely this is no different from the case of a single employer unit; all the employees do not have to strike and the “unit affected” does not alter because of this. His Lordship’s reliance on the fact that a majority of those in the smaller unit “might” have voted against the strike in the ballot may be similarly queried. this is an integral part of the risk that an employer takes in dealing with a union on a multi-employer basis. It might be added the union runs an identical risk that a majority of the joint unit may well nullify the wishes of the employees of a small firm to go on strike. Finally, one wonders whether his Lordship has not fallen into the old trap of overestimating the importance of the technical requirement of a strike vote. From a practical point of view, if there is no support within the individual unit for a strike, surely the mere fact that there is the necessary majority support in the joint vote will not coerce the individual unit into taking collective action.

More important is the effect that the majority approach has on the concept of voluntary recognition. The two hotels had bargained jointly with the union, indeed they had initiated the approach, and it appears contrary to industrial relations good faith for one of them to subsequently negate the multi-party proceedings. This is particularly so when the employer concerned was as a result placed in a stronger bargaining position because he had fewer employees. In the long term, the union response to the decision could well be to take everyone out on strike regardless of the fact that one group within the joint unit may be satisfied. This is hardly conducive to the maintenance of industrial peace.

Does this case apply in Nova Scotia? At first sight the decision of the Nova Scotia Supreme Court (en banc) in Jacobsen Bros. v. Anderson147 would appear to be in direct conflict with the unanimous decision of the Supreme Court of Canada on the first issue. In that case, the Nova Scotia Court held that otherwise legal picketing was unlawful because a joint strike vote had been taken of employees employed by the same company but certified in different

units. It appears relatively clear from the facts in *Jacobsen*, however, that the employer had not agreed to recognize a joint unit and thus the element of voluntary recognition, which was the vital component in the *Terra Nova* case, is missing. The individual certified units were, therefore, still the “unit affected” by the strike vote. Certainly, the Supreme Court of Canada cannot be interpreted as permitting a union to join units of its own accord and legally compel the employer to recognize and deal with the joint unit. The *Jacobsen* decision would, accordingly, appear to still be good law in Nova Scotia.

Would, however, *Terra Nova* have been decided the same way if it had arisen under the Trade Union Act? It is submitted that the answer is yes. In the first place, while there were two distinct statutes at issue in the British Columbia case, the relevant sections are basically the same in both jurisdictions. While “unit” is not defined in the context of collective bargaining in Nova Scotia, neither does the Trade Union Act restrict its meaning to certification proceedings. Similarly, s. 45(3) (a) dealing with the strike vote uses essentially the same terminology as s. 25 of the *Mediation Services Act*. Finally the Nova Scotia Act clearly envisages multi-party bargaining and agreements.

Secondly, while the Trade Union Act does provide for a system of exclusive certification for at least 12 months, the relevant terminology of the provisions and those relating to voluntary recognition appear to permit a voluntary joinder of separate bargaining units. Section 25 refers to a *trade union* having exclusive bargaining rights over employees in the unit. Since the same trade union maintained bargaining rights one must conclude that there has been no infringement of the section. In similar vein, s. 28(3)(b) provides that voluntary recognition under the Act will not be permitted if at the time the agreement is filed, another *trade union* has acquired bargaining rights or has applied for certification. In other words, the policy of the Act is to prevent raiding by another union. If the interests of all existing units and bargaining agents are better served by a combination of units which does not effect the status of the current bargaining agent, then there would seem to be no objection to that course being adopted.

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148. S.N.S. 1972, c. 19, s. 1(4) reads: “‘unit’ means a group of two or more employees.”
149. *Id.* at s. 22(3).
Two final points might be made. While the Terra Nova decision applies to Nova Scotia, it must be emphasized that since the essence of that case is voluntary recognition, all procedural aspects of that phenomenon required by the Trade Union Act must be respected. Otherwise the new unit will have no status under the legislation and any strike vote and consequent action would be illegal. Moreover, it should be mentioned that a procedure for the combination of certification orders does exist under the Act. While this may reduce the flexibility achieved by voluntary recognition, this method may provide a safer approach for those who are not prepared to test the validity of the above views.

In Aerovox Canada Ltd. and I.B.E.W. Local 625, the Nova Scotia Labour Relations Board had to consider a completely different aspect of the strike vote. Section 45(3) (a) provides that a legal strike cannot take place:

\[ \ldots \text{until after a secret vote by ballot of employees in the unit affected as to whether to strike or not to strike has been taken and the majority of such employees have voted in favour of a strike.} \]

A majority of the employees in Local 625 who had voted were in favour of a strike but the Board was not convinced that a majority of employees in the unit had so voted. Accordingly, the Board found that s. 45(3) (a) had not been satisfied and issued a cease and desist order against what was therefore technically an illegal strike.

In finding that s. 45(3) (a) requires a majority vote of all employees in the unit, the Board upset what appears to be the current union practice in the province of only requiring a majority of those who vote. They were, however, precluded from any other conclusion. The words “such employees” in s. 45(3) (a) clearly refer back to “employees in the unit . . .” Moreover, the earlier decision of the supreme Court in Jacobsen Bros. was apparently premised on such a construction.

Nevertheless, the decision may have some unfortunate consequences. The smaller unit is generally more subject to employer influence and it is conceivable that the absence of even a few employees on account of illegitimate pressure might make any legal strike impossible. While recourse to the unfair labour practice

150. *Id.* at s. 28.
151. *Id.* at s. 26(1) (d).
152. L.R.B. No. 2209.
provisions is available to the union these are notoriously difficult to prove and as a general rule do not provide a satisfactory remedy in this situation. It may be argued that, on the other hand, any other approach would permit a small group of employees to commit the entire work force to a strike. However, this presupposes once again that blind loyalty to the union will prevail and that the unwilling majority will happily walk off the job at the request of a few brothers. Even if picketing eventuates, one doubts whether in industrial undertakings at least, any union ethic will sustain a minority effort for very long. What is certain is that it does not assist the credibility of the Nova Scotia Labour Relations Board for it to have to prohibit strikes which are illegitimized solely by a technicality.

V. Timely Industrial Action

It must always be remembered that the Trade Union Act and the regulatory system it institutes does no constitute the entirety of labour law in Nova Scotia. It only provides who may enter the conflict and when such conflict may take place; it has little, if any, involvement in regulating how the conflict is carried out. This is particularly so where the strike is a lawful one under the Act. To solve this problem one must have regard to the common law, particularly the law of torts. There is certainly no shortage of material dealing with this subject matter as the law of picketing is an "old favourite" of academic writers. Two recent decisions, one by the Supreme Court of Canada and the other by the Nova Scotia Supreme Court, should, however, be of interest to readers.

In *Carswell v. Harrison*\(^{154}\) the Supreme Court of Canada had to face the vexed question of picketing in a shopping centre. The essential facts in question were as follows. A lawful strike had been commenced against Dominion Stores Ltd. which was a tenant in a shopping centre. The respondent, who was an employee of Dominion Stores Ltd., was peacefully picketing on the sidewalk adjacent to the front of the store building but still on the property of the shopping centre. The manager, a representative of the owner of the shopping centre, told the respondent to cease picketing as she was trespassing on private property. The latter refused to move and continued picketing. Subsequently, she was charged and convicted

under the Petty Trespass Act. On appeal from the Manitoba Court of Appeal, the Supreme Court of Canada upheld the conviction by a majority.

The importance of this decision does not rest solely on the fact that the respondent was found guilty of trespass. The vital consideration is that in future instances picketing of a similar nature which is otherwise quite legitimate will be tainted by this technical illegality. This was not the first time that Canadian Courts had been asked to face the issue of interference with the property rights of those with an interest in shopping centres. In Zellers (Western) Ltd. v. Retail Clerks Union, Local 1518, the British Columbia Court of Appeal faced the question of a suit by the tenant of a shopping centre to enjoin all picketing on the sidewalk in front of his store on the ground that it illegally interfered with his easement over that property. While the case was decided on the basis of nuisance, Davey J.A. was clearly taking into account the public character of the shopping centre in holding that the picketing was lawful. His Lordship, however, left open the issue of an action by the owner of the shopping centre in trespass. This matter was taken up by the Saskatchewan Court of Appeal in Grovesner Park Shopping Centre v. Cave. In this case the shopping centre owner had sued in trespass to restrain picketing in support of a legal strike by employees of a tenant on the parking area and sidewalk. In finding that the picketers were not guilty of trespass the Court of Appeal based their decision on a lack of possession by the owner. Once again, some emphasis was placed by the Court on the fact that the centre was open to the public.

Against these decisions must be placed that in Peters v. Regina, handed down by the Supreme Court of Canada itself only five years ago. In Peters the picketing was undertaken to obtain a boycott of a tenant in a shopping centre who was selling Californian grapes. Although the picketing was peaceful the Ontario Court of Appeal found the picketers guilty of trespass. More specifically, the Court found that by inviting the public to use the shopping centre the owner had not lost the right to withdraw that invitation whenever he felt like it, and that so long as the owner had

a right of overall control he had sufficient possession to bring an action in trespass. An appeal was then heard by the Supreme Court on the narrow question as to whether the Ontario Court had erred as to its finding on sufficient possession and the Supreme Court unanimously upheld the decision. Accordingly, the stage was set for the matter to be finally settled in the Carswell case.

The majority judgment, delivered by Dickson J., proceeded from the premise that unless the decision in Peters could be distinguished that case must be regarded as controlling. The main argument of the respondent to this end was that in Peters the picketer was a member of the general public whereas in the present case the respondent was an employee of a tenant engaged in a legitimate strike. His Lordship, however, came to the conclusion that this distinction could not be maintained; even admitting and taking into account the social and economic desirability and public commitment to effective picketing, in the absence of express statutory language to the contrary, the provisions of the Petty Trespass Act applied to employees as well as members of the general public. In essence, then, Dickson J.'s finding was that, in the context of industrial action in a shopping centre, the property rights of the centre's owner took paramountcy over any implied right to effectively picket.

The dissenting opinion was again written by the Chief Justice. As one might expect, Laskin C.J. felt that the Peters case could be distinguished on the basis that a direct employment relationship and a legitimate strike were at issue here. There were policy considerations that the Court did not have to take into account in answering the narrow issue before it in the earlier decision. Accordingly, placing heavy emphasis on the need to balance the traditional rights of property with an implied right to picket effectively, and the dangers of applying historical legal doctrines automatically to new factual situations, Laskin C.J. concluded that the action of the respondent was legal and did not constitute trespass. In reaching this conclusion his Lordship did not, however, limit himself to legitimizing the actions of the picketer on the particular facts before him. Rather, relying to some extent on United States' jurisprudence and also the Civil Code, he proceeded to develop a general theory of privilege and quasi-public property

160. (1975), 75 C.L.L.C. 15,306 at 15,308-15,309; 5 N.R. 523 at 528. This is particularly so when the labour relations legislation in question specifically reserved certain rights in trespass. See at 15,309.
161. Id. at 15,310; 5 N.R. at 528.
which would appear to restrict the general property rights of at least a shopping centre owner quite severely.

If it was necessary to categorize the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reasons of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of the members of the public, doing violence to neither and recognizing the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based.

The respondent picketer in the present case is entitled to the privilege of entry and to remain in the public areas to carry on as she did (without obstruction of the sidewalk or incommoding of others) as being not only a member of the public but being as well, in relation to her peaceful picketing, an employee involved in a labour dispute with a tenant of the shopping centre, and hence having an interest, sanctioned by law, in pursuing legitimate claims against her employer through the peaceful picketing in furtherance of a lawful strike. 162

In other words, the Chief Justice was of the opinion that the doctrine of trespass was inappropriate to the modern concept of a shopping centre where interests other than that of the owner of private property had to be considered and that, accordingly, the strict property rights of the latter should in some circumstances be subordinated.

There are a number of technical problems with Laskin C.J.'s approach. First, his Lordship would appear to be incorrect in his assessment of the general rights of a shopping centre owner to control his property. 163 To the writer's knowledge there is no Commonwealth authority for the proposition that a landowner's right to refuse entry is subject to any common law restriction. What Laskin C.J. appears to be stating as a preliminary proposition of law is no more than a statement of what he would like to be a general principle. Moreover, insofar as the Chief Justice relies on the United States' approach for justification for his analysis there are the usual problems. While his Lordship would like to ignore the

162. Id., at 15,313; 5 N.R. at 536-537.
163. Id., at 15,312; 5 N.R. at 536.
constitutional basis for the American cases, this would seem to be impossible. The leading decision of the United States Supreme Court in *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza* 164 is almost entirely based on an attempt to rationalize property rights with the First Amendment. Indeed, both the majority and dissenting opinions in that case are concerned far more with the *general right of free speech* than with the social and economic implications of effective picketing. It is true that these cases do arise out of the same economic and social setting but the fact is that the United States’ courts have not directly relied on that setting for developing their jurisprudence but on the wider implications of an express constitutional right.

Nevertheless, these are minor problems and do not detract from the overall impact of the Chief Justice’s opinion. More important is the second line of criticism; namely, that Laskin C.J. makes little, if any, attempt to define the circumstances in which the law of trespass will not apply. His Lordship’s comments are restricted to shopping centres but his theory of a *quasi-public* place certainly is not. As the United States Supreme Court recently stated in *Lloyd Corporation v. Tanner*: 165

> It is noteworthy that respondent’s argument based on the Centers being “open to the public” would apply in varying degrees to most retail stores and service establishments across the country. They are all open to the public in the sense that customers and potential customers are invited and encouraged to enter. In terms of being open to the public, there are differences only of degree — not of principle — between a free standing store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping. 166

> There is no suggestion that Laskin C.J. envisages countenancing picketing inside the local corner grocery shop. Nevertheless, without going to this extreme, the problem is highlighted by asking what his Lordship’s response would have been had the picketing taken place on the “property” of a single large department store which supplied its own parking lot. Presumably the Chief Justice would permit such action; any other answer would be inconsistent with his general theory and the policy considerations behind it. It

164. (1968) 391 U.S. 308.
166. *Id.* at 565-566 *per* Powell J.
can be argued, however, that rather different policy considerations apply in this case. In a shopping centre the property rights of the owner are to an extent indirect in that he has leased areas to third parties. His interests are therefore more concerned with protecting the commercial well-being of the tenants. In our example on the other hand, the property owners property rights are far more evident as are his personal commercial interests and to subordinate them to an implied right of picketing is a much greater jurisprudential step to take. Unfortunately, the Chief Justice gives us no assistance in drawing an appropriate line.

Laskin C.J. also envisaged that a shopping centre owner would still retain the right to restrict activity on the premises where the opening of the complex was accompanied by an announcement to this effect. Ignoring the question of what happens if the owner makes such a decision one year after the opening, there is an additional problem with the Carswell case. Namely, one wonders why the following statement of fact did not bring the shopping centre in question within the exception:

The evidence discloses that the distribution of pamphlets or leaflets in the mall of the Polo Park Shopping Centre or on the parking lot has never been permitted by the management of the centre and this prohibition has extended to tenants of the centre.

The centre as a matter of policy has not permitted any person to walk in the mall carrying placards.

Laskin C. J. did not seem to consider this evidence sufficient to protect the owner of the shopping centre. Does the Chief Justice contemplate that a formal announcement of such practice must be made? If so, it is submitted that this introduces a note of technicality uncharacteristic of his Lordship’s judgments. What is required is some action on the part of the owner that makes it apparent that there are limitations on the use of the centre as a quasi-public place and a practice of restricting picketing and parading should be sufficient. Indeed, this is a substantial defect in the Chief Justice’s theory of privileged entry. One might ask why, if his Lordship is so concerned with balancing interests and maintaining the right to effectively picket, such an exception should exist at all. Surely the right to picket should only be limited by misconduct; otherwise, will not the owner always have the effective right of prohibiting such action? To this end it might have been preferable to find an absolute

168. Id. at 15,308; 5 N.R. at 528.
right to picket based on an implied right in the relevant labour legislation which overrode the general restriction in the Petty Trespass Act. Admittedly, this would not have solved the legal problem entirely for this conclusion would be open to criticism. Nevertheless, in that this approach would give an unqualified right to picket effectively in the absence of misconduct the result would seem far more in accord with the Chief Justice's assessment of the policy considerations.

The final definitional problem is simply just what sort of activity will be permitted within a shopping centre against the wishes of the owner and what action will result in the privilege of conducting such activities being removed justifiably. Laskin C. J. clearly considers some restriction but makes no attempt to define even broadly the limits of his approach.\(^{169}\) Presumably, in the absence of any help, one must assume that as usual the nominate torts will provide a potential prohibition on otherwise legal picketing. Even if the Chief Justice had been in the majority, this factor must of necessity have caused unions some concern.

These criticisms of the Chief Justice's approach should not be construed as meaning that the writers do not agree with his Lordship's overall sentiments. From a purely industrial relations perspective there can be no other satisfactory conclusion than that reached by Laskin C. J.. The policy considerations have been dealt with elsewhere\(^{170}\) and need not be discussed in detail. It is obvious, however, that the majority judgment in reasserting property rights has precluded effective picketing of shopping centres and their tenants in the absence of express statutory permission. Equally obviously, this result is not in accord with the legislative recognition of legitimate conflict which is to a large extent dependent on the economic pressure generated by such picketing. Why should:

[b]usiness enterprises located in downtown areas [on public streets and sidewalks] be subject to on-the-spot public criticism for their practices, but business situated in the suburbs [be largely immunized] . . . from similar criticism by creating a cordon sanitaire of parking lots around their store.\(^{171}\)

This approach is, however, only half the problem. It is

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169. *Id.* at 15,314; 5 N.R. at 540.
impossible to appreciate the reasoning of either Dickson J. or the Chief Justice without having regard to the philosophical premises as to the role of the Supreme Court from which each proceeds. As far as Dickson J. is concerned, at the basis of his judgment, is a very conscious belief that the role of the Supreme Court in delicate social and economic issues must be to proceed with caution. While not denying the right of the Court to reform, and while clearly appreciating the conflicting interests involved, Dickson J. made it quite clear that he does not see it as proper for the Court to abandon well-established principles and decisions overnight in the name of social consciousness. Such a role is to be played by the legislature.

The submission that this Court should weigh and determine the respective values to society of the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It also raises fundamental questions as to the role of this Court under the Canadian Constitution. The duty of this Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of this Court to act creatively — it has done so on countless occasions; but manifestly one must ask — what are the limits of the judicial function?172

As one might have expected, the Chief Justice’s conception of the role of the Supreme Court is far more encompassing.

This Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decisions. What we would be doing here, if we were to say that the Peters case, because it was so recently decided, has concluded the present case for us, would be to take merely one side of a debatable issue and say that it concludes the debate without the need to hear the other side.

I do not have to call upon pronouncements of members of this Court that we are free to depart from previous decisions in order to support the pressing need to examine the present case on its merits. Pressing, because there are probably many hundreds of shopping centres in this country where similar issues have arisen and will arise . . . There are judgments in related cases, that were cited to us in argument, that need to be taken into consideration in order to enable this Court to begin to draw lines which Courts are habitually called upon to do. There should be, at least, some indication that the Court has addressed itself to the difficult issues

that reside in the competing contentions that were made in this case and to which I will refer later on in these reasons. But above all, this Court has not shown itself to be timorous in tackling important issues where it could be said, with some justification that an important consideration was absent from an earlier judgment, even a recent one, upon which reliance was placed to foreclose examination of similar issue in a subsequent case.173

With respect, it is impossible to criticize either of these approaches. The essential problem is reflected in the result of the case. On the one hand the Chief Justice’s conclusion is laudable in that it gives realistic effect to the right to strike; at the same time while being a sensible approach to a new factual situation, the reasoning has little if any authority and its advantage of flexibility is severely minimized by problems of uncertainty. On the other hand, Dickson J. may have given effect to basic and well established legal principles, but at the same time his subordination of industrial relations reality to strict property rights has sounded the apparent death knell as far as effective picketing of shopping centres is concerned. Nevertheless, the latter’s judgment cannot be simply dismissed as another piece of judicial conservatism, applying an ancient doctrine in a modern context. Dickson J.’s judgment is very well-reasoned and logical and certainly not lacking in an appreciation of the problems that motivated Laskin C.J. to his dissent. The distinction, which can only be found in their Lordships’ distinct views as to the role of the Supreme Court of Canada, goes much deeper than social consciousness or a lack thereof and is one that is likely to be evidenced in opinions of that Court for sometime yet.

This, then, is how the matter stands in Nova Scotia at the moment. It does not appear as though the Carswell case can be distinguished in this province. True, there is no Petty Trespass Act and it could be argued that the legislative commitment to collective bargaining overrides the property rights of a shopping center owner more readily in the absence of an express statutory provision.173a Similarly, there is no express retention of any rights in trespass under the Trade Union Act. Nonetheless, it seems that Dickson J.’s emphasis on property rights does go deeper than the fact that they have been encompassed in a statutory framework. Accordingly,

173. Id. at 15,311; 5 N.R. at 534.
until the legislature acts one way or the other, which clearly it should, trade unions must accept the concept of trespass as a very real, albeit inappropriate, restriction on their otherwise legitimate activities.

The decision of the Nova Scotia Supreme Court in *Walker & Sons Ltd. v. Groom, Robertson, LeRue, Gillis & Jollimore*\(^\text{174}\) should prove more palatable to those in local union circles. The case arose out of the organizing campaign conducted at the Lighthouse Tavern last year. It will be remembered that certain employees were dismissed by the employer. The former, along with members of the Hotel, Restaurant & Bartenders Employees’ Union then picketed the premises of the employer and, indeed, had some success in reducing the tavern’s normal rate of business. The employer applied for an *ex parte* interim injunction which was granted by Dubinsky J. but the same judge subsequently granted an application for dissolution of the injunction by the employees.

Dubinsky J., in granting the application, made it quite clear that he was in no way considering the merits of the case. Quite properly, he felt that this was a matter for the trial judge and that his sole duty was to consider the continuance of the *ex parte* injunction. The important thing, however, is that despite the lack of any investigation of the merits of the case, Dubinsky J. evidenced a refreshing approach in analysing the issue of whether even a *prima facie* case existed.

His Lordship initially considered the question whether there had been any breach of a provincial or federal statute which would, of course, have tainted the picketing; no such illegality was found. He then turned to the issue of whether the plaintiff’s legal rights had been violated in any other way and came to the conclusion that it had not been demonstrated ‘by a preponderance of credible evidence, that an actionable wrong had been done to the plaintiffs’\(^\text{175}\). The picketing was peaceful at all times and witnesses reported there had been no disturbances; for example, there was no evidence of patrons having difficulties entering the tavern.\(^\text{176}\) In fact, the picketers appear to have gone to extraordinary lengths to avoid any element of illegality.\(^\text{177}\)

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175. *Id.* at 5.
176. *Id.*
177. *Id.* Indeed, the picketers refused an interview with a reporter because the latter’s car was parked on the employer’s property.
It has never been in doubt since the decision of the Supreme Court of Canada in *Williams v. Aristocratic Restaurants*\(^{178}\) that there has been a theoretical right to picket peacefully in this country. This right has, however, been substantially abrogated by courts which had tended to assume a breach of some legal right, thus finding some illegality to taint otherwise legal picketing, and to decide that on the balance of convenience less harm would be done if an injunction was issued against the union.\(^{179}\) Two passages from the judgment of Dubinsky J. are indicative of his Lordship's more precise and realistic approach. First, with respect to the effect of the picket line:

As Mr. Justice Rand said in the *Aristocratic Restaurants* case, *supra*, I would also say that experience has proven that, insofar as these labour controversies are concerned, what is blazoned or written on placards has long ceased to have an intimidating effect on the average individual. Even certain off-colour words which one would certainly not use in polite company, no longer cause the offence which was the case with such words years ago . . . . In short, all of us in this day and age are inclined to take placards and language of this sort "in our stride".\(^{180}\)

Secondly, as to the evidence necessary to sustain an injunction:

That the tavern's business went down, there is hardly any doubt. Such is generally the case whenever pickets are set up, but after the first few days, during which time there is bound to be some hesitation on the part of a labour-oriented public, things frequently return practically to normal. But irrespective of whether such will be the case with the plaintiff's Lighthouse Tavern, the fact is that a Court must only exercise that extraordinary remedy of injunction with extreme caution. The Court must not be asked merely to assume that legal rights are being interfered with and violated. The Court must be shown, by a preponderance of evidence, that such, indeed, has been the case.\(^{181}\)

Two final points might be made, however, which tend to cloud any initial favourable impression this case gives. First, it must be remembered that this was an interlocutory hearing and that Dubinsky J. had earlier granted the *ex parte* application. Even bearing in mind the issue of speed which is inherent in such

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181. *Id.* at 6.
applications and the general inadequacy before the Court at this stage, one wonders how such evidence could give rise to the conclusion that there was even a prima facie case for breach of the plaintiff's legal rights. In granting the initial order, Dubinsky J. has therefore laid himself open to all the criticism normally directed at the role of the judiciary in this area of the law. More importantly, s 40 of the Judicature Act expressly limits the power to grant ex parte injunctions in Labour-management disputes unless:

... the Court ... is satisfied that the case is a proper one for the granting of an injunction and

(a) a breach of the peace, an interruption of an essential public service, injury to persons or severe damage to property has occurred or is about to occur; 182

It is difficult, from the evidence available at the interlocutory hearing, to see how by any stretch of the imagination any of the alternatives in s. 40(3)(a) could have been satisfied. Section 40 was enacted to restrict the granting of ex parte injunctions and was an admission of their potential for abuse, at least in the field of labour relations. Even admitting the present section's inadequacies, it is disappointing to see both the intent and terminology of the provision apparently ignored with the consequent return to the vagaries of the common law.

Secondly, it would be well to bear in mind that the present case involved a very special factual situation. None of the picketeers were employees of the plaintiff. Accordingly, there was no question on the facts of their being in breach of the strike provisions of the Trade Union Act. Had this not been the case, the picketing would quite clearly have been illegal, tainted by those provisions in the Act which prohibit collective action during an organizing campaign.

VI. Administration of the Collective Agreement

1. The Collective Agreement and Individual Contract of Employment

One of the most confusing areas of labour law in Nova Scotia and Canada generally involves the relationship which the individual contract of employment bears to the collective agreement entered into by the union on behalf of the employees and the employer. The historical view that the collective agreement was not incorporated

182. S.N.S. 1972, c. 2, s. 40(3) (a).
into the individual contract\textsuperscript{183} has been discredited largely since the advent of modern industrial relations legislation in this country.\textsuperscript{184} Currently, two views might be said to be in vogue. The first characterizes the collective agreement as being virtually identical with the individual contract, with only the act of hiring remaining outside the scope of the former.\textsuperscript{185} The second takes the view that some, but not all, of the terms of the agreement are incorporated.\textsuperscript{186} Integrally connected with this question is the very practical problem of when, if ever, the employee may have recourse to the Courts to enforce the collective agreement or his individual contract of employment. A recent decision of Jones J. in the Nova Scotia Supreme Court is worthy of note in that it provides some assistance in assessing the likely approach of the Courts to the problem in this province.

In \textit{Downey v. Scotia Square Hotel Ltd.}\textsuperscript{187} the plaintiff, an employee of the defendant, had commenced an action for wrongful dismissal. The defendant relied, \textit{inter alia}, on the fact that the plaintiff was a party to a collective agreement which contained grievance procedures covering disputes, including those arising over dismissals. Accordingly, the defendant maintained that the plaintiff should have had recourse to the collective agreement and was barred from bringing the action. It also appears that although some discussion of the plaintiff’s case had taken place informally between the union and the employer, neither the plaintiff nor the union had actually presented any grievance to the employer under the terms of the collective agreement.

Jones J. upheld the defendant’s argument. Relying on the decision in \textit{Syndicat Catholique des Employés des Magasins de Quebec, Inc. v. Compagnie Paquet Ltée.},\textsuperscript{188} to the effect that the terms of employment are governed by the collective agreement and s. 39 of the Trade Union Act which makes the collective agreement binding on employees, his Lordship decided that the plaintiff must utilize the grievance procedure laid down therein.\textsuperscript{189} In reaching this

\textsuperscript{183. See Young v. Canadian Northern Railway, [1931] A.C. 83; [1931] 1 D.L.R. 645 (P.C.) (Man.).}
\textsuperscript{184. See S.N.S. 1972, c. 19, s. 39.}
\textsuperscript{186. \textit{Infra}, note 192.}
\textsuperscript{187. Unreported. S.H. No. 04733.}
\textsuperscript{188. [1959] S.C.R. 206; 18 D.L.R. (2d) 346.}
\textsuperscript{189. S.H. No 04733 at 6.}
conclusion Jones J. expressly followed his earlier decision in *Caines v. Cape Breton Development Corporation.* Unfortunately, his Lordship makes no attempt to clarify the problems raised by his judgment in the *Caines* decision; indeed he possibly accentuates them. Accordingly, a brief discussion of that case should not be out of order.

In *Caines*, two employees of the defendant corporation were dismissed when they refused to perform certain tasks which both the company and the union had advised them to perform. The report of the case is not clear on the crucial issue of whether or not the employees approached the union to take their grievance and whether or not they were refused. However, the judge was satisfied that the employees had failed to pursue the grievance procedure which raised fairly and squarely the issue of whether or not they would be able to have recourse to the courts in an action for wrongful dismissal. There being no question but that the employees were bound by the collective agreement the issue then became simply one of whether the availability of the grievance procedure estopped the plaintiffs from bringing this independent action.

The basis of Jones J.'s decision in the *Caines* case is clearly laid down in the following passage:

> While it is not made abundantly clear in the Canadian decisions, the real crux of the matter is the interpretation of the provisions of the statute. In my view the provisions of s. 19 of the *Industrial Relations and Disputes Act* are clear. Having regard to the language used, it was the intention of Parliament to resolve disputes arising out of collective agreements through a process of arbitration or similar procedure. It is difficult to envisage more explicit language than that used in ss. (3): "Every party . . . shall comply with the provisions for final settlement contained in the agreement and give effect thereto."

In most instances employees gain benefits under collective agreements, including job security, far in excess of any rights at common law. The object of the legislation is to provide for the expeditious settlement of disputes without work stoppages, primarily by the parties to the agreement. This can be done by avoiding judicial proceedings and resorting to tribunals of the parities' own choosing. In my view this is the predominant opinion of the Canadian cases to which I have referred.

In this case the plaintiffs rely on the agreement as establishing the terms of employment. In doing so they are bound by the grievance procedures set out in the contract. It is significant that

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the agreement contains provisions by which an individual employee can express his grievance. The plaintiffs were bound to exhaust the grievance procedures before proceeding to Court. The Court has no jurisdiction to try these actions at this time.\textsuperscript{191}

On a superficial level these comments are perfectly consistent with the trend of Canadian authority which is to accept jurisdiction where this would only require the enforcement of a right already ascertained under the collective agreement but to deny it where the matter involves a question relating to the interpretation of the agreement.\textsuperscript{192} There are, however, several important points arising out of this passage. First, his Lordship appears to be justifying the necessity of recourse to the collective agreement because the plaintiffs relied on the terms of the collective agreement as setting out their contract of employment.\textsuperscript{193} This raises the interesting question of what the response of Jones J. would have been had the plaintiffs not relied on the collective agreement but on some additional and independent common law right. For example, suppose the employees had been dismissed with inadequate common law notice and the collective agreement contained no provisions regarding such notice. Could the employees have come directly to court to seek a remedy in damages? Obviously, this would be an extremely unusual situation; nevertheless the situation could arise. The Downey decision is of no assistance in answering the question as it is unclear whether or not the plaintiff was relying on the "just cause" provision but presumably this was the case. One can only speculate, then, and one's answer will depend entirely on to what extent the collective agreement is regarded as solely representing the individual contract of employment; in other words, has the common law right of notice been subordinated to the additional rights given to employees under the collective agreement.

Secondly, Jones J. places considerable emphasis on the fact that the plaintiffs could individually express their grievances under the

\textsuperscript{191} Id. at 616-617.
\textsuperscript{193} Supra, note 191.
procedure laid down in the collective agreement.\footnote{194} This immediately suggests that had the plaintiffs not had individual recourse to the procedure his Lordship might have reached a different conclusion. Certainly, this view is borne out in his judgment in \textit{Downey}.\footnote{195} Ignoring the fact that it does not appear as though the plaintiffs had a right to present their grievance individually, it is suggested that this approach is incorrect. Under the Trade Union Act the union is given exclusive rights to represent the employee;\footnote{196} the employees are bound by the terms of the collective agreement and if that agreement states that the union is responsible for bringing any grievance then surely the employees are bound by that term. To permit the individual to resort to the courts simply because he had no individual right to process his grievance would be to strike at the very foundation of arbitration as the final settlement procedure for disputes over interpretation of the collective agreement. Moreover, for a court to accept jurisdiction in this situation would be to fly in the teeth of the weight of authority insisting that the courts should not become involved in interpreting such agreements.\footnote{197}

Thirdly, and closely related to the second point, is his Lordship’s comment that the plaintiffs must exhaust the grievance procedure and that the Court had no jurisdiction “at this time.”\footnote{198} Do these last words indicate that Jones J. would have been willing to hear the action if the grievance procedure had not proved satisfactory to the plaintiffs. It appears clear that once a decision is handed down by an arbitrator the employee is bound by that decision.\footnote{199} But what if, for example, the union executive \textit{bona fide} refused to take his case past the second stage of the grievance procedure? There is little Canadian authority on point; what there is suggests that an individual has no independent rights\footnote{200} and, it is submitted, quite rightly so. As Adell\footnote{201} put very succinctly:
When the union's decision not to process a grievance is reached in good faith and on the basis of the merits of the grievance, then the union is performing its proper function as bargaining agent, and it would be inimical to the successful operation of the grievance procedure to allow the individual to force the union to process his agreement.202

One might add that such a conclusion would also be quite contrary to the intent of the legislation which is to provide arbitration as a means of final settlement. It is not envisaged that every grievance must go through this far and that they may not be settled at an earlier stage of the procedure by the employer and the union. Indeed, it is not yet established in Nova Scotia whether there is even any right of court action where the union has acted in bad faith in refusing to process the agreement.203 Certainly, the American courts have permitted an action based on the collective agreement where there has been a breach of the duty of fair representation owed by the union, but this question has hardly been touched upon by Canadian courts.204 Nor is this the time to investigate the matter further.

None of the above questions are answered in Downey and to this extent then the law is still very uncertain in Nova Scotia. One definite result, however, of reading Downey and Caines together is that, at the very least, an employee bound by and relying on a collective agreement must "exhaust" any grievance procedure under that agreement before commencing an action independently in the courts. In what situation Jones J. and the Nova Scotia Courts would be prepared to accept jurisdiction will have to be settled subsequently. With respect, that jurisdiction should be as narrow as possible. While permitting individual recourse to the courts may provide an equitable response in some cases, the writers view such an approach as inconsistent with the concept of a settlement procedure independent from the courts, the legislative intent to remove the interpretation of collective agreements from that arena and the constitution of the union as exclusive bargaining agent of the employees.

202. Id. at 216.
2. Arbitration

The Trade Union Act of Nova Scotia is divided into two parts; Part II which deals with the construction industry and Part I which deals with the other areas of labour law which fall within the competence of the province. The difference with respect to the review of awards made by arbitrators under the respective parts of the Act is at least in theory very important. Section 40, in Part I, states that the parities to a collective agreement must provide:

. . . a provision for final settlement without stoppage of work, by arbitration or otherwise . . .

The phrase "by arbitration or otherwise" is, of course, the classic formula which the courts have deemed to indicate a "consensual" arbitrator.\(^{205}\) Section 103(1), in Part II, contains only the words "to arbitration". This terminology is now accepted as establishing a "statutory" arbitrator.\(^{206}\)

Two consequences would seem to flow from this distinction. First, while certiorari will always be available in appropriate circumstances to quash an award of a statutory arbitrator, it is well established that certiorari will not lie against a private or consensual award.\(^{207}\) Thus, where the award of a Part I arbitrator is at issue, the appropriate manner to proceed for review in Nova Scotia would appear to be by way of the Arbitration Act. Of course, in the case of a Part II arbitration, certiorari is available.

Secondly, one must have regard to what is commonly called the "very question" doctrine. While the scope of misconduct under s. 13(2) of the Arbitration Act has been construed widely and includes an error of law on the face of the record,\(^{208}\) historically the courts will not interfere where the question of law concerned is the very thing referred to the consensual arbitrator. Having submitted the

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207. Supra, note 205.

matter for final determination in this forum, the parties to the collective agreement are bound by the arbitrator’s decision on that point. The point is well put by the Lord Chancellor in *Kelantan Government v. Duff Development Company*:

No doubt an award may be set aside for an error of law appearing on the fact of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion.\(^{209}\)

This theoretical immunity from review does not, however, apply to statutory arbitrators.

On the other hand from very early times the courts have employed the remedy of *certiorari* to correct errors of law appearing on the face of the proceedings of statutory boards and tribunals of all kinds having legal authority to determine questions affecting the right of subjects and having the duty to act judicially . . . The control over such bodies exercised by the Courts through the remedy of *certiorari* has never been circumscribed by the rule in the consensual cases. . . \(^{210}\)

Recent cases have demonstrated, however, that from a practical point of view the ‘‘very question’’ doctrine has ceased to be meaningful except in extreme cases. One would expect to find, for example, at the very least a discussion of the principle in Part I arbitration cases. This, however, has not been the case. When one compares the decision of the Nova Scotia Appellate Division in *Re Otis Elevator Co. and Union of Elevator Constructors*, \(^{211}\) a Part II arbitration, with more recent decisions involving consensual awards, \(^{212}\) the courts appear to be treating the question of whether there has been an error of law on the face of the record in identical fashion. No mention is made in either line of cases of the ability of the Court to interfere with the consensual arbitrator’s decision on

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212. See *supra*, note 208 and *Re Maritime Employers Association and International Longshoremen’s Association, Local 269, Port of Halifax*, unreported S.H. No. 05282. However, the recent decision of MacIntosh J. in *International Union, UAW, Local 720 v. Volvo Canada Ltd. Manufacturing Division*, S.H. No. 08334 at 8-9 clearly amounts to a generous affirmation of the ‘‘very question’’ doctrine in Canada. Its long term effects remain to be seen.
the particular question put to him for determination. It may be that issue did not arise in any of the decisions or it may be that the Nova Scotia courts do not feel that the doctrine applies where review of the arbitrator's award is sought by way of the Arbitration Act. Whatever the reason for the absence of any discussion, it is clear that the courts in this province have not accepted the distinction. Until the matter is finally decided it cannot, however, be regarded as settled.

One doubts, nevertheless, whether acceptance of the distinction in Nova Scotia would have an practical effect on the ability of the courts to set aside consensual awards. In the first place, in recent times there has not been any pronounced willingness on the part of the courts to set aside awards on the basis of error of law. As McKeigan C.J. stated in *Canadian Keyes Fibre Co. Ltd. v. United Paperworkers International Union, Local 576*213

An arbitration board does not exceed its jurisdiction or commit reviewable error of law merely because it interprets a clause in a collective agreement differently than would the appeal court so long as its interpretation is one which the language of the clause will reasonably bear.214

Secondly, the Supreme Court of Canada in the recent case of *The Metropolitan Toronto Police Association v. The Metropolitan Toronto Board of Commissioners of Police*215 has so limited the "very question" doctrine that it will likely have no effect in by far the majority of arbitrations. In this case, the appellant Association had claimed that the employer was in breach of the collective agreement by reason of stopping the dues payroll deduction for six members of the Association. This specific question, which necessitated a decision on the meaning and proper construction of the agreement, was put to an arbitrator. The Supreme Court, Laskin C.J. and Spence J. dissenting, found that this was not a case where the "very question" doctrine would protect a consensual arbitrator:

In my opinion, the present case is not one in which the parties by agreement "ousted the jurisdiction of the Courts to determine a question of law by choosing to have the question determined by a judge of their own making." The question of law which arose in the arbitration came up in the course of a consideration of a grievance in the ordinary way under the provisions of the collective agreement.

214. *Id.* at 87; 44 D.L.R. (3d) at 310.
There was here no joint submission by the parties to the arbitrator, seeking to have a specific question of law determined for them . . . [The] issue came before the arbitrator by virtue of the provisions of the collective agreement governing the processing of all grievances. Its solution certainly involved a consideration of the construction of the agreement, but the submission to the arbitrator was to be determined on the basis of the true meaning of the agreement. The parties had not bound themselves to an unqualified acceptance of the arbitrator’s decision as to what the agreement meant.216

When one combines this decision with the earlier case of *Bell Canada* v. *Office and Professional Workers Employees’ International Union*,217 it becomes readily apparent that the question put to the arbitrator will have to be the following specificity: e.g. “What does clause X mean?”, before the doctrine can have any applicability at all. Indeed, the general tenor of the Supreme Court majority judgment, which would seem in any case to require a decision by the arbitrator which is “consistent with the agreement” may well eliminate the “very question” doctrine completely.

Moving to the more specific, there is only one recent arbitration decision in Nova Scotia that necessitates any comment at length. In *Oil, Chemical and Atomic Workers’ International Union, Local 9-832 v. Canadian General Electric Co.*,218 the Nova Scotia Appellate Division was asked to set aside the award of a Part I arbitration board. The latter had found that the grievor, who had had a history of alcoholism, had been improperly discharged as the evidence failed to disclose the measure of reasonable and just cause necessary to support the dismissal. A period of suspension had been substituted. Jones J., quashed the award on the basis that the arbitration board had failed to deal with the question which was before it and had therefore committed an error of law which was apparent on the face of the record. This decision was then appealed by the union to the Appellate Division.

The respondent employer’s basic submission was that there was a distinction to be made between discharge for disciplinary reasons and discharge that has nothing to do with the employee’s misconduct.219 MacDonald J.A., delivering the unanimous judgment of the Court, accepted this analysis:

216. *Id.* at 657; 45 D.L.R. (3d) at 568.
219. *Id.* at 13.
It seems obvious to me that there must be a distinction between the discharge of an employee for disciplinary reasons on the one hand and for non-disciplinary reasons on the other. Assuming that the words "reasonable and just cause" in Article 4 [of the collective agreement] apply to both types of discharge, surely different considerations arise. If the discharge arises from the exercise of the administrative functions and is based on medical grounds only then the factors involved in the decision to discharge would include those discussed in *The University Hospital of London and London and District Building Service Workers Union, Local 220* (1973), 4 L.A.C. (2d) 16 at pp. 28-29...

On the other hand, if the discharge is for disciplinary reasons then the test of whether the company had "reasonable and just cause" must be determined within the framework of the particular infraction. 220

This passage contains a very important distinction which had not previously received judicial sanction in Nova Scotia. Arbitrators will no longer be able to apply the one uniform test of whether the arbitration was "reasonable and just" in all the circumstances of the case at hand. Rather they will have to classify initially the discharge as being either disciplinary or non-disciplinary in nature and then apply the appropriate test.

MacDonald J.A. then proceeded to characterize the issue submitted to the arbitration board as being whether the respondent company had reasonable and just cause to dismiss the grievor as being medically unfit for employment. 221 He concluded from the award that the Board had characterized the issue before it incorrectly as involving a discharge for disciplinary reasons when "what was before it was a discharge imposed for non-disciplinary reasons:" 222 Hence, the Board had erred in substituting a suspension for discharge when there was no infraction of any relevant rule or regulation and the issue became one of what effect this error had. His Lordship found that there was no reviewable error of law on the face of the record but that the Board had exceeded its jurisdiction and, therefore, misconducted itself within s. 13(2) of the Arbitration Act:

... the Board assumed an authority not given to it by the parties

220. *Id.* at 14-15.
221. *Id.* at 15.
222. *Id.* at 16.
and thereby acted without, or in excess of, jurisdiction when it exercised a disciplinary power not intended by the parties.\textsuperscript{223}

The apparent willingness of the Appellate Division to determine of its own accord both the question put to the Board by the parties and the Board's view of what that question was may cause some justifiable concern. Nevertheless, the real importance of the \textit{Oil, Chemical \& Atomic Workers} case is the lesson it gives to arbitrators; viz. how lack of clarity in drafting the award may get a board into problems. It is clear from the award that the arbitration board did consider the grievor's medical state and concluded that it was no such as to prevent him performing his work satisfactorily. Despite the reluctance of the Appellate Division to reach such a conclusion, it appears reasonably evident from the reasons given in the award that, even had the discharge been viewed solely as non-disciplinary, the Board would not have accepted the evidence of the company doctor as sufficient to justify discharge. By not stating clearly this conclusion as the basis for its decision the Board, in effect, got itself into trouble.

Certainly, this decision is going to require increased clarity from arbitrators; this is particularly so in light of the broad terminology used in most grievances. Assume, for example, that employee X is discharged by the company and the union files a grievance alleging "discharge without cause" as was the case in the present decision. The union claims that X has been disciplined while the employer states that the sole reason for dismissal was non-disciplinary. Presumably, the arbitrator may determine on the evidence available which explanation of the company's action is more probable and assess the discharge on that basis. So long as this initial step is taken any decision on the facts will normally be unimpeachable. Unless, however, it is clearly stated in the award that this assessment is being made, it is clear from this decision that the Court will feel quite free to make its own determination of the question before the Board.

\textit{VII. Construction Industry}

1. Accreditation

One of the major changes effected by the revision of the Trade Union Act\textsuperscript{224} was the provisions relating to the accreditation of

\textsuperscript{223} Id. at 18.
\textsuperscript{224} S.N.S 1972, c. 19.
employers’ organizations. The notion that accreditation was worthy of legislative recognition was formed as a result of the work of Dean H. W. Arthurs and Dr. J.H.G. Crispo, and more directly in the Nova Scotia context, following the Report of the Commission of Enquiry into Industrial Relations in the Nova Scotia Construction Industry. To date, the Construction Industry Panel of the Nova Scotia Labour Relations Board has had to deal with four applications for accreditation. What follows is a brief analysis of the developments thus far.

(a) Appropriateness of the Unit — The Sector Applied For.

The first application for accreditation was filed by the Canadian Automatic Sprinkler Association (CASA) on March 7, 1974. CASA applied for a unit consisting of:

all unionized employers, employing sprinkler fitters and their apprentices, in the industrial and commercial, housebuilding and sewers, tunnels and watermains sectors of the construction industry on the mainland of Nova Scotia.

In a written decision dated July 15, 1974 the Panel dismissed the application.

The basis of the Panel’s decision was that the unit applied for was inappropriate for accreditation. The Panel held that s. 94 of the Act does not contemplate accreditation for a group of employers which does not constitute a sector within s. 89(h) of the Act. The unit sought was not a unit consisting of all unionized employers in a sector and geographic area as required by the Act, but rather consisted of a unit of all unionized employers engaged in a particular trade within a sector and area. However, the Panel did indicate that the mere fact that the section applied for was not for all employers in one of the four sectors enumerated in the Act did not preclude the Panel from hearing the application in light of the concluding words of s. 89(h) which authorized the Panel to determine “any other sector” in addition to those specially enumerated. In the instant case the Panel concluded that the proposed unit could not be legitimized by determining that another sector existed.

227. L.R.B. No. 332c.
In so deciding the Panel outlined the factors which it would consider in deciding whether to exercise its discretion under s. 89(h). These factors are as follows:

(a) whether any additional sector could be clearly definable in terms which would distinguish the employers therein from other employers, (b) whether the addition of a new sector would be in the express interests of the employers and the union and (c) that sectors should be broadly defined and not specific as to trade and the Panel would thus be unwilling to carve up the existing sectors. The panel observed that if factors (a) and (b) were the only considerations, discretion under s. 89(h) might well have been exercised. However, in view of factor (c) and the fact that the employers involved operated mainly in the commercial and industrial sector, the Panel refused to find another sector. To do so would, in the opinion of the Panel, defeat the purpose of the legislation which was multi-trade bargaining in the construction industry.228

At first sight the Panel may have gone too far. It can be argued forcibly that multi-trade bargaining is not the aim of accreditation but the result. The real intent of accreditation would appear to be to give statutory recognition to employers’ organizations in order to offset a perceived imbalance in power between the unions and employers in the industry. By the enactment of the accreditation legislation it was hoped that this imbalance could be eliminated and increased stability achieved. Looked at in this light, if it is true, as the Panel implied, that the unit was in the express interests of the parties then it would seem as though the Panel would have been justified in exercising its discretion under s. 89(h). This approach overlooks one very important point. If the interests of the parties were to be the predominant factor in determining sectors then there would hardly have been any need for the new legislation; presumably these interests are reflected in current bargaining patterns. The legislation was, therefore, enacted to introduce new bargaining patterns based on a multi-trade sector. Moreover, it is clear from the provisions of ss. 94 and 95 that the legislation is designed to have a coercive effect; coercive not only in the sense of individual employers within a trade who may want to bargain on their own behalf but also in the sense of whole trades which fall within a larger sector. All must become part of the accredited organization. In the last resort, one might well ask why the sectors

228. Id.
in s. 89(h) were defined so broadly if this was not the intent of the legislation. To cut up the various sectors by permitting new divisions such as that suggested by CASA would be to nullify that intent.

The second application for accreditation was made by the Boilermaker’s Contractors Association of Nova Scotia (BCA) on March 20, 1974. The unit applied for consisted of

all unionized employers employing employees engaged in boilermaking, field construction, erectors, rigging, field fabrication, unloading, and work involving assembling and dismantling in the industrial and commercial, housebuilding and sewers, tunnels and watermains sectors of the construction industry on the mainland of Nova Scotia.

This application was also dismissed. It needs only a brief glance at the proposed unit to indicate that it was defective in the same way as the CASA application.

(b). Status of the Employers’ Organization

The third application for accreditation was made by the Construction Association Management Labour Bureau (CAMLRB). This application was dismissed on the basis of s. 94(8) of the Act. However, in the course of its decision the Panel offered some useful comments on the issues which face an applicant for accreditation.

The first requirement of an application is that it proves that it is an “employers’ organization” within the definition in s. 89(5). By virtue of s. 89(f) an employer is any person who (i) employs or in the preceding twelve months has employed more than one employee and (ii) who operates a business in the construction industry. The same section in s.s. (e) defines an employee as a person employed

229. L.R.B. No. 333c.

230. The BCA application was dismissed not as the result of a determination that the unit was inappropriate but on the motion of one of the intervenors, the Construction Association Management Labour Relations Bureau Ltd. Counsel for the BCA requested that the hearing be adjourned until he had time to examine the Panel’s decision in the CASA application. The Panel had not reduced that decision to writing. The Panel was prepared to give counsel the thrust of the decision and to grant a one day adjournment to him to consider it. This was rejected by counsel for BCA whereupon he withdrew from the hearing. Counsel for the Bureau then moved that the application be dismissed and that motion was granted. Both CASA and BCA appealed to the Trial Division of the Nova Scotia Supreme Court but Cowan C.J. dismissed the applications. See S.H. No. 05071 and S.H. No. 05072, handed down December 11, 1974, and (1976), 14 N.S.R. (2d) 36.

230a. L.R.B. No. 293c.
in the construction industry. The Panel found that the applicant satisfied these definitions. 

The second hurdle which an applicant for accreditation must surmount is contained in s. 94(8) of the Act. In effect this subsection has two requirements. First, the Panel must satisfy itself that the organization is properly constituted and controlled by its members. It is on this basis that the present application was dismissed. Secondly, the applicant must prove to the satisfaction of the Panel that each of the members of the applicant has vested appropriate authority in it to enable it to discharge the responsibilities of an accredited bargaining agent.\(^\text{231}\) 

The final preliminary point is that the Panel made it very clear in the present application that it would be very reluctant "to accredit an employer's organization to bargain on behalf of any employer who could not, if he wished, join the accredited organization."\(^\text{232}\) 

As noted earlier, the Panel dismissed the CAMLRB application for failure to comply with s. 94(8) (a). The Panel felt that the memorandum and articles of association of the Bureau were deficient in that (i) they did not guarantee that every member of the Bureau had a vote in the election of the Board of Directors, (ii) there was no guarantee that each member would be represented by a director, (iii) the Board of Directors had unfettered power to change the basis of the election of future directors, (iv) the Board, by special resolution, could remove any director from office and (v) there was no provision for a mandatory annual general meeting. The Panel recommended changes which would recognize that a change in the basis of the election of directors should be authorized by special resolution, all members should be entitled to be represented on the Board by a director and that an annual general meeting should be held not more than fifteen months after the last meeting with adequate notice given to all members. 

The concern of the Panel with the democratic basis of the applicant is not without foundation. Accreditation places a great 

\(^{231}\) This latter requirement can be fulfilled by statutory declarations from each member of the applicant, drafted in terms of the section, and an indication that the signatory is authorized to sign collective agreements on behalf of the member employer. Under s. 94(8) (a) and s. 94(8) (b), failure to satisfy the former is more important than failure to satisfy the latter. Section 94(9) gives the Panel the discretion of either dismissing or postponing the application for failure to satisfy s. 94(8) (b). No such discretion exists in so far as s. 94(8) (a) is concerned — the application must be dismissed. 

\(^{232}\) See the discussion, *supra*. 

deal of control and power in the hands of the accredited organization and adequate protection must be guaranteed to those covered by the accreditation order. The need for protection is evident when one appreciates the diverse and often conflicting interests involved. Large and small, national and local, general and specialty contractors may be covered by the same order. However, it must be remembered that an accredited organization must have the delegated authority to function effectively in carrying out its responsibilities. In attempting to balance these seemingly conflicting principles the Panel may have erred too far in the search for internal democracy in insisting “that every member must at all times be entitled to be represented on the Board by a director’. In a small unit such a formula might not cause any undue administrative hardships but in a larger unit such as that contemplated by the legislation the requirement could cause great inefficiency. One wonders whether in fact the Panel’s approach really adds a great deal to democracy within the CAMLRB. A better and more realistic trade-off might have been merely to require that each member had one and only one vote in the election of the Board. Or if the Panel felt that one group of contractors with a community of interest might outvote the remainder and thus elect a dominant slate, then some system of cumulative voting as introduced in recent corporations legislation could have provided a solution.\textsuperscript{233} To a large extent, this criticism of the Panel’s approach depends on the administrative structure within the Bureau. If day to day business and minor policy decisions are placed in the hands of a small executive or management committee while the Board acts only as a watchdog and major policy maker, the present system should cause little problem. If this is not the case, however, and the Board is intended to play a more important role, it will be interesting to see how the multitude of representatives affects its efficient functioning.

(c). Appropriateness of the Unit

The fourth application for accreditation was made by the CAMLRB after appropriate changes had been made to the memorandum and articles of association. The unit applied for consisted of:

all unionized employers generally engaged in the industrial and commercial sector of the construction industry on the mainland of Nova Scotia.

\textsuperscript{233} \textit{Canada Business Corporations Act}, S.C. 1974-75, c. 33, s. 102.
The Panel found this unit to be appropriate and then proceeded to elaborate on its findings with respect to inclusions and exclusions from the unit as follows:  

(i). Industrial Plant Maintenance Employers. The Panel excluded from the unit employers engaged in industrial plant maintenance on the ground that they do not operate a business in the construction industry as defined in the Act.  

(ii). Employers Engaged Partly in and Partly Out of the Construction Industry. The Panel held that where an employer is engaged in a business only partly in the construction industry then he will lose his bargaining rights to the accredited organization only in respect of his construction employees. His bargaining relationships with other employees will remain unaffected. In particular, the Panel determined that companies involved in the installation, repair and maintenance of elevators operate a business within the Construction Industry in all but maintenance aspects of their operation and thus would generally fall within the unit. Similarly, the Panel held that it was constrained by the wording of s. 89(c) to exclude employees with respect to their employees engaged in shop or off-site work but including them where they had employees engaged in on site work.  

(iii). Unionized Employers. The third exclusion identified by the Panel concerned those employers who were not "unionized employers". The latter are defined as employers employing unionized employees. Unionized employees are those on whose behalf a trade union has been "certified or recognized as bargaining agent in accordance with section 28." The Panel noted that prior to 1972 no formal mechanism of voluntary recognition existed. However, the same requirement as now appears in s. 44 did exist with respect to the necessity of filing a collective agreement with the Minister of Labour. Accordingly, the Panel held that any employer who, before or after 1972, voluntarily recognized a union as bargaining agent and signed a collective agreement which was filed with the Minister was a unionized employer. Failure to sign any subsequent agreement was not deemed to render this negating. On the other hand, an employer for whom no union had been certified

234. L.R.B. File No. 312.  
235. S.N.S. 1972, c. 19, s. 89(c).  
236. Id. at s. 89(k).  
237. Id. at s. 89(j).
and with respect to whom no agreement had even been filed is not a unionized employer and therefore not encompassed by the accreditation order.

(iv). The Scope of the Unit. The Panel also considered the question of the extent to which it would carve up the sector applied for by recognizing special interests on the part of various employers. Consistent with its decision in the CASA application the Panel was reluctant to accredit a unit of less than all unionized employers in the sector. Specifically, the Panel declined to exclude employers on the basis that they were unionized by unions who had never bargained with the applicant; that they were accustomed to bargaining with their unions on a national basis; or that they were engaged in "heavy industrial" work and historically bargained on a project basis.

More important, however, was the effect that ss. 23(3) and 95(5) of the Act had on accreditation. These sections provide that where the employees of an employer are certified in accordance with s. 23(1) of the Act, the employer is not bound by any accreditation order. Thus, the Panel was faced with a rather difficult exercise in statutory interpretation. Section 95(5), read literally, would seem to exclude any employer whose employees were unionized by any craft union. Recognizing the absurd results that would flow from this conclusion, the Panel did not apply this literal interpretation. Rather, a commonsense approach was adopted. It was held that the intent of ss. 23(3) and 95(5) was to exclude from the scope of an accreditation order an industrial employer, some of whose employees were represented by a craft union certified in accordance with s. 23(1). The Panel determined that the certification procedure in the Construction Industry are governed by s. 92 of the Act and not by s. 23 and thus employees of an employer in the construction industry would not fall within s. 23 at all. At the same time, there is a technical problem with this approach because s. 92, dealing with applications for certification by construction unions, specifically provides that ss. 23 and 22 apply to such applications. The Panel rationalized this problem by stating that the

238. S.N.S. 1972, c. 19.
239. This section permits the severance of a craft unit in a certification application where the employees in question belong to a craft or group exercising technical skills by reason of which they are distinguishable from the employees as a whole and the majority of the group are members of one trade union pertaining to that craft.
inclusion of these sections in s. 92 was only for the purposes of the timeliness of any application for certification. However, it requires considerable stretching of the intent of s. 23 to bring it within this rationale. Certainly, s. 22 is concerned with the timeliness of applications by s. 23 appears to be almost solely connected with the appropriateness of the unit. The only concern with timeliness is to be found in s. 23(2) but this would seem to be inextricably interwoven with the operation of s. 23(1).

Nevertheless, the conclusion reached by the Panel is completely in accord with common sense and the intent of accreditation. Sections 23(3) and 95(5) would seem to be the result of an overcautious draftsman. If one looks back to the definition of "employer" in Part II of the Act, it is found that he must operate a business in the construction industry. Thus, accreditation only affects such employers and industrial employers whose skilled workers are organized by a craft union would not normally be subject to any accreditation order even without these provisions. Sections 23(3) and 95(5) are, therefore, to all intents and purposes superfluous and cause nothing but confusion in the Act.

In conclusion, it can be seen that the Panel has adopted an extremely responsible approach to the question of accreditation. Its decisions will leave some practical problems, for example, the question of how to deal with employees who sometimes work within the sector or even the construction industry, and on other occasions outside. However, as the Board stated in the second CAMLRB decision, these problems of fluctuating duties can be dealt with in the collective agreement. Accreditation has also been very slow moving. The CAMLRB application has only very recently been approved. One gets the very strong impression that certain groups in the construction industry do not subscribe to the concept of accreditation at all and have been conducting to some extent a delaying action. All that can be said is that it is to be hoped that these differences are ironed out by the time accreditation really starts operating. Otherwise accreditation, viewed by its proponents as the panacea for the construction industry, could become an unmitigated disaster.

240. S.N.S. 1972, c. 19, s. 89(f).
241. Accreditation was granted to the CAMLRB on January 29, 1976. See L.R.B. No. 392 C.
242. See, for example, the CASA and BCA applications to the Supreme Court, supra, note 230 which in the writers' view appear frivolous to a large extent.
2. Jurisdictional Disputes

The Trade Union Act does not attempt to solve jurisdictional disputes in any positive fashion. Rather, the Act attempts the more modest goal of ameliorating the worst aspect — the job shutdown. In other words the Act makes no specific attempt to reorganize the industry so as to prevent completely such disputes but seeks to arbitrate jurisdictional problems before the parties are forced to resort to economic action.²⁴³

The Act defines a "jurisdictional dispute" as:

a dispute between two or more unions or between an employer or employers' organization and one or more unions over the assignment of work.²⁴⁴

In the event that "a person has reasonable grounds for believing and does believe that a stoppage of work or any part of the work carried on by one or more employers and employees represented by one or more trade unions is likely to occur as the result of a jurisdictional dispute" a complaint can be made to the Board.²⁴⁵ The Board, after satisfying itself that a stoppage of work is likely to occur as the result of such a dispute, can issue an interim order assigning the work to a specific trade or craft. Any of the parties involved in the dispute can then apply to the Board for a review of the interim order and the Board can confirm, vary or revoke the interim order. The Board's orders, both interim and final, bind all the parties affected by the dispute unless the parties agree amongst themselves in writing on the assignment of work and file the agreement with the Board or unless they submit the dispute to a tribunal or to arbitration which renders a decision binding on the parties.

The Board has considered many jurisdictional disputed cases. Most decisions have, however, followed the principles set down in L.R.B. No. 239c. That case involved a dispute between the Labourers' International Union and the Operative Plasterers' and Cement Workers' International Union over the supply, place and finish of concrete. There is not the available space to explain the facts fully. Suffice to say that as the result of swift technological changes culminating in the institution of supply, place and finish changes.

²⁴³ It should be noted that the Act still contemplates economic warfare as the result of jurisdictional disputes. (See S.N.S. 1972, c.19, s.50.) We are here concerned only with s.49 of the Act which seeks to avoid such conflict.
²⁴⁴ S.N.S. 1972, c.19, s. 1(1)(n).
²⁴⁵ Id. at s.50(1). Any reference to the Board should be taken to mean, insofar as the construction industry is concerned, the Construction Industry Panel.
contractors, the Labourers lost their jurisdiction in placing the concrete, an area in which they had previously done all the work at a time when such specialty contractors where unknown, to the Plasterers who had acquired bargaining rights for employees of the contractors. After some period of time the Labourers proceeded to make a complaint pursuant to s. 50 and the Panel issued an interim award awarding the disputed work to the Plasterers.\textsuperscript{246} At the formal hearing the Panel confirmed their interim order. Several matters of importance where, however, discussed.

At the formal hearing, the Panel was faced with two preliminary objections raised by the Operative Plasterers' Union. The first was to the effect that s. 50 of the Act did not empower the Panel to award the work to the Labourers because the respondent employer did not employ any members of the latter union. The Panel correctly rejected that argument on an interpretation of s. 50 and the definition of jurisdictional dispute.\textsuperscript{247} In effect, the Panel held that s. 50(3) of the Act empowered it to award the work to "persons" and not only to "employees."\textsuperscript{248}

The Second objection put forward was that the Panel should not accept as sufficient to invoke these powers under s. 50, the mere statement by an officer of the complainant union that he "has reasonable grounds for believing and does believe that a stoppage of the work in dispute is likely to occur." The argument was that if such was the case any union would be free to go on "a shopping tour" hoping to pick up additional work and thus extend their jurisdiction. This could lead to instability in an otherwise stable

\textsuperscript{246} L.R.B. No 222C.  
\textsuperscript{247} Supra, note 244.  
\textsuperscript{248} The argument of counsel for the Operative Plasterers was based on the decision of the Ontario Court of Appeal in \textit{R. v. Ontario Labour Relations Board, Ex parte Bennet and Wright Ltd.}, [1968] 2 O.R. 168; 68 D.L.R. (2d) 378 (C.A.) which applied and followed the decision of McRuer C.J.H.C. in \textit{R. v. Orliffe, Ex parte Canadian Pittsburgh Industries Ltd.}, [1961] O.W.N. 223 (H.C.). Under the old Ontario legislation (R.S.O. 1960, c. 202, s. 66(1)) jurisdictional disputes were referred to the Jurisdictional Disputes Commission. In order for a complaint to be made to the Commission it had to be alleged either that a union had required an employer to assign work or that an employer had assigned work to employees in one union rather than another. In the \textit{Canadian Pittsburg} case the judge held that the use of the word "employees" restricted the application of the section to "those disputes that arise with respect to the assignment of work by an employer among those that are engaged on the work over which he has direction." This approach was criticized severely in the \textit{Report of the Royal Commission on Labour-Management Relations in the Construction Industry} (Toronto, 1962) which recommended that the word "employees" be changed to "persons".
situation. The Panel agreed with this argument and stated that because the likelihood of a work stoppage was a:

necessary precondition of the Panel's power under section 50, it [the Panel] would be reluctant to invoke its power simply on the strength of statements by the complainant union's officers.\footnote{249}

Furthermore, the Panel chastized the labourers for its failure to "make a serious attempt" to settle with the Plasterers and stated that:

the complainant union in a jurisdictional dispute must make a concerted effort to work matters out with the other parties involved before making a complaint to the Panel.\footnote{250}

In the instant case, however, there was evidence from a third party that a work stoppage was likely to occur and the second objection was, in the final analysis, dismissed.

The Panel's approach to the second problem is illuminating in many respects. The theoretical basis for s. 50 stems from the \textit{Woods' Report}.\footnote{251} The Commission suggested that if appropriate private dispute settlement machinery was available to the parties the Panel should refuse jurisdiction. The legislation eventually passed was a watered down version of the Commission's recommendation. The latter was based on the premise that the parties could be encouraged and indeed would be eager to devise their own dispute settlement machinery. History and current practice have, however, demonstrated that in Nova Scotia the parties are either unwilling or unable to establish such a scheme. When viewed in this light the Panel's admonition that a "serious attempt" or a "concerted effort" be made by the parties to solve the dispute may, if carried too far, undermine the Commissioner's observation that:

the important point is that this vexatious issue must be removed from the area of illegal work stoppage action and submitted solely to some form of due process with binding authority which the parties will respect.\footnote{252}

The Panel's concern that the parties engage in discussion as a first step is laudable. However, the practice in the industry indicates that a complainant union will approach the employer as a first step, and, if satisfaction is not forthcoming, then it will "wobble the job". In the face of such practices rigid adherence to the Panel's formula could

\footnote{249. L.R.B. No. 239 C.}  
\footnote{250. \textit{Id}.}  
\footnote{251. \textit{Supra}, note 226.}  
\footnote{252. \textit{Supra}, note 226 at 97.}
result in little, if any, decrease in the number of work stoppages. If the Panel felt constrained by the "necessary precondition" contained in s. 50 then it should attempt to have the section amended to exclude it and include the power to award costs against a union on a "shopping tour." Considering the practice in the industry and the reliance placed by the parties on the Panel in dispute situations it is suggested that there should rarely be a case where the Panel refuses to hear a jurisdictional dispute. 253

After dismissing these preliminary points the Panel proceeded to lay down the criteria it would generally use in considering such cases. The factors which the Board will take into account are basically those found in the information required to be filed with the Board in a review of an interim order 254 and include: (a) any union constitution; (b) any collective agreement; (c) any agreement or understanding between trade unions as to their respective jurisdictions or work assignments; (d) any agreement or understanding between a trade union and an employer as to work assignment; (e) any decision of any tribunal respecting work assignment; (f) any other document relating to the work in dispute and a statement as to any area or trade practice relating to the work and pictures, diagrams or drawings of the disputed work; (g) the nature of the work (i.e. skills required and safety considerations), and (h) the efficiency and economy of the employer's operation or the construction industry as a whole.

In noting these factors the Panel pointed out emphatically that the criteria listed above were not in order of any priority. However, it does appear from subsequent cases that the overriding concern of

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253. In L.R.B. No. 377 C, involving a dispute between the same unions and the Bricklayers, Masons and Plasterers International Union the Panel indicated that its approach had not modified too much from that described above. The Panel stated that in a jurisdictional dispute situation, where none of the parties objects that a work stoppage is not in fact likely to occur, then the complainant's allegation that such a stoppage is imminent will be accepted. Where, however, there is an objection along these lines the Panel "will require evidence going beyond the simple allegation of the union seeking assignment of the work that its members are likely to disrupt the job". Furthermore, the Panel fell back on its "serious attempt" formula and indicated that the estimate of the employer as to the likelihood of a work stoppage would be given considerable weight. Presumably, when an employer, employer and union, or two unions complain the Panel will take action. One wonders whether, in the context of a single union complaining, the Panel's insistence on self-help remedies by the parties does not evidence a reluctance to recognize the realities of the situation in jurisdictional disputes and an overlegalistic approach to the problem.

254. See Regulation 25 of the Regulations made pursuant to the Trade Union Act.
the Panel has tended to be the efficiency and economy of the employer's operation. Once again, if carried to extremes this approach may cause problems for the Panel, this time in terms of credibility. Economy and efficiency are both employer-oriented. At this point in time both management and labour readily submit to decisions of the Panel because of its speed, specialist knowledge and, above, all, objectivity in deciding jurisdictional issues. An overemphasis on employer-oriented factors may, in the long run, reduce labour's satisfaction with the Panel as an arbiter of such disputes.

One final interesting aspect of the Panel's decision in this case concerned the differences in wage rules between the disputant unions. At the time of the dispute the Labourers were receiving $4.30 per hour and the interested members of the Operative Plasterers only $3.65. The Panel stated:

We do not think it appropriate to concern ourselves with the relative wage rates or the fact that the Labourers' collective agreement calls for overtime rates because these factors are subject to change.

While not necessarily important in the instant case, if the Panel meant the above to be a statement of principle applicable to all cases, it is surely wrong. In making an assignment of work the employer's primary concern is to have it done competently. However, many skills in the construction industry are interchangeable and may be performed as well by one trade as another. In such a case it is incomprehensible that an employer may not look to and be guided by the relative wage rates of the crafts involved. By opting for the lower-rated group the employer may very well interrupt established work patterns and jurisdictions. The fact that wage rates can change is not a relevant consideration in refusing to take cognizance of the relevant wage rates. In a proper case this factor may be extremely important, not only from the point of view of the initial assignment of work but also from the Panel's point of view in deciding the case. This is particularly so when the Panel appears to be relying more and more on the efficiency and economy of the employer's operation as the primary factor in its decisions.  

255. In this respect the Panel seems to have acted in a way not unlike other tribunals charged with the responsibility of settling jurisdictional disputes. See Labour Relations Law (2d ed. Kingston: Industrial Relations Centre, Queen's University, 1974) at 52.

256. It should be mentioned that the decision of the Panel related only to the
Apart from the above reservations the Panel appears to have achieved admirable success in coping with jurisdictional disputes. More important is the fact that both management and labour respect the Panel and are generally happy with the Panel in this area. While the legislation may not have succeeded in fostering a move by the parties to establish their own dispute settlement machinery it has, currently at least, taken jurisdictional disputes out of the realm of illegal work stoppages for the most part.

respondent companies in their relations with the two disputant unions. The Panel noted specifically that different considerations could apply where, for example, the work was done by a general and not a specialty contractor. In other words, the Panel was issuing a "job decision". The "job decision" approach, whereby only those parties before the Panel are bound by the decision makes eminent good sense in jurisdictional dispute situations. The construction industry is inherently prone to rapid technological change and the "job decision" is designed to take account of this. In addition, it protects historical work patterns which have lagged behind new changes in the industry.