

Fairness in the administration of collective agreements: whatever happened to the new frontier?

Morley R. Gorsky*

"Goodness had nothing to do with it."¹ *Mae West*

I. INTRODUCTION

IT SEEMS THAT EVERY FEW YEARS a decision of the Ontario Court of Appeal or the Supreme Court of Canada meets with the disapproval of many arbitrators.² The case of *Re Metropolitan Toronto Board of Commissioners of Police and Toronto Metropolitan Police Association et al.*,³ received such a reception in 1981 when it was decided by the Ontario Court of Appeal.⁴ This is because it *apparently* holds that

* Director of Professional Standards, Law Society of Manitoba; Professor, University of Western Ontario, Faculty of Law (on leave). This paper was presented in June of 1988 at the Arbitration Conference held by the Faculty of Law, University of Calgary.

1 One of the reasons why the "old frontier" of fairness was not opened up was because of the failure of arbitrators and judges to adequately identify its content. As a result, a plethora of meanings were thrown up by the cases involving fairness without analysis of the meaning or application of those forms of behaviour which comprised the elements of fairness. Although it is "good" to be fair (see, *infra*, note 84 and note 130) goodness is one of the few concepts not encountered when examining the cases of fairness.

2 E.g., *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1968), 70 D.L.R. (2d) 693 (S.C.C.); *General Truck Drivers Union, Local 938 et al. v. Hoar Transport Co. Ltd.* (1969), 4 D.L.R. (3d) 449 (S.C.C.); *Union Carbide Canada Ltd. v. Weiler et al.* (1968), 70 D.L.R. (2d) 333 (S.C.C.); *Bell Canada v. Office and Professional Employees' International Union, Local 131* (1973), 37 D.L.R. (3d) 561 (S.C.C.), all of which were decided with undue attention to conventional contract interpretation doctrines, wherein the arbitrator was deprived of jurisdiction to deal with a matter deemed not part of the collective agreement.

3 (1981), 33 O.R. (2d) 476 (C.A.) (hereinafter referred to as "*Metro Police*") leave to appeal to the Supreme Court of Canada dismissed (Laskin C.J.C., Dickson and McIntyre J.J.), October 19, 1981.

4 On October 14, 1982, The Canada Labour Views Co. Limited, conducted a program on "Arbitration and Collective Bargaining in a Recession Economy" in Toronto, Ontario. Part of the program was devoted to the subject of "Management Rights and the Doctrine of Fairness." Canada Labour Views was kind enough to supply me with the cassette

where management has been given powers in a management rights clause which are not required to be performed in a designated manner under some other provision in the collective agreement, it may exercise such powers without being fair or non-discriminatory.⁵ There is said to be no jurisdiction to have management's exercise of such powers reviewed by an arbitrator.⁶

A number of arbitrators questioned the decision in the *Metro Police* case and considered what it portended for a fairness requirement in the administration of collective agreements.⁷ In my analysis of the subject, I have concluded that courts and arbitrators have rarely considered what they really meant when they encountered the subject of fairness in the administration of a collective agreement.⁸ It is as if they did not consider it important to know what was included in the term "fairness" and why certain aspects of fairness were or were not singled out for attention.⁹ What seems to be important is that "they" know it when they see it. Thus, a magnificent variety of words has been employed, all of which can be found under the rubric of the word fair-

recording of the program as well as the paper submitted by Professor (now Dean) Robert Prichard. I have made a number of references to Professor Prichard's paper and references are made to the page of the paper being commented upon. References to Mr. Kevin Burkett and the Chairman, Professor David Beatty, are to their recorded statements.

5 *Supra*, note 3 at 479.

6 *Ibid.*

7 See, *infra*, Part IV.

8 It might have been useful to isolate the components of fairness. *The Oxford English Dictionary* defines "fairness" as: "equitableness, fair dealing, honesty, impartiality, uprightness." "Equitableness" is there defined as: "... unbiased, impartial" and as: "just, reasonable." "Reasonable" is there defined as: "not irrational, absurd or ridiculous."

It can be seen that fairness is a concept which includes a number of terms which have usually taken the form of "non-discriminatory," "non-arbitrary," "reasonable," "bona fide." Their origins can be found in the dictionary definitions. My analysis of the cases will try to show that the choice of language by judges and arbitrators has confused the difference between fairness and its component concepts, and, in doing so, has given the incorrect impression that all aspects of fairness are excluded from the arbitrator's jurisdiction, when it was clearly intended to impose a fairness obligation (to act in good faith). See, *infra*. In Palmer, *Collective Agreement Arbitration in Canada* (Second Edition 1983), the term "fairness" is not defined under "Words and Phrases Defined by Arbitration Boards," however "arbitrary" (at 163) and "discriminate" (at 165) are. It is significant that assistance was derived from the representation of employees cases (at 163) in arriving at the meaning of arbitrary. See, *infra*, notes 10-28.

9 It is this error which has caused confusion as to the meaning of *Metro Police* when on the facts of the case it was stated that management need not act in a fair or non-discriminatory manner. Not only did the Court of Appeal appear to overlook the *bona fides* element of fairness, it confused the meaning of fairness by linking it with one of its components.

ness. Fairness is a word which does not imply that all of its component parts be present in all cases where fairness is required in the exercise of a power. In examining cases where fairness has been held to be required, it is not always possible to see why the particular aspect(s) of fairness were chosen or what they were held to encompass. Nevertheless, the cases do disclose that requirements of fairness do not increase (encompass more of the sets and sub-sets of fairness) as along a spectrum.¹⁰ Rather, each class of cases has created a jurisprudence of fairness, albeit imperfectly defined, more or less special to the class. It is my view that the class of cases where a standard of fairness has been developed (i.e., a restriction has been placed on management's discretion in carrying out its powers) is untouched by the *Metro Police* case, but it will be necessary to examine some of the jurisprudence dealing with those cases (both pre and post *Metro Police*) in order to place it in perspective.

That the duty to be fair requires definition has been demonstrated in cases decided under the duty of fair representation provision of the Ontario *Labour Relations Act* (s.68):

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.¹¹

The elements of fairness chosen for inclusion by the draftsman were "arbitrary, discriminatory or in bad faith." The duty of fair representation, first recognized by the Supreme Court of the United States,¹² has been variously said to include (1) a "duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them,"¹³ (2) a notion of reasonableness "subject always to complete good faith and honesty of purpose in the

10 This is in contrast to the duty of fairness imposed on administrative tribunals concerned with the due process rights of respondents in certain cases. See, Mullan, "Fairness: The New Natural Justice" (1975), 25 U.T.L.J. 281, referred to by Dickson, J. in *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 at 505.

11 R.S.O. 1980, c.228, s.68. See, Brown, "The 'Arbitrary,' 'Discriminatory' and 'Bad Faith' Tests under the Duty of Fair Representation in Ontario," (1982), 60 Can. B. Rev. 412.

12 *Steele v. Louisville & N.R. Co. et al.* (1944), 323 U.S. 192.

13 *Ibid.*, at 203.

exercise of its discretion,"¹⁴ and (3) a duty not to act in a manner which was arbitrary, discriminatory or in bad faith.¹⁵

Since 1971, section 68 (referred to above) has imposed a statutory obligation on unions with respect to the fair representation of members of the bargaining unit. An examination of Ontario Labour Board cases discloses that the elements of fairness introduced into the statute have spawned a host of meanings. In the case of "arbitrary," it has been said that "in attempting to define the term ... the Board has used almost as many descriptions as there are cases reported."¹⁶ Arbitrary, in the context of a duty imposed on management, is similarly defined in the light of a particular duty and the nature of the conduct being addressed. As well, the term "discriminatory" may lend itself to a number of discrete definitions depending on particular fact situations.¹⁷

In this paper, I have identified myself with the view that even in a case covered by *Metro Police*, a good faith element of fairness (and only such an element) is imposed on management in exercising its discretion. The Ontario Labour Relations Board has described "good faith" as "honesty of purpose."¹⁸ Consistent with my view of the meaning of good faith, when applied to management's administration of the collective agreement, is the Board's view that bad faith "requires evidence of deliberate or intentional misconduct or perhaps conduct motivated by factors completely extraneous and counter to legitimate bargaining concerns."¹⁹

In determining whether management has acted in good faith, the issue becomes whether management was really actuated by its desire to exercise its right or to achieve another purpose, e.g. discipline.²⁰ That is, was a business concern being pursued, or was some other illegiti-

14 *Ford Motor Co. v. Huffman et al.* (1953), 345 U.S. 330 at 338. It is significant that in the *Ford* case, in the circumstances, the Court approved a discriminatory arrangement favouring World War II war veterans entered into between Ford and the U.A.W provided there was "complete good faith and honesty of purpose" in the exercise of discretion by the U.A.W. in entering into the agreement. The two terms are, in fact, indistinguishable. What is more significant is that it is possible to act in good faith and yet discriminate. This is important in the case of the duty to act in good faith that I find exists under *Metro Police*.

15 *Vaca v. Sipes* (1967), 386 U.S. 171 at 190.

16 See, Brown, *supra*, note 11 at 440.

17 *Ibid.* at 448-453.

18 *Ibid.* at 454, referring to the case of *David Matthews*, [1976] O.L.R.B. Rep. 283.

19 *Ibid.* at 455. Thus, it is not sufficient that the action is one "... bordering on negligence, poor judgment, irresponsibility and unawareness ... unbecoming laxness and unprofessional business procedures ... if these are the result of ... shortcomings honestly made." *Ibid.* at 454-455.

20 See *Metro Police*, *supra*, note 3.

mate concern the goal of management's action.²¹ A purpose does not, however, become illegitimate only because its exercise demonstrates laxness, misunderstanding, mistake, procrastination bordering on negligence, or unprofessional business procedures, if *honestly* made.²² Thus far, arbitrators (and judges) have done little to assist in the clarification of the meaning of fairness, as has the Board within its jurisdiction. What makes the task particularly difficult is the argument that at some point an exercise of discretion may be *so* arbitrary, discriminatory etc. as to belie an honest intention to exercise it. I therefore acknowledge that if my view of the law is correct, the task of definition will not be an easy one.

Metro Police cannot be viewed as an isolated case. It is but one of the latest in a series of court cases which reaffirm one of the two prevailing philosophies affecting the interpretation of collective agreements in Ontario²³ (if not in all of Canada). Judges and arbitrators do not necessarily adhere to one or the other of the philosophies. Some are more closely attached to one of the extreme positions and others appear to have assimilated portions of both positions into their philosophies of contract interpretation.²⁴

What appears to be clear is that how one views the importation and application of fairness into the administration of the collective agreement will be a function of one's philosophy. I will endeavour to demonstrate that *Metro Police* is merely a recent pronouncement, which is based on the conventional philosophy of many judges, and some arbitrators, that in cases involving the determination of substantive rights contained in collective agreements, the collective agreement will be seen to be governed by most of the recognized rules of contract interpretation developed in the interpretation of commercial contracts.²⁵

21 I do not suggest that it will be easy to unmask such illegitimate concerns. The onus being where it is, a cleverly disguised exercise of discretion will be hard to deal with.

22 I see no reason why the position of the O.L.R.B., as indicated in note 18, *supra*, would not be applicable in the context of arbitration.

23 *Infra*.

24 As to the philosophies, see, *infra*.

25 The rights of management, as found by the Court of Appeal in *Metro Police*, are similar to those of a party in a conventional transactional contract, where there is a provision which provides that a purchaser may reject the goods being the subject of the contract, if they are not satisfactory to her. In Fridman, *Canadian Law of Contracts*, it is stated at 456: "Such a provision is a perfectly legitimate one, as Estey, J., explained in the Supreme Court of Canada in *Canada Egg Products Ltd. v. Canadian Doughnut Co. Ltd.*, [1955] S.C.R. 398 at 409-410. The purchaser may reject goods *honestly*, even if others may have been satisfied, or he acted unreasonably" (emphasis added). I take the word, "honestly," as used in the *Canada Egg Products* case, as the equivalent of

Where such a view prevails, the cases which will be followed are those dealing with commercial contracts where one of the parties has a discretionary right under the contract to do something without any limitation being attached to the way in which the discretion is to be exercised. In such cases all that is required is that the discretion is exercised bona fides; that is honestly.²⁶ So, in the case involving the right of a party to reject goods which have been purchased, it is irrelevant that most people similarly situated, would have accepted the goods.²⁷ All that is required is that it is a decision based on an honest consideration of the goods. That the conclusion is unreasonable is, similarly, irrelevant.²⁸ I intend to demonstrate that that is the meaning of the Court of Appeal in the *Metro Police* case. Consistent with its conventional view that no term of fairness or non-discrimination²⁹ is to be implied into a management rights clause which has not been cut-down by any other provision in the agreement, is a requirement of bona fides or honesty in the exercise of the disputed right. It is my conclusion that honesty, being one of the factors included in fairness, remains a requirement of the exercise of a right such as fell to be considered in *Metro Police*. That the Court appeared to reject a requirement of fairness is a result of its failure to address itself to what fairness included. That it did not intend to rule out a requirement that the right be exercised bona fides can be seen from the Court's remission of the matter back to the arbitrator. In doing this the Court recognized the arbitrator's authority to rule on the honesty of management's purported exercise of its discretion. The arbitrator was to decide whether the impugned action, purportedly taken in the exercise of a management right to assign overtime was, in reality, a disguised form of discipline.³⁰ That is, was management behaving honestly in assigning the overtime? To the extent that such a requirement is imposed in a *Metro Police* type case, fairness in the sense of *bona fides* is a necessary part of management's exercise of its rights.

good faith. Fridman adds at 456: "Where a contract is framed in such terms, only the party entitled to exercise the stipulated judgment must be taken into account ... The only limitation or qualification would appear to be that he must act honestly.

Reasonableness is not a criterion ..." It is this view of contract interpretation which was adopted by *Metro Police*; a position consistent with the cases cited *supra*, in note 2. Cf. *Greenberg v. Meffert* (1985), 50 O.R. (2d) 754 (C.A.) *rev'g* (1983), 21 A.C.W.S. (2d) 100 (H.C.).

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 *Metro Police, supra*, note 3 at 480.

Were the second philosophy of interpretation to prevail, the primacy of the position of management in determining what it wished to do would be lost. Both parties to the agreement would be seen to be entitled to equal consideration. This fact would impose on management some of the additional standards encompassed in the term fairness. Depending on the subject matter, these would receive definition by arbitrators. This view, favoured by more arbitrators than judges, is less positivistic and more consistent with a sociological or realist view of the collective bargaining regime. It is one which has generally been accepted (in theory if not in practice) in the United States and may explain why one can look, in vain, for "fairness" entries in the American labour arbitration reporting services.³¹

The most articulate and clear statement of the second philosophical position is found in the award in *Re Sudbury Mine, Mill and Smelter Workers, Local 598 and Falconbridge Nickel Mines Ltd.*,³² in which Professor Laskin, as he then was, served as the Chairman. The Chairman summarized the first philosophical position as follows:

What this philosophy presupposes is that a collective agreement is only a restriction on management's otherwise unrestricted powers vis-a-vis its employees, and that it need give them no consideration other than through the compulsion of statute (if any) or the specific terms of any bargain which it may have made with the accredited or qualified collective bargaining agent of its employees.³³

This is a view not unlike that contained in *Metro Police*.³⁴

The second philosophy was described as follows:

31 David Feller, of the School of Law, University of California, and a prominent American arbitrator, spoke on "The American Approach to the Doctrine of Fairness in Arbitral Awards" at the C.L.V. program referred to *supra*, note 4, and commented on the effect on arbitrators of the *Steelworkers Trilogy*. Those three cases are seen by many to have effectively accepted the philosophy or relative arbitral freedom from conventional rules of contract interpretation: hence the importation of a concept of fairness more compatible with the second philosophical position to be described, which was rejected in *Metro Police*. The Trilogy cases are: *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, *United Steelworkers v. American Mfg. Co.* (1960), 363 U.S. 564, and *United Steelworkers v. Enterprise Wheel & Car Corp.* (1960), 363 U.S. 593. I have argued elsewhere that a careful reading of these cases discloses that it is not what was decided nor does subsequent American jurisprudence call for such a conclusion. (In, "Management Rights Revisited: How the Good Ship 'Warrior & Gulf' Sailed Up the Potomac River and Wound up in Metropolitan Toronto" (1984), 19 Valparaiso L.R. 123).

32 (1958), 8 L.A.C. 276.

33 *Ibid.* at 281.

34 *Supra*, note 3 at 479.

In this board's view, it is a very superficial generalization to contend that a collective agreement must be read as limiting an employer's pre-collective bargaining prerogatives only to the extent expressly stipulated. Such a generalization ignores completely the climate of employer-employee relations under a collective agreement. The change from individual to collective bargaining is a change in kind and not merely a difference in degree. The introduction of a collective bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to precollective bargaining standards is an attempt to re-enter a world which has ceased to exist. Just as the period of individual bargaining had its own common law worked out empirically over many years, so does a collective bargaining regime have a common law to be invoked to give consistency and meaning to the collective agreement on which it is based.³⁵

This view, if it were to prevail, would furnish a basis for an enlarged fairness requirement. Without the acceptance of the philosophy, such a result would be unlikely. This position is strengthened by the following statement:

The law is to be found outside the collective bargaining agreement, in principles and doctrines which must take their inspiration from the aims and purposes of collective bargaining as reflected in the policy, statutory and otherwise, of which the collective agreement is an experience ...³⁶

The *Falconbridge* case dealt with management's right to sub-contract. In the result the board found that, based on a clause in the collective agreement, the company was entitled to contract out. However, the Chairman in obiter noted that management could not exercise a discretionary power in order to undermine either the integrity of the bargaining unit or certain specific rights in the agreement referable to the transferred work. Fairness, as such, was not discussed as a requirement in carrying out management powers.³⁷ In fact, the reliance on the second philosophy as a basis for imposing a restriction on sub-contracting did not prevail in the arbitral jurisprudence.³⁸ Subcontracting was

35 *Falconbridge, supra*, note 32 at 282-283, quoting from *Re U.E.W. & Peterboro Lock* (1953), 4 L.A.C. 1499 (Laskin) at 1502.

36 *Ibid.* at 283.

37 *Ibid.* at 283-284.

38 See, *Re United Steelworkers of American and Russelsteel Ltd.* (1966), 17 L.A.C. 253. In that case the chairman, Professor Arthurs, stated, at 254-255, in referring to the two philosophical approaches:

Inevitably, in a case of this kind, [subcontracting] there are strong pressures upon a board of arbitration to declare its philosophical allegiances. ... However, we believe that so far as possible such pressures are to be resisted. Reliance on over-broad

allowed "as long as it [was] exercised in good faith and for purposes of business efficiency."³⁹ What does the purpose of "business efficiency" add to the requirement of "good faith"? In examining the bona fides of the action, one of the tests would be the purpose to be served. The fact that the decision would not lead to business efficiency is, again, irrelevant as long as this was the honest goal of management.

Fairness, as a concept encompassing more than the right to have management behave in good faith (which raises the spectre of business efficiency and a possible breach of some other provision of the collective agreement), has not played a role in cases involving work assignment.⁴⁰ Although there is a suggestion that management, in effecting work reorganization, cannot behave arbitrarily, it is clear that such an arbitrary act was (in *Windsor Public Utilities*) related to achieving a bad faith result, such as: "the old job ... merely masquerading under another new name and lower wage rate."⁴¹ The fact that bona fides is the governing requirement is seen from the statement: "In fact an employer may have to establish a change in its operations to justify the change made in the classification."⁴² Where a classification is altered, it may be necessary to test bona fides in this way: Was this really a change in classification or only a change in wage rates for the same job? In order to make such a finding, there must be a denial of the broader aspects of the second philosophy, being any implied obligation inferred from the "climate of collective bargaining,"⁴³ in this case "the status quo" as far as the assignment of work is concerned.

Without subscribing to the philosophy of *Metro Police*, Mr. Adams (in *Windsor Public Utilities*) recognized the limitations on the right of the union to interfere with the exercises of a management function regarding a "specific contractual provision."⁴⁴ The unilateral rights referred to are subject to restrictions of bona fides, which is tested by ex-

philosophical considerations may preclude pragmatic and realistic solutions to particular problems ...

Nevertheless, the philosophy followed by an arbitrator or judge will inevitably affect her analysis, especially in hard cases. At its worse, it may be seen to affect judicial objectivity. See, Arthurs, "Labour Law - Secondary Picketing - *Per Se Illegality - Public Policy" (1963), 41 Can. Bar Rev. at 573-586. Also see, *infra*, referring to Charles Fried's "Observation," note 212.

39 *Re Windsor Public Utilities Commission and International Brotherhood of Electrical Workers, Local 911* (1975), 7 L.A.C. (2d) 380 (Adams) at 381.

40 *Ibid.*

41 *Ibid.* at 387.

42 *Ibid.*

43 *Ibid.* at 381-382.

44 *Ibid.* at 386.

aming the changes to see if they are real or merely represent disguised attempts to circumvent provisions of the collective agreement. "Arbitrary" is seen to reflect a lack of bona fides as in: "arbitrarily reclassify someone for the sole purpose of paying a lower wage rate in relation to the same set of identifiable job duties."⁴⁵

I find it significant that the arbitral imposition of "fairness" restrictions on the exercise of management rights in a *Metro Police* situation is first specifically adverted to in *Labour Relations Law*⁴⁶ (Third Edition) in a separate heading: "Fairness: A New Frontier?", with reference to the now overruled case of *Re Municipality of Metropolitan Toronto and Toronto Civic Employees' Union Local No. 43*.⁴⁷ The authors refer to "the importance of the concept of fairness in administrative law."⁴⁸ The authorities they refer to are concerned with administrative due process rights and not with the interpretation of contracts. If the issue before the Court of Appeal in the *Metro Police* case had concerned due process rights, or matters of a procedural nature there is considerable support for a belief that the Court would have reached a different result.⁴⁹

I now propose to analyze the *Metro Police* case, with a view to demonstrating: (1) its consistency with a long line of court cases;⁵⁰ and (2) that it imposes a restraint on the exercise of management rights, being a requirement that management act fairly, in the sense that it must act in good faith, and this may entail a search for a business purpose behind the action.⁵¹ I also intend to demonstrate that such cases as *Canadian Food and Allied Workers Union, Local 175 v. Great Atlantic*

45 *Ibid.* at 387.

46 That here may have been a "new frontier" was suggested by the Labour Relations Casebook Group, in *Labour Relations Law*, Industrial Relations Centre, Queen's University, Kingston, Ontario (Third Edition, 1981) at 315: "Fairness: A New Frontier?" My thesis is that there was an "old frontier" that was, unfortunately, imperfectly understood. In any event, the Fourth Edition, 1986, abandons the term.

47 (1978), 16 O.R. (2d) 730, 79 D.L.R. (3d) 249 (Ont. Div. Ct.) ("Marsh" case). See *infra*.

48 *Supra*, note 46 at 317 and see, *supra*, note 10.

49 Where issues are procedural, or of a due process nature, the courts have been more flexible in their view of the collective agreement. See, *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2846* (1975), 8 O.R. (2d) 103 (C.A.). In such cases the court will recognize that the "normal laws" of contract are inapplicable and that: "a collective agreement is fundamentally different from an ordinary commercial contract or contract of employment" per Brooke, J.A. at 110. The cases relied upon by the Court of Appeal were those relied upon by O.B. Shime, Q.C. in the *INCO* case, referred to *infra* at 18-21. The Shime approach (and philosophy) was rejected by the Court of Appeal in *Metro Police*, *infra* at 22-27.

50 Such as are referred to *supra*, note 2.

51 *Infra*.

and *Pacific Company of Canada Ltd. et al.*,⁵² which dealt with the duty of fairness imposed where specific responsibilities are imposed on management, in that case assessing skill and ability in making an appointment, have not been affected by *Metro Police*. Nor does *Metro Police* greatly assist in defining what fairness means in any context.

I will also be examining a number of post-*Metro Police* cases which, I will endeavour to show, support my analysis of *Metro Police*.⁵³

I will also deal with certain philosophical implications, which arise from a comment made by Professor David Beatty concerning the existence of a fairness obligation in the administration of collective agreements.⁵⁴ Professor Beatty's reference was to Mr. Justice Weatherston's definition of the doctrine⁵⁵ and its suggested derivation from Ronald Dworkin's first principle, in his *Taking Rights Seriously*.⁵⁶

II. GENESIS

AN ARBITRAL STATEMENT, which provided the basis for the existence of a broad fairness obligation in a *Metro Police* fact situation, is found in the case of *Re International Nickel Co. of Canada Ltd. and United Steel Workers, Local 6500*, decided by a board of arbitration chaired by O.B. Shime, Q.C.⁵⁷

In the latter case, Mr. Shime stated,

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

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

Also, one must be sensitive to the nature of collective negotiations where parties for negotiating position or on the verge of an agreement, in order not to upset balances that have been struck both as the result of prior conduct in the plant and through negotiations, deliberately avoid clear and specific language preferring to have the matter re-

52 [1976] C.L.L.C. para. 14,056 (Ont. Div. Ct.) ("A&P" case). See *infra*.

53 *Infra*.

54 *Infra*.

55 *Marsh* case, *supra*, note 47, and see *infra*.

56 Duckworth, 1977, Appendix 1979.

57 (1977), 14 L.A.C. (2d) 13 (Shime).

solved at arbitration should it become necessary. Often matters are left for the express purpose of being arbitrated should the occasion arise. Unlike other agreements the parties understand that arbitration will form an integral part of a collective agreement and this enters into their contemplations and expectations when negotiating. The normal practice of the Courts in interpreting contracts by asking "What is the intention of the parties to create legal relations?" is not totally realistic when interpreting collective agreements. That is not to say that a board of arbitration has complete rein to do as it pleases with the language of a collective agreement. There are limits to an arbitrator's function, and these limits may be found by examining not only the collective agreement but also the past experience between the parties, the statutory context of collective bargaining, as well as accepted industrial norms.

While there has been some attack by the Courts on the use of past practice as an infringement of the parol evidence rule - which briefly may be stated as the rule prohibiting extrinsic evidence to contradict, vary, add to, or subtract from, the terms of a written agreement - the difficulty lies in properly understanding the context in which such evidence is admitted. Extrinsic evidence of past practice or industrial practice is often admitted not for the purpose of contradicting, varying, adding to or subtracting from a document, but rather as part of the background or historical context against which the collective agreement is negotiated, and enables a board of arbitration to better understand the context; Courts have always taken the view that such evidence is admissible.

We are also of the view that the recent decisions of the Supreme Court of Canada in *Re McGavin Toastmaster Ltd. v. Ainscough et al.* (1975), 54 D.L.R. (3d) 1, [1975] 5 W.W.R. 444, 4 N.R. 618; and *Syndicat Catholique des Employes de Magasins de Quebec Inc. v. Compagnie Paquet Ltee.* (1959), 18 D.L.R. (2d) 346, [1959] S.C.R. 206, as well as *Re Polymer Corp. and Oil Chemical & Atomic Workers' Int'l Union, Local 16-14* (1962), 33 D.L.R. (2d) 124, [1962] S.C.R. 338 *sub. nom. Imblrau et al. v. Laskin*; *C.P.R. Co. v. Zambri* (1962), 34 D.L.R. (2d) 654, [1962] S.C.R. 609, require arbitrators to view the collective agreement not only as the boundaries of the bargain struck by two equal parties who become co-authors of the collective agreement and responsible for its administration, but also as containing within those boundaries an implicit assumption that the terms and provisions of the agreement must be construed so as to operate reasonably and with good faith negates any theory which must be fleshed out by arbitration is cast in the context of an implied management rights theory.

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

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

the premise that there is in the collective agreement an internally implied management's rights theory which results in granting to management a complete discretion in matters which it is compelled to administer.

The theory of reasonable administration and interpretation is supported by the arbitration award in *Re Oil, Chemical & Atomic Workers and Polymer Corp. Ltd.* (1958), 10 L.A.C. 31 (Laskin), at 36, which imposed a theory of reasonable behaviour on union officials in administering the no-strike provision of the collective agreement. We read the *Polymer* case as imposing an obligation on the union to reasonably administer the collective agreement in so far as its obligations are concerned. In arriving at its decision it is apparent that both the board of arbitration as well as the Supreme Court of Canada assumed that the parties to the collective agreement are required to engage in reasonable behaviour during its currency. There is nothing in the language of the *Polymer* agreement that specifically required union officials to act reasonably or in accordance with the standards set out in the case. Their behaviour was examined against an implicit standard of reasonable behaviour. In our view this same theory must apply equally to the company as to the union, and the company must likewise administer its obligations in a reasonable manner.⁵⁸

Mr. Shime did not use the word fair or fairness but did use the words "reasonableness" and "good faith," being components thereof.

A theory of reasonable administration and interpretation of the collective agreement was said to be supported by the arbitration award in *Re Oil, Chemical and Atomic Workers and Polymer Corp. Ltd.*,⁵⁹ in which Professor Laskin, as he then was, is said to have "imposed a theory of reasonable behaviour on union officials in administering the no-strike provision of the collective agreement."⁶⁰ Mr. Shime read "the *Polymer* case as imposing an obligation on the union to reasonably administer the collective agreement in so far as its obligations are concerned."⁶¹ He concluded that "in arriving at its decision it is apparent that both the board of arbitration as well as the Supreme Court of Canada assumed that the parties to the collective agreement are required to engage in reasonable behaviour during its currency."⁶² He noted that in his view "there is nothing in the language of the *Polymer* agreement that specifically required union officials to act reasonably or in accordance with the standards set out in that case. Their behaviour was examined against an implicit standard of reasonable behaviour. In our view the same theory must apply equally to the company as to the union, and the company must likewise administer its obligations in a reasonable manner."⁶³

58 *Ibid.* at 17-19.

59 (1958), 10 L.A.C. 31 (Laskin).

60 *INCO case, supra*, note 57 at 19.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

It was this view that was specifically rejected by the Court of Appeal in the *Metro Police* case.⁶⁴ From a Union point of view it was "ironic, and disappointing that, with Laskin now presiding as Chief Justice, the Supreme Court of Canada....denied leave to appeal the decision of the Ontario Court of Appeal in the *Metro Police* case."⁶⁵ Notwithstanding that too much may have been read into the *Polymer* case with respect to its implication of a duty of fairness in the administration of the collective agreement in a *Metro Police* type case, Labour has viewed the rejection of the application for leave to appeal as especially disappointing.⁶⁶

III. METRO POLICE - THE REJECTION OF THE SECOND PHILOSOPHY OF INTERPRETING COLLECTIVE AGREEMENTS

THE TWO PHILOSOPHICAL APPROACHES to the interpretation of collective agreements fell to be examined by the Ontario Court of Appeal in the *Metro Police* case because it had to consider two decisions of the Divisional Court which could not be distinguished in any material as-

64 *Supra*, note 3 at 478-479. In Swan, "The Supreme Court of Canada, Judicial Review and Labour Arbitration," contained in K. Swan and K. Swinton, *Studies in Labour Law* (Butterworths, 1983) 1 at 26, the *Metro Police* case was viewed as having more to do with enjoining arbitrators from "treating judicial review decisions, which decline to quash a particular construction of a particular agreement, as somehow able to transcend both the particularity of the case and a standard of review that permits reasonable error," rather than "a statement about collective agreement construction in general." Technically, Swan is correct, however, the language chosen by the Court of Appeal to make this statement is, to me, if not to Mr. Swan (*ibid.*) clear. The Court indicated its repudiation of Weatherston's articulation in the *Marsh* case, *supra*, note 47, of the way in which a collective agreement ought to be viewed for construction purposes. Weatherston, J. not only deferred to the board, but indicated his own view as to the correctness of the view, at 732, that a duty "to act fairly towards its employees in the administration of the agreement" is inherent in a clause permitting a grievance to be filed with respect to a "difference relating to the administration of (the) agreement." (*Marsh* case at 732 O.R.). Certainly, the subsequent decisions of the courts referred to throughout this paper have gone beyond the view of *Metro Police* taken by Mr. Swan. In my view, however, the long term effect of *Metro Police* is very different from that envisaged by Mr. Swan, as I believe the Court of Appeal merely rejected the existence "of a pervasive duty of fair administration of collective agreements," (Swan, *op. cit.* at 26). What I endeavoured to do was to find in *Metro Police*, and cases decided subsequent to it, the less pervasive duty of fair administration as identified in those cases, the circumstances when it will be imposed and its meaning in those cases.

65 *Labour Arbitration News*, Editors: Jeffrey Sack and Howard Goldblatt, September, 1982, Vol. 18, no. 9 at 5.

66 My own view of the *Metro Police* case does not give rise to the "disastrous implications" seen by the editors of *Labour Arbitration News*, *supra*, note 65 at 1.

pect and which were referred to the Court pursuant to section 35 of *The Judicature Act*.⁶⁷ The appeal was by the Metropolitan Toronto Board of Commissioners of Police, pursuant to an order of the Divisional Court. The two cases involved were *Re Municipality of Metropolitan Toronto and Toronto Civic Employees' Union, Local 43 et al.*,⁶⁸ referred to as the "Stinson" case and *Re Municipality of Metropolitan Toronto and Toronto Civic Employees' Union, Local 43 et al.*,⁶⁹ referred to as the "Marsh" case. In the latter two cases, the Divisional Court took conflicting philosophical views of the way in which a collective agreement ought to be interpreted.

In the *Marsh* case, the question before the court was whether there was "an overriding duty on an employer to act fairly toward his employees in the administration of the collective agreement"⁷⁰ Some of the same concerns affecting Mr. Shime in the *INCO* case were referred to by Mr. Justice Weatherston in the *Marsh* case:

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

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

Does all this apply also to a domestic body? I think it does, at any rate when it is a body set up by one of the powerful associations which we see nowadays. Instances are readily to be found in the books, notably the Stock Exchange, that delegate power to committees. These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking. They can make or mar a man by their decisions. Not only by expelling him from membership, but also by refusing to admit him as a member; or, it may be, by a refusal to grant a licence or to give their approval. Often

67 R.S.O. 1980, c.223, then, R.S.O. 1970, c.228, s.35.

68 (1975), 10 O.R. (2d) 37, 62 D.L.R. (3d) 53 (Ont. Div. Ct.).

69 *Supra*, note 47.

70 *Ibid.*, O.R. at 731.

their rules are framed so as to give them a discretion. They then claim that it is an "unfettered" discretion with which the Minister made the same claim in the *Padfield* case, and was roundly rebuked by the House of Lords for his impudence. So should we treat this claim by trade unions. They are not above the law, but subject to it. Their rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. But the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the courts just as much as a code laid down by Parliament itself. If the rules set up a domestic body and give it a discretion, it is to be implied that that body must exercise its discretion fairly. Even though its functions are not judicial or quasi-judicial, but only administrative, still it must act fairly.

I think the same language can be applied to an employer in the administration of a collective agreement. He is dealing, not with individual employees employed under separate contracts of service, but with employees whose terms of employment are set out in an agreement negotiated on behalf of them all. Any discretion to be exercised by the employer must be exercised in the knowledge that each employee is only one of many; no one of them should be singled out for special treatment. This obviously implies that the agreement should be administered fairly.⁷¹

In *Metro Police*, the Court of Appeal noted that Weatherston J., in the *Marsh* case relied on procedural fairness decisions before a domestic and statutory body and not on cases dealing with the interpretation of a collective agreement.⁷² The court concluded:

The *Stinson* and *Marsh* cases were decided on different factual situations and on different collective agreements from the present case. If, however, the majority of the Divisional Court in the *Marsh* case were purporting to lay down a general rule, that all decisions of management pursuant to a management rights clause which do not contravene any other provisions of the agreement must stand the further test whether in the opinion of an arbitrator they were made fairly and without discrimination, then with respect we do not agree. The decisions relied on by Weatherston J. in the *Marsh* case, as that learned Judge rightly pointed out, dealt with procedural fairness in proceedings before domestic and statutory bodies; they did not deal with the interpretation of collective agreements. In our opinion, the management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause, unless those powers are otherwise circumscribed by express provisions of the collective agreement. The power to challenge a decision of management must be found in some provision of the collective agreement.⁷³

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

71 Cf. note 57, *supra*.

72 *Supra*, note 47 at 732-733.

73 *Supra*, note 3 at 478-479.

The lengthy and detailed nature of the collective agreement was also a factor in causing the Court to conclude that there was "no necessity in this case to imply a term that the management rights clause will be applied fairly and without discrimination."⁷⁴ The court stated that within the exclusive authority of the management rights clause management may act unfairly and "discriminatively."⁷⁵ Not only may the employer behave unfairly and discriminatively but the Court of Appeal also reinforced its opinion by stating that the board of arbitration had "no jurisdiction to deal with the dispute because of an alleged and improper exercise of management rights."⁷⁶ The Court of Appeal was remarkably persistent in pursuing its position that the reserved rights theory was alive and well. It followed, of necessity, that: "when the arbitrator determined that there was no provision in the collective agreement that governed the taking of inventory [being the work in dispute] and the distribution of overtime she should have ruled that she had no jurisdiction to deal with the dispute because of an alleged improper exercise of management rights."⁷⁷

IV. WHAT DID *METRO POLICE* PORTEND?

"Fairness if necessary, but not necessarily fairness." *Mackenzie King*

WERE THE IMPLICATIONS of the *Metro Police* case as serious as unions and some arbitrators appeared to think? Have subsequent cases done anything to change them? It was suggested that one of the expedients which will be followed by unions is to revise collective agreements to include terms requiring management to be fair in the administration of the collective agreement.⁷⁸ It is difficult to imagine that management would agree to the introduction into collective agreements of a broad general provision that all decisions of management made pursuant to a management rights clause which do not contravene any other provisions of the agreement must stand a further test: whether

74 *Ibid.* at 479.

75 *Ibid.*

76 *Ibid.*

77 *Ibid.* Nevertheless, my interpretation of *Metro Police* is that management must still, at the very least, behave with honesty of purpose.

78 This suggestion was made by the participants in the Canadian Labour Views program referred to *supra*, note 4. The response of the Government in Manitoba was to legislate such a provision into the *Labour Relations Act*, 1987 R.S.M c.L10, s.80(2). The impact of the section has been something less than overwhelming. I have been unable to find any reported Court cases dealing with the sections. It appears that the arbitrators have not viewed the amendment as being very significant in the way they go about their business as arbitrators.

in the opinion of an arbitrator they were made fairly and without discrimination. Management would likely take the view of Houlden J.A. that this was never its intention, and that it would not likely wish to have every decision made under its exclusive or discretionary authority subject to challenge on the grounds of unfairness in the administration of the collective agreement.⁷⁹

It was suggested that amending legislation will have to be enacted.⁸⁰ The enactment of a statutory provision requiring fairness in the administration of the management rights provisions of a collective agreement would prove to be far more unwieldy than the specific provisions relating to the amelioration of the penalty⁸¹ and to the limitation of the impact of timeliness provisions⁸² unless they were limited to that aspect of fairness (good faith) which, I suggest, is unaffected by the *Metro Police* case.

A. The Prichard View

Professor J. Robert S. Prichard (now Dean of the Faculty of Law, University of Toronto) prepared a paper for presentation at the Canadian Labour Views Conference⁸³ on Collective Bargaining in a Recession Economy, entitled "The Aftermath of Metropolitan Toronto Police: Fairness as a Limitation on Management's Right to Discipline, Promote and Retire." At the beginning of his paper, Dean Prichard makes an observation which may not be implicit in the statement of Mr. Justice Steel in the *Marsh* case,⁸⁴ which is that it "is good management" for an employer to behave fairly in such matters as promotion, retirement and discipline.⁸⁵ Therefore, it is good management in one sense, as enunciated by Dean Prichard, and it is good conduct, as referred to by Mr. Justice Steele.⁸⁶ It is good business, as Dean Prichard points out, without making any "heroic assumption about the altruistic motivations of management."⁸⁷ Good management can also be self-interested management, whether or not there is any element of "good inten-

79 *Metro Police*, *supra*, note 3 at 479.

80 *Supra*, note 78.

81 R.S.O. 1980, c.228, s.44(9).

82 R.S.O. 1980, c.228, s.44(6).

83 Referred to *supra*, note 4.

84 *Supra*, note 47 at 735 (O.R.): "It is desirable that all persons should deal with each other fairly."

85 R. Prichard, "The Aftermath of Metropolitan Toronto Police: Fairness as a Limitation on Management's Right to Discipline, Promote and Retire" presented at the conference referred to *supra*, note 4.

86 *Ibid.* at 2.

87 *Ibid.*

tions."⁸⁸ Dean Prichard would view management as having a good business reason for behaving fairly, not only in a limited class of matters, but in relation to "all other relevant decisions governing employees."⁸⁹ Dean Prichard would also characterize the relatively few cases that exemplify management unfairness as representing examples of "bad management decisions."⁹⁰ They may, indeed, represent bad management, but no more so than many other examples of management behaviour which lead to the filing of grievances.

Prichard posits "two possible interpretations" of *Metro Police*.⁹¹ Each interpretation is understood by thinking in terms of a category of cases. The two interpretations, and therefore two categories of cases, are further broken down into a broad and narrow interpretation. The first deals with the case where the collective agreement contains no express provisions dealing with the issue in dispute apart from a standard management rights clause,⁹² as was the situation in the *Metro Police* case (the collective agreement being silent with respect to overtime allocation). There, the collective agreement granted management the right to control and order the work force, which right was construed to include the power to allocate overtime. Under a broad interpretation, based on the *Metro Police* case, management rights would be unlimited and unfettered in making the decision.⁹³

Although Dean Prichard acknowledges that arbitrators cannot add an implied term to the agreement (that management will exercise its rights fairly and without discrimination) his narrow interpretive view suggests that "the arbitrator will still scrutinize the collective agreement to see if the management action violates any other provision of the agreement even though no other such provision deals expressly with the issue at hand."⁹⁴ The example chosen by Dean Prichard is a case where the union might argue (as it did in the *Metro Police* case) that the decision to deny the overtime allocation was actually a disciplinary decision based, in part, on the employer's view of the grievor's work attitude.⁹⁵ I believe that Dean Prichard was right and that the action of the employer could be seen to be covered by a specific provision of the collective agreement: the just cause for discipline pro-

88 *Ibid.*

89 *Ibid.*

90 *Ibid.* at 3.

91 *Ibid.* at 5.

92 *Ibid.*

93 *Ibid.* at 7.

94 *Ibid.* at 14. As it turns out, Dean Prichard was correct in his interpretation of *Metro Police*. Subsequent cases (*C.P.I.*, *infra*, note 235) are consistent with the Prichard view.

95 Prichard, note 85, at 15-16.

vision. However, what is really being presented is not a way around the *Metro Police* case, but a implication arising from it. If management did not act in good faith, which question was left to the arbitrator in *Metro Police*, then the real issue would be whether or not the grievor had been disciplined for just cause. Dean Prichard concludes that it is open to an arbitrator to find that management's "decision violated the collective agreement by using the denial of overtime as a form of discipline without subjecting the decision to the disciplinary procedures and the arbitral scrutiny which accompanies the just cause standard,"⁹⁶ and that this represents a basis, using the narrow view, to avoid the strict application of the *Metro Police* case. In my view he is merely acknowledging the Court's position and not finding a way around it, as the Court indicated that such a basis for arbitral review was available.⁹⁷ Accordingly, I cannot see this approach as representing a circumscribing of the impact of the *Metro Police* case or that "there would undoubtedly have to be some reconsideration of arbitral doctrines concerning the scope of what is properly understood as discipline."⁹⁸ Dean Prichard states that the approach advocated by him would only be applicable to a "decision which could be characterized in a real sense as disciplinary."⁹⁹ In the *Metro Police* case, if the selection of employees for overtime work were a disguised form of action to achieve a result not permitted by the terms of the collective agreement, then the management action would still fail. It matters only that management, in exercising its discretion, is honestly doing what it purports to do, and that is the key to an arbitrator obtaining jurisdiction.¹⁰⁰ In *Metro Police*, if management had truly intended to exercise its discretion to allocate overtime, albeit stupidly, carelessly and in an unbusinesslike way, there would be no room for a finding that it had imposed discipline under the guise of allocating overtime,¹⁰¹ maintaining efficiency or generally managing the enterprise. It was left to the arbitrator to deal with the issue of discipline and in order to do so the good faith issue would, necessarily, have to be resolved.¹⁰²

If the issue in *Metro Police* had been restricted to one relating to whether management had imposed discipline for just cause, the arbi-

96 *Ibid.* at 16.

97 *Metro Police*, *supra*, note 3 at 479 (last paragraph), where the question of whether the actions of management represented a disguised form of discipline based on management's perceptions of the grievor's attitudes. See the award in *Metro Police* (1980), 26 L.A.C. (2d) 117 (Saltman) at 122.

98 *Supra*, note 86 at 17.

99 *Ibid.*

100 *Supra*, note 97.

101 Cf. *supra*, note 19 and see, *infra*, note 180.

102 See, *supra*, note 97.

trator would have become involved with the same issue: was this really a case of discipline? In order to make this determination, she would have had to first address the issue: was this a case of management exercising its power to maintain efficiency or generally to manage the operation and undertaking in good faith. Once this is recognized, broad or narrow interpretations of *Metro Police* are unnecessary.

The second category dealt with by Dean Prichard concerns cases where there is a provision in the collective agreement governing the issue, however, granting discretion to the employer in the exercise of the power of decision.¹⁰³ Employing a broad interpretation, Dean Prichard arrives at a result which may, in fact, be broader than that covered by the *Metro Police* case. He states that under the broad interpretation "the arbitrator may not review [second guess, reverse, etc.] the employer's exercise of its discretion even if the discretion is exercised unfairly, unreasonably, discriminatorily, arbitrarily or in bad faith."¹⁰⁴ A clause found in a collective agreement providing, for example, that an employee may be disciplined for absences beyond a stated number of days unless her reasons are satisfactory to management would represent such a clause. Consistent with my view of *Metro Police*, the exercise of management's discretion would still have to be carried out in good faith. Dean Prichard has confused the matter somewhat by using a number of words, some of which are part of fairness.¹⁰⁵ He is in good company, as this is what has frequently been done, as well, by the courts and other arbitrators. This was done in *Metro Police*, where fairness and discrimination were treated as separate concepts, whereas non-discrimination is part of fairness.

Upon subjecting the second category of cases to the narrow construction which he describes, Dean Prichard would limit the impact of *Metro Police* to cases where there is no express term in the collective agreement, apart from the management rights clause. He says, "by definition, cases in the second category have an express term,"¹⁰⁶ which he urges ought to free them from the restrictions found in *Metro Police*. I am not so sure that this would be the case. In *Metro Police* it is stated: "In our opinion the management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause unless those powers are otherwise cir-

103 See, Prichard, *supra*, note 85 at 8.

104 *Ibid.* at 8.

105 *Ibid.* at 8: "unfairly, unreasonably, discriminatorily, arbitrarily or in bad faith" and "reasonably, fairly." In so doing it is easy to lose sight of the fact that each situation calling for fairness requires an analysis of what "elements" of fairness are called for and why.

106 *Ibid.* at 9.

cumscribed by express provisions of the collective agreement. The power to challenge a decision of management must be found in some provision of the collective agreement" (emphasis added).¹⁰⁷ An express term in the agreement, but outside the management rights clause, which grants discretion to the employer with respect to its exercise cannot be said to circumscribe management powers under a management rights clause.¹⁰⁸ Dean Prichard's reading of the language of *Metro Police* is too broad. The Court of Appeal, in referring to a provision which circumscribes management rights under the management rights clause, cannot be referring to a clause in the agreement outside the management rights clause, which does what the unrestricted management rights clause also does.¹⁰⁹

Some support for Dean Prichard's position might be seen to exist in the *Metro Police* case when the Court stated: "When the arbitrator determined that there was no provision in the collective agreement that governed the taking of inventory and the distribution of overtime, she should have ruled that she had no jurisdiction to deal with the dispute because of an alleged improper exercise of management rights."¹¹⁰ It cannot be said that a provision in a collective agreement that provides for the allocation of overtime and which grants discretion to management with respect to its exercise, is one that "governed the taking of inventory and the distribution of overtime," any more than an identical provision in the management rights clause could be said to do so. A clause governing the taking of inventory, as envisaged in *Metro Police*, would require management to do more than exercise its discretion. Mr. Justice Reid, in the *Stinson* case,¹¹¹ indicated that even if a collective agreement spoke specifically to a particular matter, there would have to be some "reference in that article or otherwise in the agreement, expressly entitling an employee to claim."¹¹² There was in the collec-

107 *Supra*, note 3 at 478-479 (O.R.).

108 What difference does it make *where* the discretionary power is granted, whether in the management rights clause or elsewhere in the agreement? There is no "magic" in location. If there is "magic" it is in the use of language. But, cf., *infra*, note 249.

109 Cf. *infra*, note 249.

110 *Supra*, note 3 at 479 (O.R.).

111 *Supra*, note 68 at 38 (O.R.).

112 *Ibid.* It is significant that having found that there was no specific provision "entitling an employee to claim a vacation for any particular time," Mr. Justice Reid recognized that it was still necessary to "consider the implication of the agreement as a whole for any relevant inference that may be drawn with respect to this type of grievance." Counsel for Metro Toronto acknowledged that there might be something "elsewhere in the agreement that expressly or by necessary implication confers the right on an employee to challenge management's decisions on the subject of when he shall take his vacation" (*Ibid.* at 39). In *Metro Police* terms, the agreement did not

tive agreement in the *Stinson* case a specific provision dealing with the granting of vacations, without any provision relating to their timing for employees, and there was nothing in the agreement specifically granting management the exclusive discretion to decide that question.¹¹³ On those facts, the court held that the scheduling of vacation was left to the exclusive discretion of management without a specific statement to this effect.¹¹⁴ This was concluded because there was a management rights clause which impliedly granted that power to management and there was nothing expressly, or by necessary implication, in the balance of the agreement that conferred a right on an employee to challenge management's decision on the subject, or even to participate in that decision.¹¹⁵ There is a substantial basis for reading the *Metro Police* case as having accepted the approach taken by the Divisional Court in the *Stinson* case. If so, it would not matter whether management had been given discretion in a case where a specific provision of the collective agreement did not give employees an express right to claim that the clause in question be enforced in a particular way. This does not mean that the right could be administered fraudulently or in bad faith. The difference can be illustrated by a promotion clause which provides for a choice arrived at on the basis of relative skill and ability, and one where promotions are left to a management decision, where management may consider skill and ability.¹¹⁶

In dealing with the narrow interpretation of the second category of cases, Dean Prichard raises what he regards as a more important argument in support of the narrow construction:

... that the express terms in the collective agreement should be approached within the standard interpretive framework adopted by arbitrators seeking to give content to these terms of a collective agreement by elaborating their words in light of the reasonable intentions and expectations of the parties. That is, under the narrow *interpretation* arbitrators would take their function to be the proper interpretation of the express provision and this interpretation must necessarily give content to the words of the agree-

circumscribe management's power to schedule vacation dates. This does not mean that it could do so in bad faith. I would argue that while management could be arbitrary and inefficient, the extent of its arbitrariness and inefficiency may point to a decision made for purposes extraneous to the purported exercise of its rights. See, *supra*, note 101 and *infra*, note 181. Note that a recent case of the Ontario Divisional Court (*Wardair, infra*, at 91-2 is consistent with this view and follows from the reconciliation of *Metro Police* and *CPI* by the Court: note 259).

113 *Ibid.*

114 *Ibid.* at 40 (O.R.).

115 *Ibid.* at 39 (O.R.).

116 *Re Bank of British Columbia and Union of Bank Employees, Local 2100* (1982), 133 D.L.R. (3d) 227 (B.C.S.C.); and see *Chippin Bros. v. U.F.C.W.*, *infra*, note 271.

ment in the context of the parties' intentions and reasonable expectations. In so doing, not many arbitrators are likely to find the parties intended to permit the employer to act unfairly, arbitrarily, discriminatorily, or in bad faith. While it is possible that that was the parties' intentions, it is unlikely to be the case particularly with respect to those decisions which have a substantial impact on the lives of employees.¹¹⁷

Later in the paper, Dean Prichard elaborates on the subject of the intentions and reasonable expectations of the parties. He would not treat the labour contract as being subject to any other type of interpretation than would apply to "commercial contracts or any other type of contract."¹¹⁸ (Contracts for the purchase and sale of land?) His position is that the interpretation of the contract must be performed with reference to intention, which "is expected throughout contract law and there is no convincing reason why it should not apply to a collective agreement as well."¹¹⁹ It is clear that the Court of Appeal in *Metro Police* purported to rely on conventional rules of contract interpretation when it regarded the parties as having specifically referred to those cases (discrimination and promotion, demotion or transfer and disciplining a member without reasonable cause) where it was intended to limit the discretion of management.¹²⁰ The lengthy nature and significant detail of the document caused the Court to conclude that, if it was intended to limit the discretion of management further, the parties would have specifically done so.¹²¹ The Court of Appeal stated that it was viewing the matter in the "spirit and intent of the collective agreement."¹²² Only its view of the spirit and intent, using the conventional rules of contract interpretation, differed from that which Dean Prichard would find.¹²³ Arbitrators were no less free after *Metro Police* to find a basis for imposing an obligation on management to administer the collective agreement with more than mere *bona fides*. *CPI* merely demonstrated what *Metro Police* had not done and *Wardair* is an example of the continuing freedom of arbitrators, in reading the agreement as a whole to find some greater obligation. In reviewing arbitrators, courts will continue to defer to conclusions which, while they differ from those that courts would reach, are, nevertheless, capable of having been arrived at by reasonable arbitrators.

I identified the differing philosophical attitudes toward interpreting collective agreements as having a powerful influence on the issue of

117 Prichard, *supra*, note 85 at 19-20.

118 *Ibid.* at 22-23.

119 *Ibid.* at 22.

120 *Metro Police*, *supra*, note 3 at 479 (O.R.).

121 *Ibid.*

122 *Ibid.*

123 Cf. note 25, *supra*.

whether a duty of fairness, in any of its manifestations, would be found to exist.¹²⁴ The approach taken by the Court of Appeal in *Metro Police* may, indeed, represent an anachronistic "allegiance to the notion of literal or strict interpretation,"¹²⁵ "a school of thought"¹²⁶ which Dean Prichard viewed as being without "any substantial support in the arbitral community."¹²⁷ To Dean Prichard, and to a number of other arbitrators, the broad approach would characterize the decision of the Court of Appeal as being "insensitive to the intentions and expectations of the parties"¹²⁸ and, accordingly, it would be, "wrongly decided even if it was correct in its actual and limited result in finding that the arbitrator was wrong to imply this particular term on these particular facts."¹²⁹ I do not think this view accurately reflects what the court intended and subsequent cases support this view.¹³⁰

I assume that just about everyone shares Mr. Justice Steele's sentiments, contained in his dissenting opinion in the *Marsh* case, that it is desirable that there be fair dealing between all persons.¹³¹ I share Dean Prichard's view that the fair administration of the collective agreement is good business and that unfair administration of the collective agreement does not make good economic sense.¹³² Without necessarily supporting it, I find the articulation of the position in favour of certain implied obligations of fairness in the administration of collective agreement, found in the award of Mr. Shime in the *INCO* case,¹³³ to be intellectually supportable. As this view has been rejected by the Court of Appeal in *Metro Police*, it must, for now, be discarded as an aid to interpretation. However, employing the Court of Appeal's reasoning in *Metro Police*, there is ample basis for finding a realistic obligation to behave fairly in a limited sense in the administration of the collective agreement. As will be shown *infra*, *CPI* establishes that this is still the case.

B. The Burkett View

Mr. Kevin Burkett, Alternate Chairman of the Ontario Labour Relations Board, in addressing the problem, identified the genesis of the view that management had (in the circumstances described in *Metro*

124 *Supra*.

125 Prichard, *supra*, note 85 at 22.

126 *Ibid.* at 23.

127 *Ibid.*

128 *Ibid.*

129 *Ibid.*

130 See *infra*, Part V.

131 See, *supra*, note 84.

132 See, *supra*, note 85.

133 *Supra*, note 57.

Police), a duty to act fairly and reasonably, to be the *INCO* case decided in 1977 by Mr. Shime.¹³⁴ Mr. Burkett observed that prior to the Shime decision the generally-held view of the operation of a management rights clause, where the collective agreement did not interfere with the exercise of such rights, was in line with the finding of the Court of Appeal in the *Metro Police* case. Mr. Burkett then noted the *Marsh* case,¹³⁵ which he identified with the Shime approach in the *INCO* case.

Mr. Burkett viewed the *Metro Police* case as leaving open to arbitrators the finding of an implied duty to act fairly. He saw this duty as being of a more limited nature than what he regarded as the open-ended and undefined one dealt with in *Metro Police*. The implied obligation which Mr. Burkett would find to exist, even after *Metro Police*, is that which he elaborated on in *Re United Parcel Service Canada Ltd. and Teamsters Union, Local 141*.¹³⁶ It is interesting that Mr. Burkett's finding that a duty of fairness, albeit of a limited nature, survives the *Metro Police* case, is based on a belief that the Court of Appeal did not foreclose the finding of such a duty. However, the basis for Mr. Burkett's conclusion appears to be founded on a philosophical acceptance of the position taken by Mr. Shime in the *INCO*¹³⁷ case and by Mr. Justice Weatherston in the *Marsh* case.¹³⁸ In the *United Parcel* case, the grievance concerned the right of the employer to ignore employee interests in the course of scheduling the time for taking vacations. In the award, Mr. Burkett stated:

The parties negotiated this agreement in the knowledge that the scheduling of vacations was to be left in the discretion of management and against the backdrop of arbitration awards which have been referred to. ... These awards demonstrate that if on the language the primary consideration is the efficiency of the employer's operation, the employer, so long as he is looking to efficiency, is free to make unilateral decisions in respect of vacation schedules which take little or no account of employee wishes, and which may impact adversely on individual employees. Where as in this case, there is no provision made for the consideration of employee wishes and where the scheduling of vacations is left within the sole discretion of management, one must conclude that the union understood the extent of discretion which it was agreeing to vest in management. At the very least the union understood that the efficiency of the operation would be the primary consideration in the scheduling of vacations and that a system would be put in place based on the application of general rules which might adversely impact upon individual employees. *We do not accept, as argued by counsel for the company, that in deciding whether the employer has exercised his discretion in a reasonable manner it is beyond the purview of a board of arbitration to consider the efficiencies*

134 *Ibid.*

135 *Supra*, note 47.

136 (1981), 29 L.A.C. (2d) 202 (Burkett).

137 *Supra*, note 57.

138 *Supra*, note 47.

*accruing to the employer by virtue of the vacation scheduling he puts in place. ... There is no evidence to establish the company considered other than its business interests when it formulated the general rule or that the rule has been designed to single out individual employees for special treatment. We are satisfied that the rule does not breach the standard of reasonableness or fairness against which the exercise of employer discretion is to be measured (emphasis added).*¹³⁹

Nevertheless, Mr. Burkett saw that only good faith was necessary in the exercise of management's discretion in acting on its right to "manage the business."¹⁴⁰ The employer so long as he is looking to efficiency, is free to make unilateral decisions in respect of vacation schedules.¹⁴¹ He concluded that "there [was] no evidence to establish the company considered other than its business interests"¹⁴² in establishing the vacation scheduling rule. Clearly, the good faith of management required an examination of the facts to see if the purpose was one covered by the management rights clause. If it was extraneous to any real business function, it could not be viewed as having been made bona fide. When Mr. Burkett added a reasonableness, fairness and non-discrimination test, he went beyond anything the Court of Appeal would permit.¹⁴³ To add the other requirements of fairness is inconsistent with the rule of interpretation followed by the Court of Appeal in *Metro Police*. As I mentioned above, one can be unreasonable and discriminate between employees and still be genuinely set upon arriving at a decision for business reasons.¹⁴⁴ Mr. Burkett purports to do no more than impose a business purposes test. However, his is, essentially, a Shime test. Such test is not yet open to arbitrators under *Metro Police*.

Although Mr. Burkett suggests that a too broad view of the fairness obligation has been, quite properly, rejected by the Court of Appeal in the *Metro Police* case, when he suggests that a somewhat more restricted standard may be acceptable, he fails to address the definitional difficulties inherent in arriving at the meaning of fairness, and he also neglects to analyze what the Court did when it referred the issue of discipline back to the arbitrator, and he also overlooks the philosophical positions accepted and rejected in *Metro Police*. Mr. Burkett acknowledges that on first reading the decision in *Metro Police*, he was hard pressed to find the basis for the Court accepting the more limited test he developed in the *United Parcel Services* case.¹⁴⁵ Although Mr. Burkett

139 *Supra*, note 136 at 215.

140 *Ibid.* Cf. *A&P2* case, *infra*, note 283.

141 *Ibid.*

142 *Ibid.*

143 *Metro Police*, *supra*, note 3 at 479.

144 *Supra*.

145 *Supra*, note 136.

remains of the view that an implied duty of fairness, as defined by him in *United Parcel Services*, represents a reflection of the true bargain entered into between the parties, in order to do this he examined two decisions of the Divisional Court, decided after *Metro Police*, which he regards as representing a "back-tracking" from the emphatically negative position (as he saw it) taken by the Court of Appeal towards imputing to the parties an intention to impose a duty to administer the collective agreement fairly and non-discriminatively.

The first of these cases was another *Municipality of Metropolitan Toronto* case, decided on July 3, 1981,¹⁴⁶ where the Divisional Court overturned an award of an arbitrator who had ordered reinstatement of a probationary employee in the face of a provision in the collective agreement which gave to management the exclusive authority to discharge a probationer during the first six months of his employment. In ordering reinstatement, the arbitrator stated that, "the employer failed to convince us, using the most lenient standards, that his performance was unsatisfactory."¹⁴⁷

The Divisional Court, citing the *Metro Police* case, stated:

A probationary employee should be entitled to succeed on a grievance in relationship to discharge only if he were able to affirmatively establish that the action of the employer was taken in bad faith in the sense that it was motivated by unlawful considerations or resulted from management actions which precluded the probationary employee from doing his best.¹⁴⁸

Mr. Burkett saw this decision as representing a "back-tracking" from, what appeared to him, to be the blanket prohibition set out in the *Metro Police* case. I have difficulty in viewing the decision relied on by Mr. Burkett as furnishing a basis for importing into a collective agreement a fairness obligation other than the one of good faith referred to by the Court and left open in *Metro Police*. The Court, in the *Metro Toronto* case, relied on by Mr. Burkett, focused upon the term "bad faith" and, more specifically, referred to evidence of bad faith in the nature of actions "motivated by unlawful considerations."¹⁴⁹ This is a slim reed to rely on for the development of an argument in favour of the doctrine of fairness supported by Mr. Burkett or for finding a "back-tracking" from *Metro Police*.

146 Unreported.

147 *Municipality of Metropolitan Toronto* (1980), 26 L.A.C. (2d) 320 at 326. And note the dissent of J. Baker.

148 *Supra*, note 146.

149 I once again emphasize that my comments on Mr. Burkett's statements are taken from the tapes furnished to me by Canadian Labour Views.

In further support of his argument, Mr. Burkett relied on the post-*Metro Police* judgment of the Ontario Divisional Court in *Re United Glass and Ceramic Workers of North America et al. and Libbey-St. Clair Inc. et al.*¹⁵⁰ This case is also one which he regarded as "back-tracking" from the position taken by the Court of Appeal in the *Metro Police* case. In the *Libbey* case, the arbitrator held that a decision of the personnel department with respect to the granting of a leave of absence, "was not reviewable unless perhaps it was found to have been arbitrary, discriminatory or made in bad faith."¹⁵¹ The Board found that the personnel department had not acted in bad faith, nor in a manner which was arbitrary or discriminatory. The Court did not consider the finding of the board to be "either patently unreasonable or to place an interpretation on the agreement that it cannot reasonably bear."¹⁵² The Court, in the *Libbey* case, also followed the *Metro Police* case and concluded that, "if the personnel department had the right to determine whether the reason for absence was satisfactory, its decision should not be subject to review as to reasonableness."¹⁵³ The Court saw no distinction "in the circumstances between reasonableness and fairness."¹⁵⁴

Mr. Burkett viewed the *Libbey* case as upholding the right of an arbitrator to review the decision of management where it was found to have been "arbitrary, discriminatory or made in bad faith."¹⁵⁵ The decision of management, in the *Libbey* case, as to the granting of a leave of absence, was not subject to conditions but was subject to be made on a discretionary basis: "reasons satisfactory to the department."¹⁵⁶ The arbitrator and the Court made no attempt to explain why management had to make its decision in a way which was not arbitrary, discriminatory or in bad faith. In fact, given the rules of contract interpretation accepted by the Court, only the bad faith element ought to have been considered in assessing the exercise of management discretion. The Court played fast and loose with the terms fairness and reasonableness, equating them, rather than recognizing fairness as the all inclusive term, with a number of words being included in it, such as "non-arbitrary," "non-discriminatory" and "good faith." This lack of rigour led to the acceptance of a doctrinally unsupported list of management responsibilities when exercising rights unrestricted by provisions of the collective agreement. In the absence of a reasoned explana-

150 (1981), 33 O.R. (2d) 760 (Ont. Div. Ct.).

151 *Ibid.* at 763.

152 *Ibid.*

153 *Ibid.* at 764.

154 *Ibid.*

155 *Ibid.* at 763.

156 *Ibid.* at 761.

tion supporting the inclusion of the words "arbitrary" and "discriminatory," I do not view the *Libbey* case as a "back-tracking" from *Metro Police*.

There is a distinction between a case where no provision of the collective agreement governs the matters in issue, in the sense of imposing a burden on management to exercise a right subject to restrictions, and a case where the collective agreement contains such provisions. In the case of *Ontario Public Service Employees Union and Her Majesty the Queen in Right of Ontario, as represented by the Ministry of Community and Social Service and the Grievance Settlement Board*,¹⁵⁷ being an unreported decision of the Ontario Divisional Court dated December 21, 1982, the matter in question, relating to the classification of employees, was found by the Court to be specifically covered in both the collective agreement and in the relevant Act.¹⁵⁸ The issue involved the right to grieve a classification decision. Significantly, the Court recognized that, in such cases, the previous jurisprudence had been unaffected by the *Metro Police* case and that:

... on a classification grievance the board is generally mandated to consider two matters, namely, whether or not the grievor's job measured against the relevant class standard comes within a higher classification which he seeks, and, even if he fails to fit within the higher class standard, whether there are employees performing the same duties in a higher, more senior classification. The jurisprudence of the board cited to us on this application indicates clearly that these matters have been considered by the board on classification grievances. Such matters in no way infringe the management rights provisions of the Act. We are of the view that in dismissing the grievance the Board declined to exercise its jurisdiction under section 18(2)(a) of the Act. The board was obliged to consider whether or not the grievor was properly classified regardless of whether or not he claimed in his grievance classification in different series. The obligation of the Board was to measure the duties performed by the grievor against either the class standard or other employees performing the same duties. In failing to determine these matters the Board failed to exercise the jurisdiction conferred upon it by the legislation.¹⁵⁹

1. *The Position Of The A & P160 Case After Metro Police*

The Divisional court, in the *OPSEU* case, focussed upon the significant feature of the *Metro Police* case: that the limitations on a board, in reviewing the actions of management provided for under a management rights clause, do not apply where there is a specific provision in the

¹⁵⁷ The chairman, in that case, was Professor R.J. Roberts.

¹⁵⁸ *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c.108, s.18(2) and arts. 5.1.1 and 5.1.2. of the relevant collective agreement.

¹⁵⁹ *OPSEU* case, *supra*, note 157 at 7-8.

¹⁶⁰ *Supra*, note 52.

collective agreement governing the matters in issue.¹⁶¹ Where there is a provision in the collective agreement which governs the matter in issue, in addition to insuring that the employer has carried out its responsibilities in accordance with the requirements of the provision, the board is also required to consider the actions of the employer with a view to determining whether they were carried out with fairness, as the several aspects of that term may apply to individual cases. Such a position was approved of in the case of *Re Canadian Food and Allied Workers Union, Local 175 v. Great Atlantic and Pacific Company of Canada Ltd. et al.*,¹⁶² where there was a provision in the collective agreement governing an appointment of additional full-time employees. That provision was interpreted by the Ontario Divisional Court as imposing on management an obligation to make certain that the method of selection of employees for appointment complied with the provisions of the collective agreement. The Court recognized that in scrutinizing the company's actions, it would be necessary to concern itself with the determination of whether the employer had acted "honestly and reasonably."¹⁶³

It is significant that in the *A & P* case the provision in the collective agreement governing promotions provided:

When additional full-time employees are required the Company will give preference to part-time employees on the basis of seniority, skill and qualifications for the job concerned and availability for work.¹⁶⁴

Management's right to appoint was subject to its assessing the candidates in accordance with stated criteria. In concerning itself with the selection and placement procedure, the Divisional Court acknowledged that management's right to appoint might, by agreement, be "unfettered."¹⁶⁵ The Divisional Court required, where some obligation has been placed on management by the collective agreement, that the board of arbitration scrutinize the evidence adduced by the employer and satisfy itself that the employer had complied with the provisions of the collective agreement by taking into account the evidence of compliance to see whether it comprised all of the "requisite steps."¹⁶⁶ The question, therefore, will be: are there provisions in the collective agreement imposing certain obligations on management in arriving at

161 *OPSEU case, supra*, note 157 at 7-8.

162 *Supra*, note 52.

163 *Ibid.* at 14,535.

164 *Ibid.* at 14,533.

165 *Ibid.* at 14,535.

166 *Ibid.*

its decision? In assessing the evidence of management's compliance with its obligations, the board should take into consideration matters which fall under the general rubric of fairness: "honesty," "*mala fides*," "reasonableness."¹⁶⁷ In the Award, the arbitrator also considered whether the decision has been arrived at without "discrimination." The award relied upon by the arbitrator in *A & P*, and disapproved of by the Divisional Court, also used words connoting honesty, absence of bad faith, discrimination and added the words "not capriciously or as a result of bias," when considering the fairness obligation.¹⁶⁸

Unlike the case of the union's duty of fair representation, arbitrators and judges have not been limited in the aspects of fairness which they might consider. As a result, a great number of terms have been discussed, instead of focussing upon what aspects of fairness may be applicable in a specified arbitration context, and why.¹⁶⁹ It would be helpful, in developing a jurisprudence of fairness, to pay more attention to the possible applications of fairness in a given situation and to explain why the aspects of fairness found to be applicable were chosen.¹⁷⁰ In the *A & P* case, it was stated that a consideration of "the 'reasonableness' of the employers ... may go a long way to determine the issue submitted" to the board.¹⁷¹ The court also used the terms honesty, *mala fides* and reasonableness as reflecting matters which the board might take into consideration. Such loose references to the possible meanings of fairness, in the absence of an explanation why the particular elements chosen were relevant, is regrettable.

In the *Canadian Industries Limited* case,¹⁷² Mr. Justice Roach, acting as an arbitrator, made a statement that was followed by many arbitrators. He equated a decision of management made "honestly and not capriciously or as a result of bias or bad faith or unjust discrimination,"¹⁷³ as not being subject to review by an arbitrator. Mr. Justice Roach stated the test as being one where the arbitrator would have to determine whether "management ... acting reasonably, could have reached the decision such as is ... challenged by the union ..."¹⁷⁴ In con-

167 *Ibid.* at 14,535.

168 *Re Canadian Industries Limited* (1950), 1 L.A.C. 234, although this was not the reason for its being disapproved.

169 In the *A & P* case, no explanation accompanies the choice of fairness terms.

170 There may be valid reasons, in given cases, for reducing or enlarging the fairness obligations, as where discrimination between employees may be permitted, where not in breach of a statute and where it is part of the good faith exercise of a management obligation. See, *supra*.

171 *A & P* case, *supra*, note 52 at 15,353.

172 *Supra*, note 168.

173 *Ibid.* at 237.

174 *Ibid.*

text, he appears to focus on whether management has made an honest business decision. The balance of his reasons, however, cause confusion as to his real meaning.

The Divisional Court, in the *A & P* case, added a requirement that boards of arbitration see to it that management has complied with the clause of the agreement imposing a duty on it,¹⁷⁵ in that case, to assess employees in accordance with stated criteria. What fairness meant was not well defined in the case. I am not suggesting that arbitrators be unduly limited in assessing the meaning of fairness, but it is necessary to define the boundaries of the concept which may apply in a particular case.

How many of the aspects of fairness fall to be considered in a particular case? It has been suggested that much has to do with the importance of the right affected.¹⁷⁶ The more vital job interests would seem to warrant more "fairness." But what of the case where no standard of performance is imposed on management? Vital or no, *Metro Police* must prevail.¹⁷⁷ A collective agreement without a just cause provision governing the imposition of discipline frees management from having regard for *most* elements of fairness. Why then should management (absent legislation imposing such an obligation) have greater fairness obligations imposed on it where there is, for example, no provision in the collective agreement governing the scheduling of vacations? My position is not a harsh one. Subsequent cases disclose that *Metro Police* was of a more limited application than first seemed to be the case.

C. The Beatty View

Another view, acknowledging that the direction of the "fairness" jurisprudence has been greatly influenced by the deep divisions in philosophical approach, was enunciated by Professor David Beatty, who was the chairman of the Canadian Labour Views Conference panel on the subject of fairness.¹⁷⁸ Professor Beatty interpreted the jurisprudence supporting the *Metro Police* position as exhibiting a concern on the part of the courts that to permit arbitrators to develop a doctrine of fairness governing the administration of the collective agreement would result in a situation which would be "tantamount to management by arbitrators." Contrary to the belief in some quarters, arbitrators have exhibited an abiding aversion to engaging in management

¹⁷⁵ *A & P* case, *supra*, note 52 at 14,534-5.

¹⁷⁶ By the speakers at the C.L.V. program, *supra*, note 4.

¹⁷⁷ The fact is that *Metro Police* dealt with a less than vital employee interest. My point is that the basis for decision does not appear to be affected by this circumstance.

¹⁷⁸ See, *supra*, note 4.

functions. Mr. Justice Roach, in the *Canadian Industries* case,¹⁷⁹ was satisfied that where management's decision was made honestly etc. it was free from review. He was endeavouring to avoid a management by arbitrators result. His test was, therefore, very much a business purposes test: one that "the employer, acting reasonably could have reached. ..."180 From the arbitration decisions after the *A & P* case, it is evident that many arbitrators were concerned that, in carrying out the review of management's decision pursuant to the *A & P* ruling, there could emerge a form of management by arbitrators.¹⁸¹

As mentioned above, I see no conflict between the *A & P* and the *Metro Police* cases. The rejection of jurisdiction in arbitrators, on the facts of the *Metro Police* case, can be seen as an expression of the Court's view of the labour contract. The *A & P* case is also consistent with this view, as it permits arbitral review of management actions where a provision of the collective agreement imposes obligations on management as to the way it must carry out its obligations. In such cases, the management actions are also subject to review.

The Court of Appeal in *Metro Police* was concerned with a case where no specific obligation was imposed on management with respect to the matter in issue. The Court's view of the nature of a collective agreement, and the way in which it should be interpreted, while it limits the cases where a broader fairness obligation can be seen to exist,

179 *Supra*, note 168.

180 *Ibid.* at 237.

181 See the cases referred to in Palmer, *Collective Agreement Arbitration in Canada*, *supra*, note 8 at 9-94. I agree with the statement of Professor S. Schiff, in *Re Borough of Scarborough* (1977), 14 L.A.C. (2d) 210 at 211 and particularly his reference to the case where management must act *reasonably*, where the arbitrator will only act: "If the employer's choice *clearly* fell beyond the flexible limits of this area of reason...." That is, if the arbitrator, while not necessarily agreeing with the choice made, concludes that it is one that might be reasonably arrived at by management, according to Professor Schiff's definition. I also find persuasive Professor Schiff's assessment of the arbitrator's role in a promotion (or appointment) case where, unlike *A & P*, the collective agreement "did not specifically authorize the employer to assess job fitness," and one where it did (the discretion to choose on the strength of its assessment of the qualities). Here: "... [T]he arbitrator's conclusion that the resulting judgment fails" can only be arrived at where the arbitrator finds that the employer did not really apply the criteria. "If the arbitrator finds on the basis of unreasonableness that the employer did not, the agreement has been violated. *But, if the arbitrator finds that, notwithstanding the judgment's lack of reason it resulted from the employer's honest and complete - albeit wrong - assessment of fitness, there has been no violation*" (emphasis added). *Ibid.* at 215. I regard this statement as one clearly distinguishing the kind of fairness required in *A & P* and *Metro Police* type cases. Also, cf. *infra*, note 254.

allows for more arbitral intervention in management decisions in cases such as *A & P* than some arbitrators are happy with.

Professor Beatty does not distinguish between the two situations in outlining his view of the standard of fairness that should be applied. In stating that arbitrators, in developing a fairness test, would not develop a subjective one but an objective one based on whether management actions were founded on "relevant reasons," he appears to approve of the business reasons test suggested by Mr. Burkett. Where they may differ, however, is in the number of requirements they would include in the term of "fairness." The comments of Professors Beatty and Prichard and of Mr. Burkett indicate that their fairness tests should be introduced into non-*A & P* situations, although they focus their attention on matters of primary rather than peripheral concern to job interests.¹⁸²

Professor Beatty makes the additional point that arbitrators have, for a very long time, invoked a "relevant reasons test in the areas of promotion, discipline and plant rules, without 'paralyzing management.'" They have done so, however, in *A & P* type situations and not in *Metro Police* type cases. I do not view the courts as having demonstrated any concern about the ability of arbitrators to rule on what is fair. *A & P* makes this clear. *Metro Police* only limits the extent of fairness that is required to be manifested by management. Of course, in many cases where the bona fides test is applied, "irrelevant reasons" will also have to be examined in order to evaluate the bona fides of the decision in question.

It is in his third level of argument that Professor Beatty raises the most interesting of his explanations for implying his fairness test into *Metro Police*-type cases. He maintains that there are reasons lying at the root of "our general legal theory of a liberal democratic society" which he relies upon as the foundation for the introduction of a requirement that "relevant reasons be introduced as part of our system of industrial relations." Later on, such a position is further justified as being "society's way of saying that we will not tolerate decisions based on ... [irrelevant] reasons, those reasons are irrelevant ... in all cases having to do with employment [subject to certain well known exceptions]."

¹⁸² I prefer the distinction made between the two types of cases developed by Professor Schiff, *ibid.*

In support of his position Professor Beatty refers to three cases¹⁸³ where he applied the rule which he supports. In one of these cases¹⁸⁴ I would find, on the facts, that the *Metro Police* case would not apply and the *A & P* case would. Thus, there would be no need to create an exception to the *Metro Police* rule. In the second case,¹⁸⁵ the basis for reliance on a fairness argument was because of the application of the doctrine of equitable estoppel. In the third case¹⁸⁶ the fairness requirement was voluntarily accepted by management.

In the case of *Re York University and York University Faculty Association*, Professor Beatty was dealing with the question of whether certain faculty at the Glendon campus of *York University* were within a tenured or untenured stream. Although it does not appear from the report of the award, the bargaining agent and the University negotiated a clause which provided for a clarification process for the teaching faculty whose status was unclear. In the resolution process, nine cases remained unresolved. Of these, one case was settled on the basis of the individual having received an oral undertaking from the chairman of the department to place the faculty member in the tenured stream at the end of the limited contractual term. The union argued that the same offer had been made to all the other employees in the same position and that fairness dictated that they be offered the same settlement by the University. The *York University* case can be viewed as one where the employer had a contractual obligation, as under the *A & P* case (and *CPI*), to implement a process, in this case the process of clarification. In such case the question of fairness, however the term might be defined, was imposed on management in the same way as in the *A & P* case, or in any other case where specific obligations are imposed on an employer and where an arbitration board has an obligation to review the process whereby the obligation was purportedly carried out. In carrying out its obligations under the agreement, the aspect of fairness, being non-discrimination, would apply as it would in any *A & P*-type case.¹⁸⁷

183 *Re York University and York University Faculty Association* (1980), 26 L.A.C. (2d) 17; *Re CN/CP Telecommunications and Canadian Telecommunications Union*, (1982) 4 L.A.C. (3d) 205, award upheld, *Re C.N.R. et al. and Beatty et al.* (1981), 128 D.L.R. 93d) 236, 34 O.R. (2d) 385, 82 C.L.L.C. para. 14,163 (Ont. Div. Ct.) *Re Corporation of the Borough of York and York Professional fire fighters Association, Local 411* (1982), 1 L.A.C. (3d) 304. Professor Beatty was chairman in all three cases.

184 *York University* case, *ibid.*

185 *CN/CP*, *supra*, note 183.

186 *York firefighters* case, *supra*, note 183 at 306.

187 See note 181, *supra*.

In the *CN/CP* case referred to by Professor Beatty,¹⁸⁸ there was a provision that management need not pay an employee for the first three days when the employee was off sick, unless the employee was in a hospital. The employer had, over a long period of time, ignored the provisions and made payment for the first three days that an employee was sick, whether or not the employee had complied with the specific provision in the collective agreement. As a result of a corporate reorganization, management decided to cease making payments unless they were specifically within the clause in question. The case appears to have been decided on the basis of the application of the doctrine of equitable estoppel, although Professor Beatty quite clearly identifies the basis for the rule as the application of a fairness principle. Nevertheless, the case falls outside of the ambit of the finding in the *Metro Police* case.

In the third case,¹⁸⁹ it would seem that the employer had, as in the *Falconbridge*¹⁹⁰ case to be referred to, accepted the principle that it was required to act fairly in the circumstances and endeavoured to establish this fact. It had, by its position, waived any defence based on the matter being beyond the jurisdiction of the arbitrator. That being so, the decision is not, in my view, inconsistent with the finding in the *Metro Police* case.

I believe that Professor Beatty came closest to the mark in identifying the real issue in the debate over when fairness, in its broader aspect, must be shown, when he stated, in the *York University* case: "... on our view of it, the duty [of fairness] is defined quite clearly both by the language of the agreement and by principles which lie at the core of our

188 *Supra*, note 183. In the *CN/CP* case, the issue, as it related to the question of fairness, arose in the context of the availability of the doctrine of promissory estoppel in labour arbitration proceedings.

Osler, J., who delivered the judgment of the Court, relied on the case of *Frito-Lay Canada Ltd. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local Union No. 647* (1976), 77 C.L.L.C. para. 14,061 (Ont. C.A.), where it was held that as the remedy sought was discretionary, "the conduct of the [Company] may constitute a good reason for not granting it" (*Frito-Lay* case at 36). So, in the *CN/CP* case, Osler J. would, in any event, have refused to grant the application because of the company's long standing practice. He felt a departure from the long standing practice would render an injustice to the Employees and the Union (D.L.R. at 245). It would, therefore, appear that even where fairness in the exercise of management rights may not be required, failure to act fairly may still be punished. Cf. the dissenting reasons of Steele, J. in the *Marsh* case, *supra*, note 47 at 736 O.R.

189 *York firefighters* case, *supra*, note 183.

190 *Infra*, note 223.

sense of justice and which we would have thought to [be] uncontroversial."¹⁹¹

In the *York University* case, Professor Beatty saw the fairness obligation "articulated" by Mr. Justice Weatherston in the *Marsh*¹⁹² case as "the basis of the first principle of justice," of Dworkin in his *Taking Rights Seriously*.¹⁹³ When *Metro Police* is viewed in the light of all that it stands for, it can be seen to recognize a management obligation to be fair, even though the right exercised by management is not affected by any clause in the collective agreement. On the *Metro Police* facts, fairness means honesty of purpose, or *bona fides* in the exercise of the right.¹⁹⁴

Where Dworkin refers to the obligation of fairness, he does not pretend that the term has a specific meaning applicable in the same way in all cases. Nor do I believe Messrs. Beatty, Burkett and Prichard see fairness in a different way, but they attempt to find a broader meaning of fairness in a *Metro Police*-type case than that case seems to allow for.

I would take Dworkin to have said that the basic values (abstract rights) which justify specific legal standards (rules) involve the right of parties to have their reasonable expectations recognized.¹⁹⁵ If Dworkin's first principle of justice is regarded as the basis of a rule that contracts are to be administered fairly, then, in a *Metro Police* type case, the abstract principle, being the reasonable expectation of the parties, is met by the specific legal standard (rule) which was reaffirmed in *Metro Police*. The *Metro Police* rule can be seen to be reasonable when compared with the application of the same abstract right to an *A & P* type case.

The broader fairness obligation, as enunciated in the *A & P* case, would have to include under the head of "reasonableness" an obliga-

191 Professor Beatty expanded on his view in "The Role of the Arbitrator: A Liberal Version" (1984), 34 U.T.L.J. 136. He continues to see *Metro Police* as placing restrictions on arbitrators much greater than I do and views subsequent cases, especially *CPI*, (*infra*, note 237), as creating a quandary rather than clarifying *Metro Police*. He argues (at 167) that only legislation can lead to this "liberal theory of arbitration [being] fully realized." I am more optimistic than he is about the ability of the present arbitration process to do justice to the reasonable expectations of the parties. Part of my optimism flows from my less pessimistic view of the jurisprudence and its impact on the development of a fairness obligation in the administration of collective agreements. I will expand on Beatty's position further, *infra*.

192 *Supra*, note 47.

193 *Supra*, note 56. His governing principle of equal concern and respect, at 180-183 and 272-78.

194 See, *supra*, notes 99, and 25-26.

195 Faller, "Does Dworkin's Rights Thesis Succeed in Solving the Problem of Judicial Discretion?" (1984), 22 U.W.O.L.Rev. 15 at 17.

tion on management not to behave either arbitrarily, discriminatorily or in bad faith. To permit arbitrary or discriminatory conduct by management in carrying out its obligations of assessing the qualifications of the employees applying for permanent status (the *A & P* case) would be irrational,¹⁹⁶ as it would undermine the purpose of the parties having imposed a "skill and qualifications" provision. The goal cannot be detached from the rule without defeating the purpose of the parties. This cannot be said of a *Metro Police*-type case, where management may be honestly pursuing the right left to it, and, at the same time, behave unfairly and discriminatorily. In such a case, the discriminatory or arbitrary behaviour may reflect on whether management behaved honestly, but it need not necessarily do so, in which case it could not affect the result.

In Dworkin's first theory of rights, judges would be free to give effect to specific collective goals when these are made relevant by abstract rights.¹⁹⁷ Dworkin's second theory is closer to the case where fairness becomes a factor where judges holding to it, can, as Beatty does, appeal to collective goals (Beatty's view of a liberal, democratic society and its values),¹⁹⁸ which have motivated legal rules in resolving conflicts between abstract rights embodied in those rules.

In an *A & P* type case, such a resolution is unnecessary. In a *Metro Police* type case, there were conflicting rules,¹⁹⁹ but not conflicting abstract rights, and there lies the problem. The abstract right to be dealt with is the right to the protection of one's reasonable expectations, and that is the principle which applies and is said to be relied on by all parties. There is, using Dworkin's analysis of the second theory of rights, no conflict of principles (rights) but rather of rules.²⁰⁰

Dworkin's first theory of rights might, on a cursory examination, appear to support the existence of a broader fairness doctrine in a *Metro-Police* type case on the basis that it is permissible to appeal to specific collective goals when these are made relevant by abstract rights.²⁰¹ Here, the abstract right, the protection of a contracting party's reasonable expectations, requires a consideration of consequences when one person's act is likely to have serious consequences on the welfare

196 *A & P* case, *supra*, note 52. If management can be arbitrary or discriminate, the article is meaningless. Cf. *Chippin*, *infra*, note 271. Also, Cf. *Meadow Park*, *infra*, note 275.

197 *Supra*, note 56 at 18.

198 *Supra*, note 56.

199 These rules were encompassed in the two competing philosophies of collective agreement interpretation.

200 See, Dworkin, *supra*, note 56 at 22-28 and 71-80.

201 *Ibid.* at 314-315, and also at 98.

of others.²⁰² Here, the consequences or "collective goals" are affected by the abstract rights being viewed one way or the other.²⁰³ Thus, reasonable expectations of the contracting parties, as an abstract right, should be limited by the impact it would have on others. This might be so in cases where the right could be seen to be affected by the consequences or "collective goals", where the "right to the concern of others" (abstract right) could be affected by the consequences (collective goal) of causing such person "great injury for relatively small gains ..., or ... [neglecting] to save [the object of the abstract right] ... from great harm if they are in a position to do so with little harm to themselves ..."204

The abstract right to receive one's reasonable expectation under the contract might also be seen to require consideration of the same "consequences" as are relied on in the first example. The problem with such a view of the matter is that there are so many collective goals which judges can select which ultimately reflect their own values.²⁰⁵ It is difficult to fault the Court of Appeal in the *Metro Police* case, which can be seen to have an articulated collective goal to rely on: being the goal of achieving some level of equal respect and concern in the society as a whole, regardless of the respect and concern shown to a given individual.²⁰⁶ This goal would limit the application of the abstract right of receiving one's reasonable contractual expectations to those seen to flow from the contract entered into as embodied in its terms.

Less supportive of Professor Beatty's position is the fact that Dworkin's "rights thesis" can also be viewed as a sophisticated and complex defence of the doctrine of precedent as a check on judicial discretion based on the judge's view of collective goals.²⁰⁷

Where Professor Beatty manifests concern for employees whose bargaining strength is inadequate to achieve a negotiated change, and suggests a legislated response, he overlooks the historical reality of "free" collective bargaining which recognizes the existence of unequal conditions and guarantees little protection to the weaker party.²⁰⁸ To legislate a duty of fairness, even one limited in scope to that described

202 *Ibid.* at 314.

203 *Ibid.*

204 *Ibid.*

205 Faller, *supra*, note 195 at 20-31.

206 In that case the court believed it was sensitive to the "spirit and intent of the collective agreement." *Supra*, note 3 at 479.

207 Dworkin, *supra*, note 56 at 84-85.

208 There are a significant number of cases where statutory intervention was deemed necessary. Arguably, extension of time limits might have been negotiated without the intervention of the legislature if it had represented the reasonable expectation of the parties.

by Mr. Burkett, and supported by the other speakers, could create many more difficulties than have been encountered in other examples of legislative intervention.²⁰⁹ As I believe that my view of *Metro Police* (as explained by subsequent cases) is correct, is legislation required?²¹⁰

As I have already argued, the problem of when fairness is required in the exercise of management rights is rooted in profound differences in philosophy. It is probably fair to say that judges have remained in a more or less positivistic position and find other philosophical views incompatible.²¹¹ They tend to decide cases using the tools and discipline they are familiar with.²¹²

Each philosophical position has intellectual support. To some extent, concessions would seem called-for in interpreting collective agreements because arbitrators are dealing with relational contracts which, unlike transactional ones, are more often characterized by being long-term arrangements, and some would say, are less likely to be fully planned.²¹³ Although transactional exchange contracts are more often characterized by more complete planning and discreet and impersonal performance, contracts of either type can have characteristics more usually associated with the other. Hence, courts may properly view a collective agreement, although relational, as having been negotiated with care and attention to detail and they will be unwilling to depart (too far) from the conventional rules of contract interpretation.²¹⁴ To establish two modes of contract interpretation may seem uncalled-for, if a collective agreement can be viewed as being the result of considerable planning, with more attention being given to its contents than many commercial, transactional exchange contracts involving many millions of dollars, where only the outline of the contract is agreed to.²¹⁵ Ideally, contracts ought to be treated as being of a composite

209 As to the real implications of *Metro Police*, see *CPI* and subsequent cases, *infra*.

210 If nothing has really been changed, a call for legislation would be as a result of dissatisfaction with a *bona fide* fairness requirement as being too limited in *Metro Police* type cases.

211 See, generally, *Dworkin, supra*, note 56 at 1-13.

212 See, Fried, "The Artificial Reason of the Law or: What Lawyers Know" (1981), 60 *Texas L. Rev.* 35 at 57.

213 See, Brown, "Contract Remedies in a Planned Economy: Labour Arbitration Leads the Way" in Reiter & Swan, *Studies in Contract Law* (London: Butterworths, 1980) at 94.

214 *Metro Police, supra*, note 3.

215 There is much anecdotal evidence of such dealings. Eg. The Olympia and York custom of arranging major construction projects orally and writing up the contractual arrangements after the job has been completed. My own experience in practice, acting in labour and commercial contracts, satisfies me that the principal difference between the two is the continuing nature of the relationship between the parties to the collective agreement.

(transactional/relational) character. Judges and arbitrators, being sensitive to the nature of the matter in dispute and the nature of the contract, might rely on the principles most suited to each case. In the context of the *Metro Police* case, that can be seen to be what the Court did. It found that the parties took pains to limit management's discretion in a very specific way.²¹⁶ The contract, being long and complex, left no room for an implied duty of fairness, in the broad sense.²¹⁷

The relational view, based on the Shime/Weatherston approach, sees the contract as one where new rules apply because of arguments based on statute and case law. Simply because one might favour fairness as a general principle to be applied to all relationships, or because one might see greater legal merit in the Shime/Weatherston view, is an insufficient basis for permitting me to characterize the court as having been guilty of an error when it decided *Metro Police*. There was a basis for such a decision, as intellectually justified as the one derived from the Shime/Weatherston position. "The artificial Reason of the law," being a distinct subject matter for the legal profession, is a method of analogy, and precedent being "the stuff of law" left after "general philosophical structures and deductive reasoning give out, overwhelmed by a mass of particular details."²¹⁸ "Analogy" being "the application of a trained disciplined intuition where the manifold of particular is too extensive to allow our minds to work on it deductively" is a sufficient reason to explain *Metro Police*.²¹⁹ Analogy and precedent there was aplenty. Analogy, in Fried's sense will often be affected by philosophical inclination, and that may also go a long way in explaining *Metro Police*.

The interpretation of the Court of Appeal in the *Metro Police* case is one that the agreement might reasonably bear, although I might not have arrived at the same result, were I a judge. Nor can it be said that it denied the existence of a fairness obligation. That it appeared to some to do so is regrettable. I believe it only appeared to do so because of its unfortunate use of language.²²⁰ That it did not do so is, I believe, nevertheless clear.²²¹

An examination of some other court cases decided since the *Metro Police* case tends to support my view of *Metro Police* and the role of fairness in the administration of the collective agreement. My position, as outlined above, is that the doctrine is far from dead. Rather, its place

216 *Metro Police*, *supra*, note 3 at 479.

217 *Ibid.*

218 Fried, *supra*, note 212 at 57.

219 *Ibid.*

220 See, note 9, *supra*.

221 See *OPSEU* case, *infra*, note 222.

has been established for some time and *Metro Police* did nothing to alter its role.

V. SOME ADDITIONAL EXAMPLES OF THE APPLICATION OF *METRO POLICE*

IN AN UNREPORTED CASE decided by the Divisional Court on September 3, 1982, *Her Majesty the Queen in Right of Ontario as represented by the Minister of Health and Ontario Public Service Employees Union, G.R. Lenehan and the Grievance Settlement Board*, the Ontario Grievance Settlement Board, after having decided that there was no provision in the collective agreement which governed the matter in issue, nevertheless held that:

... obviously the employer in administering the collective agreement is not entitled to benefit one employee over the other on the basis that the former may give evidence on behalf of the employer while the latter will give evidence on his own behalf.

In the result the grievance succeeds on the basis of the fairness argument advanced by the grievor.

The Divisional Court held that the case failed to be decided under the principles enunciated in the *Metro Police* case and quashed the award. It is significant, however, that the Court stated: "It should be noted that there was no evidence of bad faith in this case, which may have placed things in a different light."²²² If the decision was not an honest one, then it would not have been exercised under the authority of the management rights clause, as was purported to be the case. In the *OPSEU (Lenehan)* case, the issue not being one that was subject to the grievance procedure, the Divisional Court quashed the award because of the Board's having exceeded its jurisdiction.

Another post-*Metro Police* case decided by the Court of Appeal is *Re Falconbridge Nickel Mines Limited and Brunner et al. (No. 2)*.²²³ The difficulty experienced with the subject of fairness, both by arbitrators and the courts, is exemplified by this case. There, the grievance related to an alleged demotion in violation of provisions of the collective agreement. The arbitrator accepted that the grievance was both with respect to a demotion without just cause and an alleged demotion contrary to the "rights or powers under the collective agreement." The position of the union was that there was no right or power under the collective agreement to demote the grievor. The union acknowledged that the company had the right, under article 3.01, being the management

²²² Thus recognizing a good faith requirement of fairness.

²²³ (1983), 40 O.R. (2d) 14 (C.A.).

rights clause, to demote an employee where it could do so for just cause or where the provisions of article 12.19 of the collective agreement applied. (There was a provision for demotion where there was a reduction in the work force, which was not applicable in this case). It was argued, and accepted by the majority, that the demotion was not for just cause, and, as no reduction in the work force took place, article 12.19 had no relevance. It is significant that counsel for the company took the position that the right to demote under the management rights clause was not in any way restricted and, accordingly, management could demote as it saw fit. The management rights clause of the collective agreement contained two demotion provisions, one of which was relied upon by the company: "to manage the offices, plant and mines, direct the working force and to hire, promote, transfer, demote, lay-off."²²⁴ The second clause "to suspend, demote, discharge or otherwise discipline employees for just cause" was not relied upon by the company and it was only the powers under the first clause that were dealt with by the Board.²²⁵

The majority agreed with counsel for the company that, exclusive of the requirement that there be just cause as provided for in the second clause, there was nothing in the collective agreement which in any way restricted management's right or power to demote an employee in circumstances falling outside of the language of article 12.19.²²⁶ This statement, however, was subject to the arbitrator's view that it had "long been the law, that the rights and powers of the parties under a collective agreement must be exercised reasonably and fairly."²²⁷ The majority included in the designation reasonably and fairly the words "unreasonably, arbitrarily or [in] any discriminatory fashion."²²⁸ They also relied on the judgment of the Divisional Court in the *Marsh* case,²²⁹ and, in upholding a fairness requirement, stated that management, in order to demote an employee, must rely on reasons connected with, and relevant to, the job of the employee, or his work performance. Failure to do so was regarded as "an unreasonable and unfair exercise of its albeit exclusive power and right to demote."²³⁰ The majority thus imposed a test of fairness incorporating elements of bona fides along with an absence of behaviour that might be characterized as unreasonable, discriminatory, or arbitrary. Under the *Metro Police* test,

224 *Ibid.* at 15.

225 *Ibid.*

226 *Ibid.*

227 (1979), 21 L.A.C. (2d) 280 at 284.

228 *Ibid.*

229 *Supra*, note 47.

230 *Falconbridge* award, *supra*, note 227 at 286.

as I interpret it, management, if acting honestly, can be unreasonable, discriminate and act arbitrarily, although reliance on behaviour that is expressively arbitrary, unreasonable or discriminatory may affect the assessment of management's bona fides.

The Court of Appeal, in the *Falconbridge* case, noted that the Divisional Court, in refusing to quash the award, indicated the latter Court's sensitivity to the fact that the judgment of Weatherston J., in the *Marsh* case was "the last word on the subject,"²³¹ and that there was a duty, in administering the management rights clause, "to be fair to the employee except where the demotion is for disciplinary reasons or to accommodate a reduction in work force."²³² The Court also observed that the *Metro Police* case was decided after the decision of the Divisional Court in the *Falconbridge* case, and concluded that the Supreme Court of Canada having refused to grant leave to appeal in the former case, it was not open, in the circumstances, for the Court to accede to the respondent's argument that the *Metro Police* case not be followed. In dismissing the appeal, the Court of Appeal did not reject *Metro Police*, but found that, as the company had agreed that its right to demote under the first part of article 3.01 could not be exercised "unreasonably, arbitrarily or discriminatorily," and as the concession had been put to the arbitration board, the Board was given the right to determine whether management had acted "fairly" in demoting the grievor.²³³

Throughout the decision of the Court of Appeal in the *Falconbridge* case, the Court used the terms "unfair and unreasonable" and linked those words with the words "arbitrarily or discriminatorily." Most significantly, the Court of Appeal noted the existence of certain restrictions under the collective agreement which prevented management from exercising the powers given to it "in an unfair and unreasonable manner."²³⁴ I regard these references as supporting my view that where an obligation is imposed on management in the collective agreement (as where there is an obligation not to discipline except for just cause), there is implicit in such restriction the imposition of some fairness obligation, which is unaffected by *Metro Police*. Nor does the *Falconbridge* case state that management could have acted dishonestly in effecting the demotion.

The most cited case on "fairness" since *Metro Police* is *Re Council of Printing Industries of Canada and Toronto Printing Pressmen and*

231 *Supra*, note 223 at 16.

232 *Ibid.*

233 *Ibid.* at 17.

234 *Ibid.* at 16. cf. *Re: The Queen and O.P.S.E.U.* (1984), 45 O.R. (2d) 358 at 366.

*Assistants' Union #10 et al.*²³⁵ There, it was alleged that there had been a breach of the seniority provision of the collective agreement (article 6), because certain employees had been selected "out of seniority" for permanent classification as paper handlers under article 22 of the collective agreement.

Article 22.01 of the collective agreement provided that: "The employer shall permanently classify thirty-four (34) employees under this Agreement."

Article 6.03 of the collective agreement provided as follows: "All other things being reasonably equal, seniority shall govern as between individual employees in all cases of rehiring, laying off of staff, or promotion to higher rated positions within jurisdiction of this agreement."

A number of employees were made part of the permanent classification by management. The Board, after reviewing the provisions of the collective agreement, concluded that the parties did not intend article 6.03 to govern the permanent classification of employees under article 22. The Board then went on to consider whether management had been given a free hand to make decisions as to which employees would be permanently classified. The Board noted that,

... once permanently classified, an employee is more or less immune from lay-off and this means that the impact of contractions in the company's work force must be borne by the so-called temporary employees. In other words, the job security rights of employees classified by the company under article 22 are said to be an exception to the seniority rights provided by article 6, in effect of bridging the latter rights of all employees not so classified. If this is a proper construction of the agreement as we think it is, the well-known arbitral concern over the abridgement of seniority rights reflected in the following quotation would support the implication of a contractual intent that the company must exercise its discretion under art. 22 in a reasonable manner, without discrimination, bad faith or arbitrariness.

The Board then quoted a passage from *Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.*:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement with the utmost strictness wherever it is contended that an employee's se-

²³⁵ Award and application for review unreported. Court of Appeal decision (1983) 149 D.L.R. (3d) 53, leave to appeal refused 52 N.R. 3083; 42 O.R. (2d) 404.

niority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.²³⁶

A majority of the Board in the *CPI* case noted that: "The management rights clause makes no explicit reference to the company's right to permanently classify employees, explicitly consigning that right to the unfettered discretion of management." The Board also held that article 22 does not give management the right to permanently classify employees in its sole discretion. The Board acknowledged that such a provision would have "considerably strengthened the company's position" but then pointed out that some arbitration awards have implied the constraint of reasonable conduct notwithstanding.

In the absence of a specific provision granting to management the right to act with unfettered discretion, the Board in the *CPI* case concluded that the parties did not intend the company's decision under article 22 to be unfettered. The award notes that management must exercise its power under article 22 in a reasonable way and without bad faith, discrimination or arbitrariness, which obligation is said to arise by implication. Reference was made to such clauses as those relating to promotion and lay-off where a standard of reasonableness has been said to exist.

In the *CPI* case, the Board found that the job security rights of employees classified by the company under art. 22 represented an exception to the seniority rights provided by art. 6, having the effect of abridging the latter rights of all employees not so classified. This being so, the concern of arbitrators over the abridgment of seniority rights, as reflected in the *Tung-Sol* case,²³⁷ supported the implication that the parties intended that management exercise its discretion "in a reasonable manner, without discrimination, bad faith, or arbitrariness."

The basis for those cases, where a greater standard of fairness has been implied (promotion and lay-off cases), can be seen to have something to do with the fact that in such cases, management has specific obligations to carry out in arriving at its decision: in the case of promotion, the assessment of skill and ability, and in the case of lay-off decisions, considerations as to whether an employee exercising bumping rights can perform the job in accordance with a stated standard. Where, as in the *CPI* case, the clause in question merely provides that management could appoint a certain number of employees to the permanent classification, without more, the implication must rest on some other provision of the collective agreement. The Divisional Court, in the *CPI* case, found that there was no provision in the collective agreement

²³⁶ (1964), 15 L.A.C. 16 at 162 (Reville).

²³⁷ *Ibid.*

which governed the way in which employees might be permanently classified. It is for this reason that the Court found that the opinion of Mr. Justice Houlden, in the *Metro Police* case, ought to prevail. The decision of the Divisional Court in the *CPI* case did not preclude an arbitrator from determining that there is a provision in the collective agreement which indirectly governs the way in which the disputed appointments were to take place. These might be found in any provision of the collective agreement. What the Court did find was that the seniority provision, in that case, did not directly or impliedly impose any obligation on the company with respect to the making of the permanent classification appointments.

It is also of significance that Judge Reville in the *Tung-Sol* case,²³⁸ where the issue concerned whether seniority accrued while employees were on a legal strike, (and there was nothing in the collective agreement which stated that employees lost seniority by reason of being so engaged), stated that as the parties had, in great detail and in a most specific way, covered the circumstances under which seniority may be acquired, retained and lost in whole or in part, they did not intend that it be lost in some other way. In a similar manner to that of the Court in the *Metro Police* case, Judge Reville held that the parties could have agreed to the inclusion of a provision excluding the period an employee was engaged in a lawful strike from an employee's built-up seniority. The case had nothing to do with implying a provision into a collective agreement, but was concerned with another matter, where no such implication was open to the company.

The Ontario Court of Appeal held that the provisions of art. 22, being a provision outside the absolute restrictions of the management rights clause, should be interpreted by employing certain conventional rules of contract interpretation. It was held that the article should be read along with other clauses in the agreement and that an attempt should be made to harmonize competing clauses.²³⁹ In the absence of a clear right to exercise unfettered discretion, as might, according to *Metro Police*, be granted by a properly worded management rights clause, it could be argued that to give practical and business efficacy to the agreement, the exercise of a right by management ought to

²³⁸ *Ibid.*

²³⁹ *Ibid.* at 411. Although the Court reproduced extensive portions of the award, which clearly indicated that the Board majority supported the Shime approach to contract administration as set out in the *INCO* case, the Court rested its decision on the Board's being able to conclude that the seniority rights provisions of the agreement would be "seriously affected" by the exercise of the act in dispute. The Court held that the conclusion of the board majority as to management's fairness obligations in the administration of the collective agreement was one it was entitled to arrive at. *Ibid.*

accommodate certain employee and union rights contained in other provisions of the collective agreement.²⁴⁰

There are two pre-CPI cases decided outside of Ontario which I also wish to refer to. The *Bank of B.C.* case²⁴¹ involved a job-posting grievance. The Bank selected an employee from an outside branch for the position of loans officer. The Bank's position was that the grievors, who were unsuccessful candidates and were employed at the subject branch, were not qualified for the position because they lacked experience in consumer lending. The evidence disclosed that the successful applicant had such experience but lacked a basic knowledge of the Bank's consumer loan policy, which was another qualification provided for in the posting.

The relevant provisions of the collective agreement were as follows:

12.01 the Bank will endeavour to fill permanent vacancies from within the bargaining unit using the job-posting procedure before seeking other means such as hiring or transferring personnel from outside the bargaining unit.

12.05 ... present ability, merit, skill and seniority, must be considered in filling this application.

After arbitration, the majority found that the grievors had the present ability and skill to fill the position in question, and that the Bank had been unreasonable in specifying the qualifications of the job. A question was raised as to the bona fides of the qualifications, as they were ignored by the Bank when it hired the successful applicant from outside the bargaining unit. The majority concluded that the Bank had behaved arbitrarily and discriminatorily in its assessment of the grievors' qualifications, and had failed to comply with the provisions of article 12.01.

The British Columbia Supreme Court cited the *Metro Police* case with approval and quashed the award. Mr. Justice McFarlane stated:

240 Cf. the statements of Laskin in *Falconbridge* (1958), 8 L.A.C. (2d) 276 at 281, *supra*. I would emphasize that the latter comments deal with a case unlike *Metro Police*. In *Metro Police* the arbitrator was found by the Court of Appeal to have decided that the power in dispute (to award overtime during the plant shut-down) was provided for in the management rights clause which was in terms of an "exclusive" grant of authority to management. See *Metro Police* at 478.

241 See, *supra*, note 116.

[T]he question is whether the Board of Arbitration has exceeded its jurisdiction by setting aside a management decision on the grounds that it is arbitrary, discriminatory or unreasonable. ... The question is not whether there was an appearance of arbitrariness to what management did but whether what management did was in breach of the terms of the collective agreement. *Management must, of course, have acted genuinely. They must not have manipulated the terms of the agreement to defeat the legitimate rights of employees.* In making the assessment, however, the arbitrators must not infringe upon the right of management to assess a given situation, and to make a business judgment. The arbitrators must not weigh evidence and substitute their own opinion for that of management. If management has ignored the provisions of the agreement, then although it might be appropriate to characterize such conduct as arbitrary or discriminatory the decision would be reversed only because there has been a breach of the agreement (emphasis added).²⁴²

The court treated the provisions of article 12.05 as being different from the obligations often found in provisions of collective agreements relating to appointment and promotion (as in the *A & P* case).²⁴³ Typically, management is obliged to make an assessment as to whether such matters as skill and ability are relatively equal. In the *Bank of B.C.* case, management was only required to consider such matters as skill and ability. In such a case, the obligation is to have acted genuinely or honestly (which amounts to good faith) when it considered the matters listed in article 12.05. The Court indicates, by the language employed in its reasons, that the considerations must be business considerations based on the Bank's "experience in the field of banking."²⁴⁴ Such a holding is consistent with the *Metro Police* case and the Ontario cases following it (such as *CPI*) and with the recognition of the fairness obligation of acting in good faith in a *Metro Police* type case.

The *Halifax Infirmary* case²⁴⁵ also considered the *Metro Police* case. The *Halifax Infirmary* case concerned the issue of whether the Infirmary had wrongly refused sick pay to the grievor for the period July 18, 1981 to August 12, 1981. The management rights clause of the collective agreement (article 3) provided:

The Hospital reserves and retains, solely and exclusively, all rights to manage the Hospital and direct its working forces except to the extent that such rights are expressly abridged by the specific articles of the Collective Agreement.

²⁴² *Ibid.* at 238-239.

²⁴³ *Supra*, note 52.

²⁴⁴ *B.C. Bank, supra*, note 116 at 240. Cf. statements of Professor Schiff, in *Re Borough of Scarborough, supra*, note 181.

²⁴⁵ *Nova Scotia Nurses' Union (Halifax Infirmary Local) v. Halifax Infirmary Hospital* (1983), 54 N.S.R. (2d) 289 (N.S.C.A.).

A certain portion of the grievor's absence was not compensated for by the Infirmary because of the failure to produce a medical certificate from her own doctor or from an hospital physician for the period after July 17, 1981.

In that case, the Board majority concluded that "there was no serious dispute that [the grievor] was ill during this time period for which she claims paid sick leave" and stated:

The only question is whether the Infirmary's rule concerning evidence of sickness, as it appears in the Personnel Policy manual is binding upon the union generally, and [the grievor] in particular.²⁴⁶

A rule had been issued, unilaterally, by the Infirmary and the majority of the Board found that the validity of the rule should be tested by principles which many arbitration boards have applied where discipline for "just cause" has been invoked for breach of a management rule. The majority focused on the reasonableness of the rule which related to the method of proof of illness. The Board concluded:

In our view ... the rule that at the employer's option the employee be required to submit to medical examination by the employer's physician to become entitled to be paid sick leave is not a reasonable one.²⁴⁷

The rule "purportedly" gave the Infirmary the right to require the grievor to furnish "proof of illness by medical certificate from the employee's physician or the Hospital Health Service." Such proof was not supplied. The Infirmary relied on the management rights clause.

In addition to the management rights clause, the Infirmary relied on article 16 of the collective agreement:

Employees required by the Hospital to have medical tests, etc. shall have their expenses borne by the Hospital. The results of medical tests, etc. or any other information on a nurse shall be handled in strict confidentiality.

In early July of 1981 the grievor's supervisor contacted her and informed her that the Infirmary wished her to be examined by the staff health service, as it was the view of the Infirmary that the grievor's sick leave documentation had expired. When the grievor refused to accede to this request the Infirmary wrote to her, informing her that an appointment had been made for her to be examined by the occupational health physician at the Infirmary on July 16, 1981. When the grievor

²⁴⁶ *Ibid.* at 295.

²⁴⁷ *Ibid.* at 296.

did not attend for this examination, the Infirmary terminated her sick leave entitlement as of July 16, 1981.

The majority of the Board relied on the arbitration case of *Re Lumber and Sawmill Workers Union v. KVP Co. Ltd.*,²⁴⁸ where the arbitrator set out a series of six guidelines to be employed in determining whether or not an employee is bound by company rules. Among those rules was a provision that the rule "... must not be unreasonable."

The Board in the *Halifax Infirmary* case concluded:

In our view, however, the rule that at the employer's option the employee be required to submit to medical examination by the employer's physician to become entitled to be paid sick leave is not a reasonable one.²⁴⁹

Richard, J., who heard the application by the Infirmary to quash and set aside the majority award, held that:

The management rights clause in the agreement now under consideration is clear and gives the Hospital the exclusive right to direct the work force except "to the extent that such rights are expressly abridged by the specific articles of the collective agreement."²⁵⁰

He held that because of the right to prepare and disseminate personnel policies, which was not abridged by the collective agreement, there was no term of reasonableness with respect to such rules or policies.²⁵¹ Mr. Justice Richard therefore found that the majority erred in implying a term of reasonableness and further erred in finding that the reasonableness of an in-house medical examination was unreasonable.

The Court of Appeal, while agreeing that the majority decision contained a fatal error of law on its face and must be quashed, defined the error "quite differently." According to the Nova Scotia Court of Appeal, the real issue, which the Board should have decided was whether the grievor was "really sick," the onus or burden of proof being with the grievor. The Court found that there was *no* evidence proving the claim except for the grievor's assertions that she was "sick."²⁵² Thus, the Court concluded that the grievor had not proved her case and the Court did not have to deal with any question pertaining to fairness. The Court found that the Arbitration Board "misapprehended and misread the management rules." In the opinion

248 (1965), 16 L.A.C. 73 at 85.

249 See *Re Halifax Infirmary Local of Nova Scotia Nurses' and Halifax Infirmary Hospital* (1983), 53 N.S.R. (2d) 554 (N.S.S.C.T.D.).

250 *Ibid.* at 558-559.

251 *Ibid.* at 559.

252 *Supra*, note 245 at 293.

of the Court, the rules did not oblige the grievor to be examined by the hospital physician as a prerequisite or precondition to receiving sick leave payment. It also held that the grievor could have obtained proof of illness "from her physician or otherwise or [by] presenting such other evidence to the Infirmary." Accordingly, the grievor's non-compliance with the directive was found to have "no direct evidentiary consequence." The onus of proof had not been satisfied as the Infirmary had no evidence of illness beyond the grievor's assertions that she was sick.²⁵³

The *Halifax Infirmary* case does not stand for the proposition that rules or regulations are free from a reasonableness requirement. The Court of Appeal noted that management rules or directives ought not to be questioned by an arbitration board where they are not inconsistent with the provisions of the collective agreement. Therefore, an arbitration board has no jurisdiction to do so unless the particular rule or directive is directly in issue before the board. This will be so, and has been held to be so, where the rules affect such matters as (a) the imposition of discipline, where a just cause provision exists, or (b) loss of seniority, where seniority rights are present in the agreement. Reference by the Court to the *Canadian Keys Fibre*²⁵⁴ case clarifies its meaning. The lat-

253 *Ibid.* at 304.

254 *Canadian Keys fibre Co. Ltd. v. United Paperworkers International Union, Local 576* (1974), 8 N.S.R. 81 (N.S.C.A.). In the *Canadian Keys* case the relevant provisions of the collective agreement were:

It is understood that the Company retains the rights to manage its operations in all respects except as this right may be expressly restricted by the terms of this Agreement. (Section 4)

In promotions, demotions, transfers, layoffs, and rehiring, qualifications and skill being equal, seniority shall be the governing factor ... (Section 7(2)(b))

In the case of employees who are classified as tradesmen, layoff to the labour pool will be carried out in order of least service to the department. However, it is understood that job training, skill and ability will be the deciding factors in such layoffs and in this matter the decision of the Company shall govern (Section 7(2)(i)).

Section 7(2)(b), if it had stood alone, would have raised an *A & P*-type assessment situation. The question arose as to whether Section 7(2)(i) gave such powers to management as to make its decisions unreviewable. (See, *ibid.*, at 86) The Court of Appeal concluded that the Board had interpreted Section 7(2)(i) so as to provide for a standard of review of management's judgment, in that case a more limited one than would normally prevail in such a case (*ibid.*). The matter being arbitrable, the Court would only intervene where it could not view the Board's interpretation as being one which the language of the clause would reasonably bear (*ibid.*, at 87). It is a rare case which would have the peculiar juxtaposition of sections as occurred in the *Canadian*

ter case concerned an employer who made an unreasonable assessment of qualifications for lay-off. The court noted that this issue more commonly arises in disciplinary grievances; however, as noted above, this is precisely the kind of case where the reasonableness of a rule becomes in issue. The Court noted that if the grievor had been discharged or otherwise disciplined for disregard of the directive and had grieved on the ground of absence of "just cause," the reasonableness of the directive would have been in issue because breach of an unreasonable rule or directive cannot constitute "just cause."²⁵⁵ The Court's subsequent obiter statement that it did not regard the rule, nor the directive, as being unreasonable does not affect its earlier statements.

The Court stated that there is a right inherent in management "under its management prerogative to ask for particulars of an ailment, request a medical certificate or even require examination by a staff doctor."²⁵⁶ In light of the Court's position that the grievor could have proved her illness without much proof, but had failed to do so, I do not read the judgment as deciding that the grievor's failure to furnish medical proof, in any particular form, affected the result.

The Court concluded:

In summary, the arbitration board erred in law in misinterpreting the management rule and the directive, in holding them to be unreasonable and invalid, and in considering that this invalidity determined the grievance.²⁵⁷

Keyes case. It is difficult to believe that if Section 7(2)(b) was not in the agreement, and the Board arrived at the same result, that the Court of Appeal would have allowed the Board's interpretation to stand (*ibid.*, at 88).

The decision of the Nova Scotia Court of Appeal, in *Re N.S. Govt. Employees Assoc. and R. in Right of Nova Scotia* (1977), 84 D.L.R. (3d), at 42-43, affg. 24 N.S.R. (2d) 389, was seen by Palmer, *supra* note 8 at 593 as indicating that MacKeigan, C.J.N.S. had stated, in *obiter dicta* that arbitrators have jurisdiction "to review an employer's discretionary decision and that the standard applied should be a discretionary one." It should be noted, however, that the Court seized upon a provision in the collective agreement (art. 26.01) which permitted an employee to "take a grievance if he "feels he has been treated unjustly ... by any action or lack of action by the employer. MacKeigan, C.J.N.S. read the article as imposing a responsibility on management not to engage in any "'unjust' action" in exercising the management rights clauses. Therefore, there was a clause, in the Court's view, fettering the exercise of a discretionary right, unlike the situation in the *Metro Police* case.

Also see *Hydro-Electric Power Commission of Ontario* (1975), 8 L.A.C. (2d) 180 (Adams) and *C.N. Telecommunications* (1976), 11 L.A.C. (2d) 152 (*Rayner*) where a fettering of management's discretion required the presence of a "substantive provision [in] the agreement." See *N.S. Civil Service Commission* (1977), 14 L.A.C. (2d) 69 at 74.

²⁵⁵ *Supra*, note 245 at 304.

²⁵⁶ *Ibid.* at 304.

²⁵⁷ *Ibid.*

In so stating its conclusion, the Court was not deciding that there was no fairness requirement imposed on the Infirmary in carrying out its unfettered rights under the collective agreement. This is made clear from the final statement of the Court: "[The Board] then committed a primary error by allowing the grievance even though it had before it no evidence of illness for the crucial period except [the grievor's] assertion."²⁵⁸ This statement is of particular significance in light of its departure from the reasons of Mr. Justice Richard for quashing and setting aside the Award.

It is unfortunate that the Court did not limit its summary to the last quoted sentence. When one examines the entire judgment, it is apparent there is nothing in it which furnishes management with a right to promulgate rules in a way which is inconsistent with pre-*Metro Police* cases, where, at the very least, they would have to be made honestly. If they directly impacted on obligations imposed on management under the collective agreement, they would be subject to a more extensive obligation of fairness.

Court cases since *CPI* have found it to be compatible with *Metro Police*. In *Wardair Inc. and Canadian Air Line Flight Attendants and David M. Beatty*, an unreported decision of the Ontario Divisional Court (released January 14, 1988), Craig J., joined by Callaghan, A.C.J.H.C., while stating (at 8) that: "In [the *CPI* case] the Court of Appeal agreed with the application (by an arbitration board) of the theory of reasonable administrations and interpretations ...," stated:

In my opinion the arbitrator correctly concluded that the collective agreement could be construed according to an implied principle or term of reasonable contract administration and interpretation.²⁵⁹

In the *Wardair* case, Craig J. quoted²⁶⁰ further from the *CPI* case:

The submission to this court on behalf of the appellant is that the Divisional Court disposed of the application for judicial review on a basis that was not relevant to a proper determination of the problem before that court. The issue, it is submitted, which was now before the Divisional Court and now before this court, is whether the board placed an interpretation on art. 22, which it can reasonably bear. *It is argued that it is not a question of the exercise of management rights under art. 4 that is being questioned but rather of management's responsibilities under art. 22 in light of the whole collective agreement* (emphasis supplied).²⁶¹

258 *Ibid.*

259 Since reported at (1988), 63 O.R. (2d) 471 at 476-7.

260 at 8-9.

261 at 408.

This statement should be read along with that at 411 of the *CPI* case:

It can be seen that in determining the approach to the interpretations of art. 22, the majority of the board was of a view that the company's interpretation of its rights or obligations under that article seriously affected the seniority rights given by art. 6.

That is, there must be something in the agreement that expressly or by implication imposes one of the duties of fairness on management. In the *CPI* case it was to permanently classify employees "in a bona fide fashion."²⁶² The lengthy quotes from the award were largely irrelevant given the limited basis for restoring the award: "although many words were used."²⁶³

In *Wardair*, the issue was whether management had an unfettered right to impose a rule that a male flight attendant could not wear an earring while on duty, or whether, in the absence of a specific contract term governing the matter, it was open to the arbitrator to imply some element of fairness upon a reading of other provisions which might modify the management rights clause.

The key to sensibly distinguishing the *Metro Police* and *CPI* cases is as follows: In interpreting "management's responsibilities under art. 22," other relevant provisions of the collective agreement must be considered. The mere existence of s.22 alone would not give rise to a fairness obligation on management. In *Wardair*²⁶⁴ Craig, J. referred to three articles in the collective agreement which had to be read alongside the management rights provision. This led to the conclusion²⁶⁵ that the management had to consider the employee's interest along with its own. The conclusion of Craig, J. is linked to his treatment of the basis for the arbitrator claiming "jurisdiction on the principles of reasonable contract administration and interpretation."²⁶⁶ The arbitrator was held to have found the obligation of reasonableness from a reading of certain provisions of the collective agreement.

The *Metro Police* and *CPI* cases were also referred to in *Re Board of Governors of Fanshawe College and OPSEU*.²⁶⁷ There, the Court, per Van Camp, J., observed (at 547) that the *CPI* case "does not differ in principle" from *Metro Police*. It was noted (at 548) that in *CPI* it was not a management rights clause that was being reviewed.²⁶⁸ In the *Fanshawe* case, the arbitration board was found to have exceeded its juris-

²⁶² at 411.

²⁶³ *Ibid.*

²⁶⁴ at 473-4.

²⁶⁵ *Ibid.* at 474-5.

²⁶⁶ *Ibid.* at 475-6.

²⁶⁷ (1984), 44 O.R. (2d) 545 (Div. Ct.).

²⁶⁸ *Ibid.* at 547.

diction in finding that it could look "at the collective agreement as a whole to see if there could be an implied term that the management rights clause would be applied fairly and without discrimination" in the way in which retirement was carried out. The headnote states that the collective agreement provided for mandatory retirement. In fact the mandatory retirement policy which was contained in a unilaterally promulgated resolution of the board of governors of the college and, by statute, was incapable of being included in the collective agreement.²⁶⁹ The Court held that the board could only have looked at other provisions of the agreement if the subject of the dispute was "within the purview of the collective agreement."²⁷⁰

The New Brunswick Court of Appeal, in *Chippin Bros. v. United Food and Commercial Workers, Local 694*,²⁷¹ also saw no conflict between *CPI* and *Metro Police* because in *CPI* there were other relevant provisions of the collective agreement bearing on the subject of the grievance.²⁷² In *Chippin*, the provisions were those relating to seniority in a promotions case.²⁷³ LaForest, J.A. referred to the skill and ability provision:

The expressions "has" or "has indicated" the ability, etc. each appear to me to describe an objective situation, one, in other words, that calls for a reasonable interpretation. The employer under Article IV undoubtedly has the exclusive right to make the judgment whether an employee meets these criteria. If, having weighed the relevant evidence, the employer comes to an honest and reasonable decision (i.e. one that can be supported on the evidence), a board of arbitration may not interfere with it. But the employer has a duty to make a judgment whether an employee meets the criteria, and to make that judgment it must properly consider the relevant evidence.

I think that is all the majority of the Board in this case meant when it stated that the employer's decision must meet the tests of reasonableness and completeness. This is not really adding an implied term to the collective agreement, though that may be a convenient way of putting it. It is simply interpreting the words used by the parties in a reasonable manner. If the employer were permitted to make whatever judgment it wished without regard to relevant evidence, the criteria that an employee "has"

or "has indicated" that he possessed certain abilities, etc., would really be meaningless...²⁷⁴

This is similar to my position extrapolated from the *A & P* case. The *A & P* type test was used in *Meadow Park Nursing Home and*

269 *Ibid.* at 548-9.

270 *Ibid.* at 549.

271 (1985), 58 N.B.R. (2d) 398 (C.A.).

272 *Ibid.* at 402.

273 *Ibid.* at 402-3.

274 *Ibid.* at 403. Cf. *O.P.S.E.U. v Ontario* (1986), 15 O.A.C. 15 at 19-20.

SEIU, Local 220.²⁷⁵ This case involved a dispute over the application of a provision in the collective agreement relating to sick leave. The clause specifically gave the employer a discretion to withhold payment for the first two days of absence in the fourth and succeeding periods of leave due to sickness in each calendar year. The employer decided not to pay the grievor for her fourth absence as per the collective agreement. Its concern was that paying an employee when her absences far exceeded other employees was unfair. The issue for the arbitration board was whether the employer had properly exercised its discretion. It is important to note that the employer *conceded* that it had a duty to be fair and impartial in the exercise of its discretion but questioned what, under the circumstances, would be fair and impartial.

The arbitration board reviewed the extent of arbitral review of an expressly conferred discretion and noted that "the role of a court on an application for judicial review of an arbitration award is ... merely to decide whether the interpretation given to the collective agreement language is one which it can reasonably bear."²⁷⁶ In the board's opinion this principle was applied in *Metro Police*; i.e. "that arbitrators exceed their jurisdiction if they purport to establish general principles for the administration of collective agreements divorced from the language negotiated by the parties." The board rejected the interpretation given *Metro Police* by many commentators; i.e. that there can never be implied into a collective agreement a duty to exercise a management function fairly. Instead, it emphasized the significance of an individual consideration of the language negotiated by the parties and the implications that arise from that language.

Thus, having identified its approach, the board went on to consider the clause in question. The board concluded that the clause was intended to allow the employer to control absenteeism and continued: "We think it must have been intended to incorporate a number of the elements of the administrative law concept of discretion."²⁷⁷ The board went on to enumerate the aspects of the administrative law jurisprudence which it believed the parties intended to include:

The exercise of the employer's discretion must be in good faith, must be a genuine exercise of discretion and not merely the application of a rigid policy, and must include a

²⁷⁵ (1983), 9 L.A.C. (3d) 137 (Swan). Although couched in *A & P* terms, Mr. Swan chose to utilize the administrative law counterpart, which is similar though not identical. *Ibid.* at 141, and see *infra*, note 277. The danger of using administrative law precedent involving the exercise of discretion by a public official and importing it into labour arbitration, was pointed out in *Metro Police*. See *supra*, notes 72 and 73. It was, in any event, unnecessary to do so as the *A & P* test was available.

²⁷⁶ *Ibid.* at 139.

²⁷⁷ *Ibid.* at 142.

consideration of the merits of each individual case. All relevant factors must be considered, but no extraneous or irrelevant considerations may be taken into account. Finally, we think the parties must have intended that an exercise of discretion so unreasonable that no reasonable employer could ever have come to it would fall outside the meaning of art. 14:05.²⁷⁸

It is clear that Swan would have implied that elements of fairness into the clause in question and the board went on to conclude that the employer had not, in fact, exercised its discretion properly. In particular, it had failed to consider certain relevant evidence regarding the grievor's particular case and had therefore breached the collective agreement.

After studying the board's decision I remain somewhat at a loss as to where the elements of fairness (beyond good faith) it implied into the collective agreement were found. I find it difficult to believe that an employer would actually intend to bind itself that way simply by negotiating a clause "at the employer's discretion." In this regard the employer's concession that fairness and impartiality were required is particularly significant. One wonders whether the board would have gone so far as it did in the absence of this fact. Are the elements of fairness listed above unique to this particular agreement as the board would have us believe or are they in fact an articulated minimum standard which this board would find in every expressly negotiated discretion? One wonders whether this board in a *Metro Police* situation, would have been able to find in a broadly worded managements rights clause an intention to act fairly to some degree beyond *bona fides*. It can be seen primarily as a strong statement on the importance of an individualized approach to each collective agreement, the terms negotiated by the parties and the implications which can be derived therefrom.²⁷⁹

Where Swan and I differ is in his use of what is really an *A & P* test. It would be proper to review the factors considered by management to see if they bore on the question of *bona fides*. Was it a genuine exercise of discretion? I would also look at the reasonableness of the conclusion based on the factors reviewed, but only to see if there was evidence of *mala fides*. In the *Meadow Park* case, evidence of exercising discretion in an untrammelled and capricious manner²⁸⁰ would be evidence of a purported as opposed to a genuine use of the discretionary power.

Thus, while *Chippin*²⁸¹ and *Meadow Park* employ the same test (*A & P*) they do so in very different circumstances. In *Chippin*, there were

278 *Ibid.* at 143.

279 In *CPI* the Court of Appeal found the standard of fairness, as found by the board, no matter how many words were used, to be that of *bona fides*. See notes 262 and 263, *supra*.

280 *Meadow Park, supra*, note 275 at 142.

281 *Supra*, note 278.

certain factors to be considered by management: those relating to "ability." In *Meadow Park*, the factors were not set out in the agreement. The decision was left to the "discretion" of management. There, was, however, a reading of the discretionary article in the context of other articles ("a sick-leave scheme") which caused the arbitrator to find an *A & P* review appropriate.²⁸²

The nature of the ongoing tensions between unions and employers is such that they will not often acknowledge that a middle ground exists in the fairness debate. *Metro Police* and *CPI* have done little to change the positions of the antagonists. Management seems only comfortable with an expanded interpretation of *Metro Police* and unions continue to argue for an expanded interpretation of *CPI*.

An arbitration case which places the matter in perspective is *Re Atlantic Pacific Co. of Canada Ltd. and Bakery Confectionery and Tobacco Workers Int'l. Union, Local 264*.²⁸³ The grievance involved the payment of sick-leave benefits as per the collective agreement to an employee who was apparently injured while fighting. The collective agreement stated that benefits were payable subject to approval by management and the board interpreted this clause as granting management a discretionary power over the payment of sick benefits. Again, the emphasis was on a proper interpretation of the agreement and in particular whether the parties intended that certain limits would be placed on management's discretion.

The board cited the decision in *Toronto East General Hospital and Service Employees Union, Local 204*²⁸⁴ as a correct reconciliation of the apparent conflict between *Metro Police* and *CPI*. The board, in that case noted that *CPI* was resolved in terms of interpretation, while *Metro Police* dealt with the importation of a general requirement not referenced to in the language of the collective agreement. The *A & P2* board was unwilling to countenance that the parties might have intended that sick benefits "could be refused on the whim of management or that the plan itself could be operated in an arbitrary or discriminatory fashion."²⁸⁵ There is some evidence of this intent in an Appendix to the agreement which listed particular exceptions and limitations to the sick-leave plan. The board reasoned that this plan indicated what the purpose of the plan was and that management's decision was to be exercised primarily to prevent abuses. In fact the board adopted a fairly minimum standard for exercise of discretion in finding that management had exercised its discretion improperly.

282 *Meadow Park*, *supra*, note 275 at 142.

283 (1985), 18 L.A.C. (3d) 44 (Burkett) ("*A&P2*").

284 (1984), 13 L.A.C. (3d) 400 (Burkett).

285 *Supra*, note 283 at 50.

My difference with such cases as *Meadow Park, Toronto East General Hospital* and *A & P2*, is not with their general proposition that *Metro Police* had not "laid down an edict preventing [arbitrators] from implying limits on the exercise of managerial discretion into the collective agreement where the law of implied terms in contracts, as adopted to collective agreements, gives rise to such an implication."²⁸⁶ It is when those cases incorporate as law the position in the *INCO* case²⁸⁷ (and by inference the *Marsh*²⁸⁸ case) that we part company. It leads to the pronouncement of a general principle of fairness without the need for some finding based on a reading of the agreement as a whole. Such a view is incorrect and the error is based on a misreading of *Metro Police* and *CPI*, especially the former. The Court of Appeal in *Metro Police* did not say that arbitrators could not imply some fairness obligation in the case of a managerial rights clause by reading the agreement as a whole. It only said that on the facts of that case there was no "necessity" to do so.²⁸⁹ It is a short step to interpreting *CPI* as being limited to clauses other than the management rights clause.²⁹⁰ Therefore, it is unfair to blame *Metro Police* and *CPI* for failing to see that: "The distinction between discretion exercised pursuant to a managerial rights clause and discretion granted by some other clause in the collective agreement is spurious."²⁹¹ *Metro-Police* left it open to arbitrators to find such an implication in the case of a management rights clause in a proper case, but not on the facts of that case.²⁹² It is also wrong to conclude that even in such cases involving discretion (e.g. *Metro-Police*) that good faith does not apply.²⁹³ Reasonableness may also apply in the latter case in the limited sense that a sufficiently unreasonable conclusion could furnish evidence of bad faith. Nevertheless, the *CPI* and *Metro Police* cases continue to be seen as confusing.²⁹⁴ Beatty²⁹⁵ views *Metro Police* and *CPI* to be completely contradictory. He saw *Metro Police* as always mandating that "the power to challenge a decision of management in a broad management rights clause must be

286 MacNeil, "Recent Developments in Canadian Law" (1986), 18 *Ottawa L.Rev.* 83 at 113.

287 *Supra*, note 57.

288 *Supra*, note 47.

289 *Metro Police* at 479. This error is repeated in MacNeil, *supra*, note 289 at 110.

290 *Ibid.* at 113.

291 *Ibid.*

292 At 141.

293 As claimed in MacNeil, *supra*, note 289 at 113.

294 *Children's Hospital of Eastern Ontario and O.N.A.* (1980), 30 *L.A.C.* (3d) 238 (Adell), where reference was made to MacNeil, *supra*, note 286.

295 *Supra*, note 191 at 136-7.

found in some express provisions of the agreement.²⁹⁶ That is not what the Court said. It limited its finding to the specific facts of that case.

Beatty's view of *CPI* is "that obligations implied by the arbitrator on management's otherwise unfettered authority to classify as permanent a specified member of its temporary work-force was one which the language of the agreement could reasonably bear." In his opinion, the power to challenge a decision of management could be found beyond the express provisions of a collective agreement.²⁹⁷ That is a general duty of fairness. The Court in *CPI* only held that the arbitration board had interpreted art. 22 in the light of art. 6, dealing with seniority rights, and that art. 6 raised an implication that "although many words were used," the mandatory obligation under art. 22 to permanently classify "must be done in a bona fide fashion."²⁹⁸

The difference between arbitrators is essentially philosophical. Beatty represents the second philosophy which I discussed earlier.²⁹⁹ Beatty views *Metro Police* as being a statement of the first philosophy (classic reserved rights) and *CPI* as consistent with *INCO* and *Marsh* and the "common law of the plant" philosophy. I see both cases as being in-between the extremes of both schools and as furnishing a basis for a pragmatic development of the fairness obligation.

Beatty argues for a politically imposed solution. It is a philosophical statement in favour of the joint sovereignty theory of labour relations. In the second part of his paper,³⁰⁰ Beatty argues that the arbitral process is not suitable as a supervisory tool over management discretion. He rejects the argument that arbitrators will become managers and policy makers by pointing out that arbitrators' solutions to problems must, of necessity, lie within an expanded interpretation of the collective agreement. In the concluding part of his paper,³⁰¹ Beatty suggests that perhaps the only way to ensure a minimum arbitral principle of fairness is to legislate it. He argues that legislation would ensure a standard of justice in employment situations and avoid the "idiosyncracies of individual arbitral approaches to the management rights problem."³⁰²

296 *Ibid.* at 136.

297 *Ibid.*

298 *CPI* case at 411 (O.R.).

299 See note 24, *supra*.

300 *Supra*, note 191, "Arbitration is a process of social ordering," at 160-166.

301 *Ibid.* at 166-169.

302 *Ibid.* at 168-9. Cf. B. Langille "Equal Partnership in Canadian Labour Law", (1983), 21 O.H.L.J. 496, which argues for statutory correction of the rules dealing with the duty to bargain in good faith imposed in Canadian Labour legislation. Langille attacks the problem of "reserved rights" at what he views to be the critical point: the defining of what issues are bargainable. He submits that if all issues are made the subject of

Viewing the development of arbitral jurisprudence over thirty years in the field I can sympathize with many of Beatty's concerns. Because I view the cases on fairness in a way which differs from Beatty, I do not see the need for statutory intervention. As I view the cases, and the developing jurisprudence, arbitrators have found an ample basis for creating a jurisprudence of fairness, which will, given the realities of life, work well enough. The search for a more perfect politically imposed solution is unnecessary. In the current state of the law it is possible to argue that even a discretion given management to exercise a right under a management rights clause could, on the right facts, be affected by an article in the agreement. *Metro Police* does not foreclose such an approach. It did so on the special facts of that case.

The most recent case that I have found dealing with *Metro Police* is *Re: Municipality of Metropolitan Toronto and Canadian Union of Public Employees et al*³⁰³ As this case and the *Wardair case*³⁰⁴ are now being appealed to the Court of Appeal, further material may be expected to rekindle the "fairness" debate. As the facts are stated in the report of the *Metro Toronto* case, I find nothing to alter my views on the nature and extent of the "fairness" doctrine as enunciated in *Metro Police and C.P.I*

In *Metro Toronto*, the grievances related to a memorandum issued by the employer mandating the use of emergency lights on its ambulances³⁰⁵ This represented a change in the procedure, as prior to the memorandum being issued the use of the lights on the employer's ambulances was discretionary in the case of "non-life threatening" emergency calls.³⁰⁶ The employee grievances related to the memorandum itself and not to any alleged specific infractions resulting in discipline as a result of failure to obey the directive.³⁰⁷

The employer's position was that the right to issue the directive was entirely within management's rights and relied on the manage-

mandatory bargaining, this will create a level bargaining field more likely to promote the equal partnership which Langille (and Beatty) both favour and regard as having been incorrectly undermined by courts and labour boards. The issue of contracting out is a specific example of a subject where the (participants in the labour relations system have sought to inject a viewpoint which is fundamentally at odds with our legislation's starting point". (at 534).

303 (1988), 62 O.R. (2d) 636.

304 See notes 259-265 *supra*.

305 *Metro Toronto, Supra*, note 303 at 638.

306 *Ibid.*.

307 *Ibid.*

ment rights clause.³⁰⁸ The provision relied upon was Art. 3.01 (iii) of the agreement:

generally to manage the operation and undertakings of the Metropolitan Corporation and without restricting the generality of the foregoing to select, install and require the operation of any equipment, plant and machinery which the Metropolitan Corporation in its uncontrolled discretion deems necessary for the efficient and economical carrying out of the operations and undertakings of the Metropolitan Corporation.³⁰⁹

The union position, agreed with by the arbitration board, was that there was jurisdiction to adjudicate the grievance because the directive was inconsistent with the "reasonable cause" reference in Art. 3.01 (ii):

hire, discharge, direct, classify, transfer, promote, demote and suspend or otherwise discipline any employee coming within the 43 Unit provided that a claim for discriminatory promotion, demotion or transfer or a claim that an employee has been discharged or disciplined without reasonable cause, may be the subject of a grievance and dealt with as hereinafter provided.³¹⁰

That is, an employee who violated the directive would be subject to discipline. Therefore, the matter was grievable on the principle of "work now grieve later".³¹¹ In addition, the union submitted that the change was made without consultation and that it was "counter-productive, unreasonable and unsafe".³¹² The board found jurisdiction because the directive was, in its view, inconsistent with the "reasonable cause" reference in Art. 3.01 (ii) of the agreement.³¹³ The board went on to state:

It boils down to this. Management cannot use its powers under the management rights clause to issue directives, rules, or orders which undermine the reasonable cause provision [and:] "All that it [sic] is being said here is that what is controlled is the power to issue orders or directives to employees and then discipline for non-compliance. Management powers to do anything else are on this view unimpaired." (emphasis in original)³¹⁴

The board found that it had jurisdiction to hear the case, "in order to maintain the integrity of the 'work now grieve later' rule,³¹⁵ and

308 *Ibid.*

309 *Ibid.* at 637.

310 *Ibid.* at 638.

311 *Ibid.*

312 *Ibid.*

313 *Ibid.*

314 *Ibid.* at 638.

315 *Ibid.* at 639.

went onto say: "Thus we can and should simply treat this case by assuming the grievors have been disciplined for refusing to obey the directive. Does the employer have, as required, just cause for such discipline?...."³¹⁶ The board focused on the question: "Has any act meriting discipline occurred?"³¹⁷

In deciding in the negative, the board, while finding the employer had acted in good faith, felt that there was "no valid reason for Employer interests for the implementation of this rule..." and that there were "clear and compelling reasons for questioning the adoption of this rule because of its impact upon employees and members of the public".³¹⁸ The board, therefore, found that discipline imposed for breach of the rule would not be for "reasonable" cause.³¹⁹

The Court, in allowing the application, held that Art. 3.01 (ii) only dealt with grievances where an employee had been disciplined without reasonable cause.³²⁰ The board was found to have amended the agreement by changing the employer's exclusive function to make rules to a right to make reasonable rules.³²¹

The Court did not view the directive as necessarily leading to discipline. It did not say that it might not do so. It merely said it "may not" lead to discipline. It acknowledged only that no employee had been disciplined for breach of the directive to the time of the grievance.³²² In context "may" meant "might" rather than "cannot". On this view of Art. 3.01 (ii), the Court held that the latter article only applied when "actual discipline had been meted, "in which case the matter could then be grieved on the facts relevant to the actual occurrence" and where discipline has been imposed a grievance would succeed where it was not for "reasonable cause".³²³

The limited view taken by the Court (following *Metro Police*) was whether there was the "necessity in this case to imply a term that the management rights clause would be applied fairly and without discrimination".³²⁴ The Court did not say that on other facts an implication might not be drawn.

316 *Ibid.*

317 *Ibid.*

318 *Ibid.*

319 *Ibid.*

320 *Ibid.*

321 *Ibid.*

322 *Ibid.*

323 *Ibid.*

324 *Ibid.* at 640.

Referring to *Re; the Queen in right of Ontario and O.P.S.E.U.*, the Court regarded the directive as non-arbitrable as not being "disciplinary in substance".³²⁵

On appeal, the directive may be regarded as more than a communication between the grievors and the employer. From the grievors' perspective the employer was seen to have indicated that the directive was to be deviated from at an employee's [ero;/ An employee would be foolhardy to disobey it and then grieve, arguing that a breach might not lead to discipline.

If the Court's directions are to be followed, an employee would have to disobey the directive and be disciplined to test the reasonableness of the rule. If this is the Court's meaning, it would be unfortunate but it would not detract from my interpreting of *Metro Police and C.P.I.* The correctness of the conclusion in *Metro Toronto* case is dependent on a finding that *Art. 3.01 (ii)* is inapplicable because present discipline was not a factor.³²⁶ If it is subsequently held that it is, it would be as a result of an implication arising out of a reading of the entire management rights clause: To treat the matter as being inarbitrable would undermine the purpose of *Art. 3.01 (ii)*, "to maintain the integrity of the 'work now grieve later' rule" which is integral to that article. In a narrow sense the Court is correct: "a breach of the directive may not lead to discipline".³²⁷ On the other hand, it might. Such a narrow view could lead to the peculiar scenario outlined above.

In *C.P.I.*, management, in filling certain positions, had an obligation to be fair in some sense of that term.³²⁸ This duty was implied to maintain the integrity of the seniority provision.³²⁹ In *Metro Police*, no implication was found in the agreement of affect management rights.³³⁰ This was so on the language of that agreement. On other facts, such an implication might be made. In *Metro Toronto*, the Divisional Court viewed the agreement before it as substantially the same as the one in *Metro Police*, hence no implied term involving some element of fairness could be implied.³³¹

In *Metro Toronto*, the board can be seen to have treated what appears to be either a group grievance or a number of individual employee grievances as a policy grievance: "assuming the grievors to have

325 (1986), 57 O.R. (2d) 404 at 409.

326 *Metro Toronto* at 640.

327 *Ibid.*

328 See *Supra.*

329 *Ibid.*

330 See *Supra.*

331 *Supra*, note 303 at 640.

been disciplined for refusing to obey the directive".³³² The provision for policy grievances permits the resolution of differences between the parties without the need to test the meaning by engaging in some disputed conduct. One of the purposes of policy grievances is to obtain declaratory relief. The statement of the Laskin, J.A., as he then was, in *Hoogendorn* is enlightening:

"...the virtue of a policy grievance is that it is an extension of the administration of the bargain by the parties who concluded it, and the award therein becomes, in effect, a clarifying term of the agreement...."³³³

The employer in *Metro Toronto* does not appear to have objected to the board's jurisdiction on the basis that a policy grievance was inapplicable but on the grounds that it had unfettered discretion to promulgate rules relating to the operation of its undertaking.³³⁴ If the grievances could be treated as a policy grievance seeking declaratory relief, certain necessary factual assumptions could be made: that an employee had breached the rule and had then been disciplined.³³⁵ The issue would be: If the directive was not followed, can the employer impose discipline? Then the rule could be examined to see if the rule was reasonable.³³⁶ I.e.: Could it support the imposition of discipline for reasonable (just) cause? Certainly, this would prove salutary to the resolution of a real difference between the parties as to the interpretation of the collective agreement.

³³² *Ibid.* at 639.

³³³ [1967] 1 O.R. 712; 62 D.L.R. (2d) 167 at 179-180 (C.A.), later reversed on different grounds, [1968] S.C.R. 30; 65 D.L.R. (2d) 641.

³³⁴ *Metro Toronto case*, at 638. This was similar to what had occurred in the *Wardair* case, referred to *supra*, note 259. There, it was the position of the employer that the arbitrator (Prof. Beatty) had exceeded his jurisdiction, *inter alia*, "because the collective agreement expressly provided (as part of management rights clause) that Wardair had the right to require employees to observe company rules and regulations not inconsistent with the terms of the collective agreement...." (*Wardair* at 474, per Craig, J.). At 475 of the *Wardair case* Craig, J. saw nothing wrong with treating the matter as the arbitrator had done in *Metro Toronto*; "In my opinion, the arbitrator did not err in applying this rule in the same way as though discipline had been administered to the grievor for insubordination...." That is, the treatment of the case was similar to its having raised a policy grievance: Can a breach of the directive give rise to any form of discipline? To decide this issue, the question of the reasonableness of the directive would have to be answered.

³³⁵ As to the legitimacy of a reviewing court treating an individual grievance as a policy grievance, see generally Gorsky, *Evidence and Procedure in Canadian Labour Arbitration* (De Boo:1981) at 15-23.

³³⁶ See *K.V.P. CO. Ltd.* (1965), 16 L.A.C. 73 (Robinson), at 86.

In any event, the judgment of the Divisional Court in *Metro Toronto* does not undermine my interpretation of *C.P.I.* or *Metro Police*.

VII. CONCLUSIONS

1. *METRO POLICE* DEMONSTRATES the continuing recognition by the Ontario courts of a philosophy of collective agreement interpretation more consistent with a positivist, transactional view of collective bargaining, than with the alternative philosophy, which stresses the relational nature of parties engaged in collective bargaining (and of the contract itself), as well as the statutory, deontological, historical and sociological basis for this view. It is, however, by no means a restatement of a strict reserved rights theory.

2. *Metro Police* contains a requirement of fairness (good faith, including a requirement that the discretion not be exercised fraudulently) which is imposed on management in the exercise of its discretionary rights under the agreement. Where the exercise of management discretion is so unreasonable as to belie good faith, the extent of management's discriminatory and/or arbitrary conduct may become an issue.

3. Those cases where obligations have been imposed on management in the administration of the collective agreement (promotion, discipline, lay-off) and where fairness obligations, beyond acting in good faith, have been implied, have not been affected by *Metro Police*. Even in the case where the discretion is in the exercise of a right under a management rights article, it is still possible for an implication to arise from some additional form of fairness being required of management.

4. It will now be necessary to pay more attention to the development of a jurisprudence of fairness, with greater emphasis being given to the various meanings of fairness in different settings.

5. Court cases since *Metro Police*, such as *CPI*, can be seen to support the above conclusions.

6. Arbitration imitates life. Life is often unfair.