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BELL CANADA AND THE OLDER WORKER: WHO WILL REVIEW THE JUDGES?

By GEORGE W. ADAMS*

"They were trying to get rid of some of the old boys, and I just got caught in that. Anyway, I'm keeping busy now."¹

This was Mr. L. V. Garvin's reaction to the recent decision of the Supreme Court of Canada quashing a labour arbitration award and thereby upholding *Bell Canada's* right to retire him compulsorily.² But what will happen to Mr. Garvin now? Or at least, what may happen to persons of his age when other companies use this right? He was 61 years old when retired, having worked for Bell Canada for almost 36 years. No one had suggested that he was too old or physically unable to carry on his work. Rather, he was deprived of his job because in 1917 the company unilaterally instituted a pension plan. The company was to make all the payments into the plan provided that all male employees who reached the age of 60 and who had worked 20 years or more for Bell "may, at the discretion of the Committee, be retired from active service and shall thereupon become entitled to and shall be granted pensions, which pensions are designated as 'service pensions'." It is important to note that the pension plan had not been negotiated with the union that was later certified as the exclusive bargaining agent of Bell's employees, and for that reason the plan was not part of the collective agreement. Accordingly, it remained a plan both unilaterally introduced and unilaterally maintained by the company. Now retired, how will Garvin provide for himself and family? What kinds of employment opportunities are open to him should he want to re-enter the work force? How long can one keep busy, remaining satisfied with the residual role assigned to the retired worker in today's society? In answering these questions, a brief outline of the socio-economic and psychological plight of the retired worker, and more generally the aged, will serve to emphasize both the importance of the issue before the Supreme Court of Canada and the questionable merits of this so-called legal right to retire a worker without his consent.

There are some 800,000 people in Ontario alone who are 65 years of age or older, and approximately 1.8 million throughout Canada.³ Moreover, this

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¹ *Toronto Star*, July 11, 1973.

Bell Canada v. Office and Professional Employees' Inter'l Union, Loc. 131 (1973), 73 C.L.L.C. para. 14, 170, 37 D.L.R. (3d) 561; [1972] 2 O.R. 595, 26 D.L.R. (3d) 263 (C.A.).

² The award, *Bell Canada and Office and Professional Employees' Inter'l Union, Loc. 131* (May 14, 1971 — Prof. P. Weiler) has gone unreported. However, it can be found in the new edition of *Labour Relations Law: Cases, Materials, and Commentary* compiled by the Labour Relations Casebook Group (1974).

³ *Target for Senior Citizens*, Task Force on Senior Citizens, sponsored by the Ontario Federation of Labour (1973), at 1 and 14.

age category is increasing at the rate of 100 people per day.⁴ It is reported that more than 90% of these people are not physically or mentally incapacitated to the extent that they must be taken into care.⁵

In 1961, 54% of this age category had gross annual money incomes of less than \$1,000.⁶ More specifically, 570,000 unattached persons in this category had a medium income of \$829. Of these 570,000 people, 40% lived with married children, and the remainder, some 267,000 people, lived alone. Statistics compiled by the Federal Department of Health and Welfare up to March 1973 indicate that of 1,808,233 pensioners in Canada, 1,045,467 received a Guaranteed Income Supplement, a program instituted in 1967 to replace the former old age assistance scheme, and intended to bring pensioners close to the poverty line.⁷

Of course, Garvin may be better off than many of these people because he is party to the Bell's pension scheme. But with today's ravaging inflation, few pension plans will provide retired workers with an adequate post retirement income. More importantly, there is no law in Canada requiring companies to provide pension schemes no matter how inadequate, and in 1972 only 40% of the Canadian work force was covered by private plans.⁸ As a consequence of this economic setting in modern society, 'old and poor' has become almost a tautology.⁹

It was this kind of economic reality facing the retired worker that led the Special Committee of the Senate on Aging in 1966 to conclude:

To sum up, the Committee, while recognizing and regretting the gaps and differences in existing knowledge about the income status of older people, is fully persuaded on the basis of the evidence presented to it and its own analysis of available data, that

⁴ *The Globe and Mail*, Nov. 10, 1973. Everywhere one finds the same causes — a lowering of both the morality and birth rates. See S. de Beauvoir, *The Coming of Age* (New York: Putnam, 1972) at 330. See also, Spengler, "Aging Population: Mechanics, Historical Emergence, Impact" in J. Kreps, ed., *Employment, Income, and Retirement Problems of the Aged*, (Duke University Press, 1963) at 23.

⁵ *The Final Report of the Special Committee of the Senate on Aging* (1966) at 1.

⁶ *Id.* at 10.

⁷ D. J. Baum, *The Final Plateau* (to be published in 1974 by Burns and MacEachern, Toronto) c. 1. Admittedly, the federal government has taken a number of important steps in the area of the Canada Pension Plan by increasing the benefit levels and incorporating some form of cost of living index. But all of these payments are far from adequate.

⁸ *Id.* c. 1. Moreover, even this 40% figure is misleading. A host of problems centring on the accumulation of "credits" and inadequate vesting seriously undermine the quality of this coverage. See *Work in America*, (Report of a Special Task Force to the Secretary of Health, Education and Welfare, 1973) at 73.

⁹ See De Beauvoir, *supra*, note 4 at 410. See also, Ostry and Podoluk, *The Economic Status of the Aging* (Ottawa, Queen's Printer, 1966); Podoluk, *3 Income Characteristics of the Older Population: Submission to the Senate Committee on Aging* (Proceedings of the Special Committee of the Senate on Aging, 1966), at 1205; *Report of the Special Senate Committee on Poverty in Canada* (Ottawa, Queen's Printer, 1971); Adams, Cameron, Hill, Penz, *The Real Poverty Report* (Edmonton: M. G. Hurtig, 1971); Batchelder, *The Economics of Poverty* (New York: Wiley, 1966); Harp and Hofley, ed., *Poverty in Canada* (Scarborough, Ontario: Prentice-Hall of Canada, 1971); Harrington, *The Other America* (New York: MacMillan, 1962); W. Mann, ed., *Poverty and Social Policy in Canada* (Vancouver: Copp, Clark, 1970).

the economic problems of the aging population continue to present a serious challenge. Everything we learned confirms the view, expressed at the outset — that older people and more especially those denied the support of a family — are a low income group, both absolutely and by comparison with younger adults. Not only so, but older people, unlike younger adults, have little prospect of improving their condition through their own efforts. Only about one in six of them (one in four of the men) is in the labour force and even this low rate of participation is definitely falling. Older people, therefore, are not able to benefit from the gains resulting from increased industrial productivity, while at the same time their meager incomes are subject to erosion as the cost of living rises.¹⁰

But most importantly, this economic plight of older people may be, to a very large extent, the result of both misguided bias and empirically unfounded intuition about the capabilities of the older worker in the Canadian industrial relations system.¹¹ This, too, was aptly summarized by the Committee on Aging when they wrote:

While in some instances the reluctance to take on older workers may be well-founded, the National Employment Service is convinced that much of it is due to the general tendency in our society, with its accent on youth, to underestimate the capabilities of people beyond middle life. Such attitudes, unfortunately, persist in spite of numerous studies which clearly show the relative advantage older workers have over younger workers for the considerable variety of work, and in respect of a number of characteristics like reliability, judgments and a low rate of absenteeism. Hiring and retiring practices, often related to pension plans, which discriminate against older workers are part of this general practice.¹²

Chronological age is not necessarily a good indication of an individual's ability to perform a given task. Numerous studies have been made to determine the productive abilities and capacities of older workers, and one of the most important results is the demonstration that many older workers can and do exceed the output of younger workers.¹³ Even with a decline in certain physical attributes as a worker grows older, this person is able to maintain an efficient level of production. For example, despite a deterioration in one's lifting ability, few modern industrial jobs require an individual to perform at his maximum physical capacity. Most modern-day plants are equipped with machinery designed to lessen the arduous, physical burden of the worker. Furthermore, decline in dexterity and agility may be compensated for by the skill and know-how of experience. This is so not only in the specific job but also in the general job situation which requires coping with special contingencies and working

¹⁰ *Final Report of the Special Committee of the Senate on Aging* (Ottawa, Queen's Printer, 1966) at 15.

¹¹ De Beauvoir, *supra*, note 4 at 42 and 346, has suggested that this has been a deliberate social choice. See also, Orbach and Tibbitts, *Aging and the Economy* (Ann Arbor, Mich.: University of Michigan Press, 1963); M. Derber, ed., *The Aged and Society*, (Industrial Relations Research Assoc., 1950); Streib and Schneider, *Retirement in American Society* (Ithaca: Cornell University Press, 1971); Busse and Pfeiffer, ed., *Aging and Society* (Russell Sage Foundation, 1968).

¹² See, *supra*, note 10 at 23.

¹³ *Daily Labor Report*, 1-7-74, Bureau of Nat'l Affairs, at A-6. See, as well, L. Greenberg, *Productivity of Older Workers*, (The Gerontologist 38-41, 1961); R. Droege, *Effects and Aptitude-Score Adjustments by Age Curves on Prediction of Job Performance* (1967), 51 *J. of Applied Psychology*, at 181-186; Laufer and Fowler, Jr. *Work Potential of the Aging* (1971), 34 *Personnel Administration*, at 20-25; H. Sheppard *Toward an Industrial Gerontology* (Cambridge, Mass.: Schenkman Pub., 1970); de Beauvoir, *supra*, note 4 at 341-343.

with other people. Moreover, while younger people may be physically stronger than someone of greater age, it may also be that younger people are more likely to present discipline problems to management and to be subject to a greater degree of absenteeism from work. Each of these characteristics have an adverse impact on an individual's productivity. In fact, some firms have begun to experiment in the utilization of older workers already. For example, the Philips firm in Holland has set up a workshop of part-time jobs for retired employees. These 250 pensioners averaging 70 years of age, work three hour shifts and their work has meant a \$75,000 net profit to the company.¹⁴

Finally, with very minor changes, jobs can be redesigned and thereby add literally years to an employee's work life. Might not a chair or stool be fashioned for a work bench, giving an older worker an opportunity of performing some of the work from a seated position? Surely many jobs are susceptible to a similar redesign at a very small cost. Unfortunately today, as in the past, older workers are stereotyped by the assumptions that they are less productive, they cannot easily be retrained, or that they are inflexible. These generalities are applied to the older worker as a class without a real evaluation of the background, experience and capabilities of the worker as an individual. Even present day public policy evidences this invidious discrimination.¹⁵

The vicious circle is therefore clearly apparent. These unfounded societal biases place older persons on inadequate fixed incomes within a society experiencing ravaging inflation and accelerating productivity. This in turn forces them to give up many of the comforts of modern-day life at a very inopportune time, and to make soul-destroying claims upon relatives. Furthermore, for many older people, the loss of identity associated with compulsory retirement may present a stark social reality. This may be so if one's life revolves about one's job, a revolution that suddenly and unnaturally stops at age 66. The consequence is described by one informed observer in the following way:

In short, the retired older man and his wife are imprisoned in a roleless role. They have no vital function to perform . . . This roleless role is thrust upon the older person at retirement and to a greater or lesser degree he has accepted it and become resigned to it.¹⁶

As a consequence of all of these factors, it is evident that an enlightened policy objective for a modern industrial society should be the *retention* of older workers in the work force and not their enforced attrition. In this regard, retraining programmes, the redesign of job functions and flexible retirement policies should become the norms of the Canadian industrial relations system,

¹⁴ *The Older Worker in Today's Economy and Community: Report of Proceedings of 1st Seminar on Age Discrimination, and Age Discrimination Act of Ontario*, as sponsored by The Ontario Human Rights Commission, Age Discrimination Division, June 4, 1970.

¹⁵ Witness, for example, the legislation that has been enacted to combat age discrimination. It does not apply to discrimination directed at people over the age of 65. The Ontario Human Rights Code, R.S.O. 1970, c. 318, s. 19. See also, *Work in America*, *supra*, note 8 at 69-70.

¹⁶ E. Burgess, ed., *Aging in Western Societies* (Chicago: University of Chicago Press, 1960) at 20. See also, *Work in America*, *Id.* at 70. But see Streib and Schneider, *Retirement in American Society*, *supra*, note 11 at 164.

as opposed to being present-day exceptions.¹⁷ Retirement is not a neutral event in our lives. While we are told that retirement is the time of freedom and leisure, the foregoing socio-economic realities suggest otherwise. And surely it was these realities that caused Simone de Beauvoir to lament:

Society inflicts so wretched a standard of living upon the vast majority of old people that it is almost tautological to say 'old and poor': again, most exceedingly poor people are old. Leisure does not open up new possibilities for the retired man; just when he is at last set free from compulsion and restraint, the means of making use of his library are taken from him. He is condemned to stagnate in boredom and loneliness, a mere throw-out.¹⁸

With this brief, and possibly too one-sided, sketch of the context in which a retired person must live, let us now assess the legal merits of *Bell Canada* by first *developing* a logical intuitive response to Bell Canada's claims that: i) it can compulsorily retire its employees, and that ii) the arbitrator was wrong in holding that such a termination must be reviewed under Article 8—the provision requiring just cause in order to terminate an employee. To begin with, termination of employment presents a worker with the same socio-economic outcome whether his termination is called "a retirement" or "a discharge." Therefore, one would expect that clear and specific wording in a collective agreement would be required before an employer could impose termination upon a worker without cause and without his consent. Stated another way, one would expect that the "right" to retire was a right of the employee to leave the work force if and when that person deems it economically and psychologically feasible. As I will later argue, a management right to retire a worker without his consent is not a very logical legal proposition. But this is not to say that should an older worker be unfit to perform in his job an employer would be unable to terminate him. Inability to perform one's job function is certainly just cause for discharge, and on exercising *this* management right to discharge for just cause, any pension rights that the employee might have could then be activated. Therefore, our intuition leads us to conclude that there is no inherent management right to retire a worker without his consent or the consent of his agent.

Now, for Bell's second claim—that the arbitrator was wrong and the courts should intervene. If this kind of claim is freely embraced by courts of law, the "final and binding" qualities of grievance labour arbitration will be irrevocably undermined. Furthermore, one would expect a labour arbitrator, because of his specialized experience in such matters, to be more expert than a court in applying the "law of the collective agreement". This fact, coupled with the time and expense endemic to judicial review, should buttress our presumption against uninhibited judicial intervention.

Unfortunately, the Supreme Court of Canada shares in neither of these

¹⁷ See, *supra*, note 12 at 8 and 95.

¹⁸ De Beauvoir, *supra*, note 13 at 15. The emphasis on novelty existing as it does with a rapid introduction of social change, has created a society based upon, what Alvin Toffler calls, a "throw-away" culture. A. Toffler, *Future Shock* (New York: Random House, 1970). The aged are our "throw-aways". See also, *Work in America*, *supra*, note 16 at 67. This quality of our modern culture is brilliantly detailed by P. Slater, *The Pursuit of Loneliness* (Boston: Beacon Press, 1970).

intuitions, for in the very sparsely worded and sparsely reasoned majority judgment of *Bell Canada*, Judson J. decreed:

Article 8 of the collective agreement reading "The Company may dismiss or suspend an employee" cannot possibly be read as "dismiss, or suspend, or retire on pension." Until the words "retire on pension" appear in Article 8 of the collective agreement, there can be no basis for the arbitrator's decision. Dismissal, suspension and retirement on pension are three different and distinct concepts. The result is that the arbitrator exceeded his powers.¹⁹

How the Court came to ignore: i) the plight of the older worker; ii) its role in supervising labour arbitration boards; and iii) the law of the collective agreement, is a disheartening story but a story that cannot go unreviewed. And were it not for the brilliant dissenting opinion written by Mr. Justice Laskin, now the Chief Justice of the Court, the tale would be very grim indeed.

I have argued elsewhere that most instances of judicial intervention into the Canadian industrial relations system have been uninformed and disastrously harmful, and the *Bell Canada* decision is no exception.²⁰ While it seems so futile to restate the values of grievance arbitration and the undermining effect of an unrestrained judicial intervention, the *Bell Canada* decision with its implications for older workers and grievance arbitration cannot be overlooked. On May 15, 1971, the arbitrator ruled that compulsory retirement was *prima facie* a "dismissal" and subject to Article 8 of the agreement. This ruling was upheld by the Ontario High Court and the Ontario Court of Appeal.²¹ Then, in May 1973, some two years later, the Supreme Court of Canada quashed the award in the summary fashion that it did. The time, expense, and harmful legal result generated by this kind of judicial review is obvious to all—grievance arbitration evolved to avoid just such costs. Of course, there are those who argue that if an arbitrator has usurped authority, he should be stripped of such pretense. If this process is costly, it is no more so than the costs sustained by the party burdened by a wrong decision. And this kind of argument has particular appeal when an arbitrator's award suffers from bias or fraud, for no one would argue that such an award should stand.²²

¹⁹ While at first glance the decision merely places the onus of bargaining voluntary retirements upon the union, the political realities of a trade union suggest the decision is much more determinative. A trade union must accommodate the demands of many interests of which the younger worker and the older worker is only one conflicting set. If older workers stay on, younger workers are denied jobs and promotions. Furthermore, younger workers have a longer "dues paying" horizon. But even if the younger worker's interest is not given priority, it is very doubtful that voluntary retirement would become a strike issue or even be of high priority on a bargaining agenda. For these reasons the *Bell Canada* decision is likely to be conclusive on this issue.

²⁰ G. Adams, *Grievance Arbitration and Judicial Review in North America* (1971), 9 Osgoode Hall L. J. 443. See as well, P. Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974); P. Weiler, *The 'Slippery Slope' of Judicial Intervention* (1971), 9 Osgoode Hall L. J. 1; Christensen, "Judicial Review: As Arbitrators See It" in *Labour Arbitration at the Quarter Century Mark* (Proceedings of 25th Ann. Meeting, Nat'l Academy of Arbitration, 1972) at 99.

²¹ See, *supra*, note 1.

²² And I agree that in the case of bias and fraud a court should intervene. First, it does not take industrial relations expertise to determine if such exists (but see *Re Canadian Shipbuilding and Engineering Ltd.*, [1973] 3 O.R. 240 (Div. Ct.)), and secondly, such intervention is aimed at preserving the integrity of grievance arbitration.

But these attempts to justify the judicial review of substantive matters go too far and are usually too simplistic. Difficult questions of law that reach arbitration entail applications of reasoned judgment. There is no clearly right or wrong answer—if there was, the parties would have settled the dispute long before spending the money and time that even grievance arbitration involves. What the parties want is a reasoned decision from the arbitrator and thereby a “final and binding” resolution of their dispute. Furthermore, most arbitrators, people who are selected by both parties, are selected because of their experience and expertise in resolving disputes over the meaning of collective agreements. They are specialists. Is it a sufficient reason to expend more time and money entailed in a review by a judicial officer, a person the parties have not selected and who generally has little previous acquaintance with industrial relations, because that officer disagrees with the decision of an arbitrator? No doubt an arbitrator must work within the rule of law but when the rule of law is really the reasoned elaboration of the ambiguous and vague wording found in collective agreements, reasonable men can differ over the meaning of *that* law. And so, at the very least, if the arbitrator’s decision is reasonable, a court should discourage the party seeking its opinion. Thus Ontario courts, in reviewing grievance arbitration boards constituted under The Ontario Labour Relations Act, have arrived at just such a standard of deferential review. They have held that no court should trifle with an arbitration award unless it is clearly and unreasonably wrong or unless it is subject to bias and fraud.²³ Surely they are right. There should be no gamesmanship over jurisdictional errors, or errors of law on the face of the record. The award—no matter how in error—must be unreasonably wrong. And should courts prove disingenuous in applying this standard, legislatures should not be hesitant to draft more rebuffing privative clauses as the British Columbia legislature recently has.²⁴ Judicial review casts a very long shadow²⁵ over the industrial relation system. The availability of judicial intervention forces the parties to be more technical in their approach to both collective bargaining and the grievance process. In turn, as more emphasis is given to technical details, the system becomes less comprehensible to the parties, and this leads both to misunderstanding, and eventually, more industrial conflict.

This is the importance of Mr. Justice Laskin’s dissent: it is the first thoroughly reasoned judicial opinion outlining the appropriate standard of

²³ *Re Canadian Westinghouse Co. Ltd., and Local 164, Draftsmen’s Assn. of Ontario*, [1962] O.R. 17 at 20; 30 D.L.R. (2d) 673 at 676; *Re Ford Motor Co. of Canada Ltd., and Int’l Union, United Automobile Workers of America*, [1972] 1 O.R. 26, 22 D.L.R. (3d) 151; *Re Taylor, and Ford Motor Co. of Canada*, [1974] 1 O.R. (2d) 398; *Re United Glass Workers and Dominion Glass Co.*, [1974] 1 O.R. (2d) 408; but see, *Re Hospital Commission, Sarnia General Dist. Building Service Workers’ Union, Loc. 220, S.E.I.U.*, [1973] 1 O.R. 240 (Div. Ct.); *The Metropolitan Toronto Board of Commissioners of Police v. The Metropolitan Toronto Police Association and Weiler* (1972), 72 C.L.L.C. para. 14, 125 (Ont. C.A.) recently upheld by the Supreme Court of Canada. And see generally, P. Weiler, *Remedies in Labour Arbitration: The Revised Judicial Version* (1974), Can. Bar Rev. (March Issue).

²⁴ Labour Code of British Columbia, S.B.C. 1973, c. 122 assented to Nov. 7, 1973. Not all of the sections are as yet proclaimed in force. But for the privative language, see ss. 31, 32, 33*, 34*, and 35* (*proclaimed effective Jan. 14, 1974.)

²⁵ This is a phrase suggested by my colleague, Dean Harry Arthurs.

judicial review in private labour arbitration matters. It must be remembered that the board of arbitration in *Bell* was a consensual board (this explains why the Ontario High Court could hear the matter in the first instance as opposed to the Federal Court doing so)²⁶ and hoary old case law suggests that a court cannot set aside the award of a consensual arbitration board save: 1) if its jurisdiction is exceeded; 2) if an error in law appears on the face of the record, unless that issue of law was directly submitted to it for decision (the "Absalom rule"²⁷ as Mr. Justice Laskin coined it); and 3) if fraud, bias, or gross misconduct is present.²⁸ This second ground for intervention, the "Absalom rule", is the most important basis of judicial intervention in the *Bell Canada* decision: Judson J. held that specific construction of Article 8 arose out of the arbitrator's determination and was not directly submitted by the parties for his consideration. Accordingly, he then went on to disagree with the arbitrator's ruling and reverse the result—an outcome that was as harmful to the process of labour arbitration as it was to the older worker. By contrast, Mr. Justice Laskin saw the case raising two important institutional issues. First, would a court be reasonable in holding that the construction of Article 8 was not directly submitted to the arbitrator? Secondly, even if this was the case (that Article 8 arose in the course of the proceedings), should the fact that a court disagrees with an arbitrator be sufficient grounds for judicial intervention—particularly in light of the purposes and origin of grievance arbitration and the costs of judicial review.

Both the Judge of the first instance and the Court of Appeal dismissed the application for review on the ground that the case was one in which a specific question of law had been referred to an arbitrator for decision and that the court could not intervene even if it appeared to the members of the court that the arbitrator's decision upon this question of law was erroneous. Judson J. disagreed with both of these courts and dispensed with their reasons in writing:

This is not a case where the parties by agreement ousted the jurisdiction of the courts to determine a question of law by choosing to have that question determined by a judge of their own making. This matter came up in the ordinary course on the hearing of a grievance which was characterized by the employee as a dismissal and by the Company as a retirement on pension. It is obvious from the letter which the Company wrote when it consented to the appointment of the arbitrator that there would be a preliminary objection to jurisdiction. This was all that was done on the first hearing before the arbitrator. He made his decision to proceed with the arbitra-

²⁶ For the legal hydraulics of this conclusion, see Laskin J.'s dissent in *Association of Radio and Television Employees of Canada v. Canadian Broadcasting Corporation* (1973), 73 C.L.L.C. para. 14, 189.

A very nice question surrounds whether the Ontario High Court can review the award of a consensual labour arbitration board today as opposed to the Ontario Divisional Court. The Ontario High Court upheld the arbitrator on November 2, 1971 (unreported), and The Judicial Review Procedure Act, S.O. 1971, c. 48 was not proclaimed in force until April 17, 1972 (see Ontario Gazette, Vol. 105, no. 14, April 1, 1972). As a consequence, that Act had no application at the time; but section 6 of this legislation reads:

6(1) Subject to subsection 2, an application for judicial review shall be made to the Divisional Court.

(2) An application for judicial review may be made to the High Court with leave of a judge thereof, which may be granted at the hearing of the application,

where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

And part of section 2 reads:

2(1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review," the court may, notwithstanding any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of action for a declaration or for an injunction or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

Accordingly, it could be argued that because courts review consensual arbitration boards as a matter of contract, as a matter of its inherent jurisdiction (*Canadian Co-operative Implements Ltd. v. Local 3960 United Steelworkers of America*, 69 C.L.L.C. para. 14, 207 (Man. Q.B. 1969), or as a matter of provincial arbitration legislation (*Int'l Woodworkers of America, Local 1-71 v. Weldwood of Canada Ltd.*, 70 C.L.L.C. para. 14,033 (B.C.C.A.)), and not by way of the prerogative writs. The Ontario Divisional Court has no jurisdiction. On the other hand, it could be argued that because section 2(1) of The Judicial Review Procedures Act gives that Court jurisdiction in matters "in the nature of mandamus, prohibition or certiorari" and there exists judicial opinion to the effect that judicial review of consensual arbitration boards and statutory arbitration boards are equivalent proceedings, at least for the purpose of procedure (see *Regina v. Arthurs, ex parte Port Arthur Shipbuilding Co.*, 68 C.L.L.C. para. 14,136 at s. 90 (S.C.C.)), such review is "in the nature of mandamus, prohibition or certiorari." For a recent exercise of the High Court's jurisdiction, see *Re General Truck Drivers' Union, Local 938, and Bulk Carriers Ltd.*, [1974] 2 O.R. (2d) 81 (H.C.).

²⁷ An error of law on the face of the record that does not go to jurisdiction is no longer grounds for reviewing a labour arbitration award under the *Canadian Labour Code* because of s. 156 which reads:

156. (1) Every order or decision of an arbitrator appointed pursuant to a collective agreement or of an arbitration board is final and shall not be questioned or reviewed by any court.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of his or its proceedings under this Part.

(3) For the purposes of the *Federal Court Act*, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act.

Unfortunately, this provision was not proclaimed in force until March 1, 1973. (See *Canadian Labour Code*, S.C. 1972, c. 18, assented to July 7, 1972, proclaimed effective March 1, 1973.) As to the general effect of such a privative clause, see *Re Ontario Labour Relations Board, Bradley v. Canadian General Electric Co. Ltd.* (1957), 8 D.L.R. (2d) 65; *Metropolitan Life Ins. Co. v. Int'l Union of Operating Engineers, Loc. 796, et al.*, 70 C.L.L.C. para. 14,008 (S.C.C.); Laskin, *Certiorari of Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Bar Rev. 986.

²⁸ *F.R. Alsalom, Limited, and Great Western (London) Garden Village Society, Ltd.*, [1973] A.C. 592 at 67. Lord Russell of Killowen wrote:

My Lords, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

tion. There was nothing to prevent the Company from asking the Court for an immediate review of this decision. The arbitrator's decision was one which the Court ought to have reviewed and reversed.²⁹

But Mr. Justice Laskin disagreed with him in writing a dissent that appears unassailable. In that the standard of review he reasons and recommends went undiscussed by the majority, and because Laskin's perspective may be a reflection of the Court's approach in the future moreover, we need to carefully review this reasoning.

It was his opinion that in the circumstances there had been a reference of a specific question of law to the arbitrator by the parties. As a consequence, his opinion was unreviewable. To object to the arbitrability of a dispute on the basis that the word "dismissal" in Article 8 did not embrace "retirement on pension" in no way affected the fact that in submitting this dispute to the arbitrator the parties were asking him for a specific ruling on the meaning of Article 8. But, recognizing how reasonable men might differ on this point—that one might believe the specific question submitted actually entailed answering whether just cause for dismissal existed and, accordingly, the meaning of Article 8 was a necessary but collateral determination—Mr. Justice Laskin went on to fashion a rule of construction in determining when a specific question of law has been submitted to an arbitrator.

It was his admonition that "the exception of non-interference should be liberally construed" and in arriving at this recommendation he closely examined both the evolution of the judicial doctrine in the area (the "Absalom rule") and the nature of the Canadian industrial relations context being reviewed. To begin with, the learned Justice questioned whether the judicial distinction (the review of a general submission in contrast to a specific reference of law) made any sense at all, particularly in relation to labour-management arbitration in Ontario — a province whose legislation excludes the application thereto of the provincial Arbitration Act.³⁰ Furthermore, the principles of "law" applied in grievance arbitration hearings are the provisions and wording of collective bargaining agreements. In effect, the parties legislate for themselves, leaving universal principles of common law with very little relevance. In fact, it was noted that the courts of law have no original jurisdiction when it comes to enforcing collective agreements. Therefore, as a consequence of social changes and the specific intent of legislatures in many provinces to by-pass the more general arbitration legislation, and by implication the common law, the efficacy of a jurisdiction within the courts to entertain reviews of "questions of law" arising out of general submissions to labour arbitrators is dubious. And one might add that because of the way most grievances are formulated on the "shop floor," a requirement of more specificity in submissions is simply unrealistic. All that can be said about a submission to arbitration is that at the time of lodging a grievance

²⁹ See, *supra*, note 21.

³⁰ Of course, it is extremely doubtful that provincial arbitration legislation applies to an entity falling with federal jurisdiction. See *Etmanski v. Taggart Service Ltd.*, [1966] 1 O.R. 473, 54 D.L.R. (2d) 210 (C.A.). See also, *Comm. du Salaire Minimum v. Bell Telephone Co.*, [1966] S.C.R. 767, 59 D.L.R. (2d) 145. But the analogy is appropriate nevertheless.

ance the parties desire a quick, inexpensive, and informal resolution of their dispute in order to maintain a viable if not harmonious relationship with each other.

While these same factors indicate that the "Absalom rule" may be inappropriate, they also suggest that, where applied, it ought to receive a liberal construction. Mr. Justice Laskin so proposed. Moreover, he went on to buttress this standard of deference by demonstrating that judicial review in the case of a general reference to a consensual board of arbitration arose originally as a *exception* to a pre-existing rule of non-interference with awards of arbitrators cited in *Kent v. Elstob*. In this regard, after establishing this contention by way of excerpts from *Hodgkinson v. Fernie*, and *Knox v. Symmonds*, Laskin concluded:

The considerations which originally persuaded the English Courts not to interfere and certainly not save for grave reasons, with awards of arbitrators, namely, the evident wish of the parties for a non-curial determination as well as finality, without courting appeals, gave rise to an exception from what became the general rule, although the general rule was itself originally an exception. . . .

I question whether the concluding sentence, stating the rationale for the exception, is any less valid in relation to the submission of a general issue to arbitration. Be that as it may, the whole development indicates to me that the exception of non-interference should be liberally construed. Moreover, if the general law of arbitration and reviewability of awards is to be applied to labour-management arbitrations under collective agreements, where the Courts have no original jurisdiction, it appears to me to be plain sense to confine interference to what, for want of precise definition, I would call gross error. Especially in a situation of on-going collective bargaining relations, where the parties themselves legislate for the common enterprise and provide their own supervisory and administrative machinery without judicial oversight—they should be equally left pretty well alone with their adjudicative machinery.³¹

His words, therefore, represent a valuable response to the many complaints that arbitration awards are often overturned by judicial legerdemain involving nothing more than a mere difference of opinion between the courts and the arbitrators — a result that looks more like an appeal in blind neglect of the final and binding intendment of grievance arbitration. Accordingly, Mr. Justice Laskin suggests that submission to arbitration should be viewed as a reference of a specific issue of law unless there exists a clear, undoubted indication to the contrary.

As for the second and very much related issue — assuming a general reference was involved in *Bell* what standard of review should be applied to consensual arbitration boards — the learned Judge was quick to emphasize that the review of an arbitrator's decision by a court is not an appeal in which a court may properly substitute its own opinion on the correctness of the arbitral determination. On this point he elaborates:

Whether I as an arbitrator or as a judge would have come to the same conclusion is not a dominant consideration. Is it so clear that a unilateral discretionary termination of service, such as occurred under the Company-administered plan, must be held, as a matter of law, not to be a dismissal because the Company refers to it as a retirement? "Retire" is both intransitive and transitive in the dictionaries, and certainly the grievor did not retire but was retired. In plain English, he was put out of his job. An arbitrator who concludes that he was dismissed, but without deciding the question

³¹ See, *supra*, note 29.

of "sufficient and reasonable cause" is, in my view, not giving an outrageous meaning to the term "dismissal" under a collective agreement providing for the amicable settlement of grievance and, ultimately, for the arbitration of grievances "relating to the interpretation or alleged violation" of the collective agreement. The arbitrator in the present case is not the first one who has held that compulsory retirement at the instance of the employer alone is arbitrable as a discharge. His reasons cite cases in which other arbitrators, indeed judges acting as arbitrators, have so held.³²

Therefore, the Chief Justice held that a court should only intervene if the arbitrator has given an "outrageous meaning" to the provision of the collective agreement in question — a standard that is even more deferential than that currently used to supervise statutory arbitration boards in Ontario. Today there are so many criticisms of the time, expense and mysticism associated with the judicial process that courts must be willing to make the maximum use of alternative dispute resolving agencies.³³ This kind of supervisory standard provides a full jurisdiction to inferior tribunals and rightly assumes that they are responsible law administering bodies.

But it is important not to stop here and merely complain how misguided the majority was. Mr. Justice Judson made no effort to canvass the arbitral jurisprudence dealing with company retirement — the law of the collective agreement. Nor did he bother to reply to the detailed rationale of the arbitrator's ruling on this issue. He simply disagreed in such an abrupt manner as to imply that any suggestion of the equivalency between discharge and compulsory retirement was clearly and unequivocally outrageous. For this reason, but in a very brief way, I want to review the arbitral jurisprudence considered by the arbitrator, Professor Weiler. It should become obvious that his reasoning, particularly in light of the adversities facing the older worker discussed above, not only fails to be outrageous but is probably right.

Professor Weiler's decision was the first arbitration award both to critically examine the jurisprudence and, in rationalizing these pre-existing cases, to establish a firm, coherent principle. Prior to the *Bell* award there had been a series of cases considering whether compulsory retirement could be distinguished from a discharge. But unfortunately the results of these arbitral machinations, if taken in isolation, substantially undermine the basis to my above-mentioned praise of "arbitral expertise." Their reasoning is far from satisfactory — in fact, much of the reasoning fails to suggest a real comprehension of the issues involved. Happily, such a phenomenon is more the exception than the rule and, to be fair, even here it is more reflective of an evolution of principle than of an unconscionable neglect.

It is essential to emphasize at the outset of this review that these awards must be considered in light of two important jurisprudential developments in Canadian labour law. First, it must be remembered that the Supreme Court of Canada in *Le Syndicat Catholique des Employes de Magasins du Quebec Inc. v. La Compagnie Paquet Ltée*.³⁴ affirmed the exclusivity of the union's bargain-

³² *Id.*

³³ See generally, G. Adams, *Towards a Mobilization of the Adversary Process* (1974), 12 Osgoode Hall L.J. (page not available).

³⁴ (1959), 18 D.L.R. (2d) 346 (S.C.C.).

ing status. The relevant passage of the Court's opinion (a judgment delivered by Mr. Justice Judson, incidently) reads:

... The union is, by virtue of its incorporation under the *Professional Syndicates' Act* and its certification under the *Labour Relations Act*, the representative of all employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes. The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all. How did this compulsory check-off of the equivalent of union dues become a term of the individual employee's contract of employment? They were told by the notice that in future this deduction would be a term of their contract of employment. They were put to their election at this point either to accept the term or seek other employment. They made their election by continuing to work and the deductions were actually made. It is admitted that all these employees were employees at will and no question arises as to the right of the employer to make or impose new contracts or of the length of notice they may be required to bring this about. It was not within the power of the employee to insist on retaining his employment on his own terms, or on any terms other than those lawfully inserted in the collective agreement. [Taschereau, Locke and Fauteux JJ. dissented.]

Moreover, the line of cases commencing with *Re Grottoli v. Lock & Son Ltd.*³⁵ and ending with *Hamilton Street Railway v. Northcott*³⁶ does not impinge upon this principle of exclusivity. The contract of employment, as unrealistic as as its existence may seem, has been held to co-exist with and embody the terms of the collective agreement, but no court opinion has countenanced any difference in the content of these two legal relationships. And, therefore, today, if management is going to claim a unilateral right to introduce a pension plan or retiring policy — thereby dealing directly with its employees — it must claim to do so through rights reserved to it within the collective agreement. This, then, would focus the inquiry on the management rights clause, which brings us to the second important jurisprudential development.

At this juncture in the "climate of Canadian industrial relations" there is little doubt that management has reserved onto itself a bundle of unspecified rights to manage the enterprise; a union must specifically derogate from these rights if its claims are to prevail.³⁷ For example, despite the absence of specific wording reserving a management right to contract bargaining unit work out to subcontractors or to introduce technological changes which eliminate bargaining unit jobs, it has been held that management now possesses a right to do so.³⁸ A union must achieve the requisite contractual specificity to control these events. Thus it could be argued that management has a similar inherent right to retire workers without their consent.

³⁵ (1963), 39 D.L.R. (2d) 128 (Ont. H.C.).

³⁶ (1966), 58 D.L.R. (2d) 708 (S.C.C.).

³⁷ See Weiler, *Labour Arbitration and Industrial Change* (Task Force Study No. 6, Canada, 1969).

³⁸ *Re United Steelworkers of America and Russel Steel Ltd.* (1966), 17 L.A.C. 253 (Arthurs).

The argument must be examined closely for on doing so it becomes apparent that the justification of an inherent management right to contract out, innovate, or change working schedules lacks the same compellability when applied in the area of compulsory retirement. An industrial enterprise is a complex undertaking riding on a sea of uncertainty. This uncertainty is a product of the highly dynamic, technical, market, budgetary and power contexts within which the actors of an industrial relations system must operate. Accordingly, to force management to negotiate effective and necessary control over production with the specificity required to codify every right it may need to react to these changing contexts, is to entertain a fantasy. Elsewhere I have attempted to describe the nature and inherent obstacles of the collective negotiation process existing as it does against the background of human emotion and limited foreseeability.³⁹ As a result extreme specificity and detail is, in many instances, simply unobtainable. Thus the fact that management has not specifically reserved such rights does not mean the union has achieved total job control. But because one of the parties must write its position into the contract and because, if the enterprise is to survive for the benefit of all, the enterprise must be able to react quickly to changing contextual demands; it is now presumed that management has certain inherent powers unless specifically relinquished. In effect, this presumption is felt to be a necessary implication to the proper and efficient functioning of a commercial enterprise. Management should have the powers to initiate change to insure the economic viability of the firm unless it specifically gives these rights up.

However, this argument, with its underlying economic purpose, fails to support a management right to retire employees compulsorily. In none of the cases that we will examine, nor in the *Bell* case for that matter, were the employees retired because they were too old to perform the work. Rather, they had reached an arbitrary age of 60 or 66 years of age — an age the company had unilaterally set as the age for retirement. Why was it necessary to the enterprises that these people be terminated? All of them could perform their work, and the gerontological research discussed above establishes that many older workers are as efficient as younger workers performing the same jobs. What is the corporate interest in this management right? Should there not be a clear and compelling legal justification for this right in light of the harsh socio-economic implications for the older worker? We will now examine the arbitral jurisprudence in a quest for this legal justification — a justification that Mr. Justice Judson must have felt was self-evident. After reviewing the complexity of arbitral jurisprudence in this area — the law of the collective agreement — only the erroneous nature of his beliefs will be so clear.

In *Port Hope Sanitary Manufacturing Company Limited*,⁴⁰ the first of the cases dealing with this issue, the company retired the grievor, a man 71 years of age, in accordance with its long-standing policy ante-dating the collective agreement of retiring employees in its discretion, after the age of 65 years, and

³⁹ The new edition of *Labour Relations Law: Cases, Materials and Commentary*, compiled by the Labour Relations Casebook Group (1974), c. 6; and see *T.C.F. of Canada Ltd.* (1972), 1 L.A.C. (2d) 382 (Adell) at 385-6.

⁴⁰ (1952), 3 L.A.C. 1144 (Cochrane).

with a pension after 15 years of service, again in the company's discretion. Because the grievor had worked only 10 years for the company, he was retired without a pension. The company claimed the matter was not arbitrable, but the board disagreed, ruling that a company cannot deprive an employee of his grievance rights simply by describing a discharge as "retirement." However, it then went on to hold that the non-discriminatory application of a long-standing policy justified the company's action. This result in itself is not difficult to accept if the underlying basis of decision is some form of estoppel principle — the company having relied to its detriment on the union's acquiescence in the long-standing policy. The union had not attempted to bring the existing policy within the four corners of the collective agreement as if tacitly agreeing that management was within its rights. This would mean that the estoppel would be operative at least until the then present collective agreement expired — at which time management could specifically negotiate the plan into the agreement. However, the following paragraph is an ominous indication of the board's contrary motivation:

It cannot be seriously contended that under the terms of the present agreement the company has no right either to set up or maintain a pension and retirement plan, even though neither the employees nor their representatives are parties to it.⁴¹

This statement looks perilously close to sanctioning unilateral management initiative in the area of employee retirement but provides no legal basis for the assertion. Therefore, aside from the possible implication that the board was adverting to a form of estoppel, this statement is simply conclusionary and, being so, *Port Hope* is not a helpful award. Arbitral jurisprudence is not hampered by a formal notion of precedent in that there is no hierarchal arbitral structure.⁴² Acceptance of another arbitrator's reasoning depends upon twin principles of reason and persuasion. The *Port Hope* case fails in both of these regards.

In *Canadian Westinghouse*,⁴³ the grievors were retired in accordance with a long-standing company retirement-pension plan which the union had unsuccessfully tried to modify in the last negotiations. The company paid all of the pension, and the reasoning of the board in upholding the terminations appears to be a mixture of estoppel and management rights. The dispute was held to be arbitrable, but the retirement policy was found to be "a reasonable one, in keeping with the common practice, [and] it has been in force for some twenty years." In fact, in the five years preceding the grievance 194 employees had been retired. But once again, the rationale of the board is far from explicit as revealed by the following statement.

However, it would appear that both the employees and the union knew that there was such a plan. There has been no submission on the part of the union (and if there had been, it would seem untenable) that the company hasn't the right to set up a pension and retirement plan without the union being a party to it.⁴⁴

⁴¹ *Id.*

⁴² P. Weiler, *The Role of the Labour Arbitrator: Alternative Versions* (1969), 19 U. of T. L. J. 16; *Wickett and Craig* (1963), 13 L.A.C. 363 (Arthurs).

⁴³ (1952), 4 L.A.C. 1210 (Anderson).

⁴⁴ *Id.*

In the next case, *Rexall Drug Co.*,⁴⁵ the company "retired" 4 employees at the age of 65, pursuant to its long-standing pension plan which pre-dated the collective agreement and which the union had not been successful in drawing "into the ambit of collective relations." It was a condition of employment, on the application form, that employees accept pension coverage when eligible. Two of the employees retired were ineligible for pension benefits under the plan, and the board reinstated them, holding that they could not be retired. But with respect to the other two grievors retired with pension, the board concluded:

Whatever the force of the pension plan, this Board is of the opinion that retirement thereunder does not raise a question of discharge. It is straining well known industrial usage of the term "discharge" to have it include compulsory retirement because of age. Can the Company then insist on enforcement of the pension plan in the face of other terms of the Collective Agreement? If the Company had sought to introduce a compulsory retirement policy unilaterally after the advent of the Union, then clearly no force could be given to it. The situation here is different. The pension plan was in effect to the knowledge of the employees and of the Union when the Union obtained Collective Bargaining rights. As an existing condition of employment, although applicable only to employees able to meet its eligibility requirements, it was not expressly abrogated by the Collective Agreement; and the only possible inconsistency between operation of the plan and the Collective Agreement lies in the seniority and the employment security provisions. The question which remains is, hence, whether the Collective Agreement in its provisions for seniority and employment security should be construed to make allowance for the pension plan in a situation where the plan was known to the employees and the Union prior to the execution of the first Collective Agreement between the Union and the Company.⁴⁶

The board did not construe these provisions to make such allowance but went on to hold that the company was not entitled to retire some over-age employees while keeping others at work if it acted arbitrarily or capriciously in differentiating between the workers involved. If this did happen, (although these were not the facts before it) such a case would be an unwarranted discharge. Accordingly, this case looks more like one of estoppel or the use of past practice to construe and interpret ambiguous wording found in the collective agreement. It does not appear, at least unequivocally, as an award supporting some form of inherent and universal management right to retire employees.

In *Libby, McNeil and Libby*,⁴⁷ the grievor was retired at the age of 65 pursuant to a policy existing since 1935 (and prior to the first collective agreement). He did not receive a pension because he was ineligible under the plan, though he did receive a small cash retirement allowance. Once again, the reasoning of the board in dismissing the grievance is unclear. The arbitrator simply held that retirement was different from "discharge" or "lay-off"; that there was nothing in the agreement about it; that the company had consistently applied its policy in the past without objection from the union; and that the latter had failed several times to have the agreement incorporate references to the pension plan. He went on to write, without referring to *Rexall Drug Co.*:

A discharge certainly terminates employment but so does retirement and they are not the same thing. In the field of management-labour relations, each has a well understood meaning.⁴⁸

⁴⁵ (1953), 4 L.A.C. 1468 (Laskin).

⁴⁶ *Id.*

⁴⁷ (1954), 5 L.A.C. 2120 (Roach).

⁴⁸ *Id.*

The arbitrator must have had the benefit of divine insight in finding this "well understood" meaning for certainly none of the preceding cases would decisively lend themselves to this conclusion. As a consequence, the case fails to provide any rational justification for its conclusion.

In *Canadian Car and Foundry Ltd.*,⁴⁹ as Professor Weiler stresses in his *Bell Canada* opinion, the situation was markedly different from those discussed to this point. Here the company instituted a retirement-pension plan *during* the term of a collective agreement which provided for discharge only for proper cause, and for loss of seniority due to quit, lay-off for a specified period, or discharge. However, the grievances of the employees who were retired by the company were dismissed. It is important to note that in this case, when the agreement terminated, one of the chief issues in negotiation had been the compulsory retirement policy. Then a strike ensued, and the dispute was settled when the company agreed to two explicit modifications of its retirement scheme. But, the union explicitly reserved its right to renew the assault on the compulsory retirement by grievances under the new agreement.

Unfortunately, the arbitrator did not refer to the *Rexall Drug* dictum that a unilateral introduction of a retirement plan was improper after the introduction of collective bargaining. He dismissed the grievances on the ground that 'retirement' was a form of 'termination of employment' which is different from 'discharge' or 'lay-off.' While holding that a company could not circumvent the rules governing discharge by way of the retirement rules, he gave no criterion to distinguish between the legitimate and illegitimate use of a retirement policy. In fact, his following statement severely undermines both the exclusive bargaining agent status of the union and the comprehensive nature of the collective agreement.

I have carefully examined the union's argument that the phrase 'and all other conditions of employment' in clause one, means that the agreement contains a list of all the conditions of employment in the sense that no more can be introduced and in particular that no rule regarding compulsory retirement can be introduced. I have concluded that the phrase in question merely indicates that the parties hope or plan or expect to achieve a certain objective. It is a statement of purpose rather than a statement of accomplishment as the title of the clause indicates. It does not establish that the parties have, in fact, agreed to and enumerated in the clauses that follow all the conditions of employment. Therefore, it does not stand in the way of the company's application of a new condition affecting employment, namely, the rule that an employee shall retire upon attaining the age of 65.⁵⁰

This is the first case to assert boldly that management can unilaterally introduce additional terms of employment or that such is an inherent management right. All of the preceding cases had a thread of estoppel woven through them or the implication that a tacit union assent to such policies had been used to interpret otherwise ambiguous language. Unfortunately, this arbitrator fails to tell us *why* management must possess this right and how it logically co-exists with the union's exclusive bargaining status derived from labour relations legislation. Hence, the case, in and of itself, fails at the level of persuasion, and unsurprisingly Professor Weiler refused to follow it.

⁴⁹ (1955), 6 L.A.C. 161 (Curtis).

⁵⁰ *Id.*

In *William Kennedy and Sons*⁵¹ the grievor was 76 years of age and his job was shovelling coal into a stoker hopper. There was no question surrounding his physical capacity to continue on in the job. The pension plan post-dated both the employment of the grievor and the bargaining rights attained by the union. Furthermore, the grievor had not participated in the plan. Claiming to follow *Rexall Drug*, the board distinguished between compulsory and voluntary plans, and between those ante-dating and those post-dating the existence of collective bargaining; accordingly, it was held that the grievor could not be retired. But in doing so, by relying upon this sterile categorization of fact and legal outcome, the legal basis of the decision is obscured. No policy justification was given to support the prohibition against the compulsory retirement of an employee by a plan that post-dates the bargaining rights of the trade union nor was any clear rationale provided for the "compulsory versus voluntary" distinction. The end result was to leave arbitrators and judges in a conceptual vacuum which then permitted the evolution of a management right to retire employees compulsorily. The remaining few cases illustrate just how instrumental this conceptual vacuum was.

In *Dominion Tar and Chemical*⁵² the grievor was retired at the age of 70. He joined the company in 1939, and in 1942 the company unilaterally introduced a voluntary contributory pension plan. However, the plan had never been mentioned in the collective agreement and the grievor had not subscribed to the arrangement. Now faced with the decision of the Supreme Court of Canada in *Canadian Car and Foundry v. Dinham*⁵³ which had upheld an arbitration award denying a grievance of an employee who had been retired pursuant to a "compulsory retirement-pension plan" which had been unilaterally instituted by the company during the term of a collective agreement, the board distinguished it and other awards on the basis that in the case facing it the compulsory retirement age was not separate from the pension plan and was only applicable to those who participated in the plan. The grievor was not a participant and hence his grievance was upheld. But, in this case, one starts to detect the basic legitimization of these unilateral management actions. The decision-making effort centers more on considering the voluntary nature of the plan than upon the legal justification validating its very existence.

To the extent that this approach was motivated by *Dinham* it is important to appreciate that the ratio of the *Dinham* case was clearly that once a grievance had been lodged on behalf of an employee and an arbitration award given, a civil suit can not subsequently be brought by the employee for that same claim. The importance of this recognition stems from the subsequent impact of an accompanying *obiter dictum* of Mr. Justice Abbott that "the determination of a mandatory retirement age, applicable to all employees, is clearly a function of management . . . , and a compulsory retirement at age 65 is not a violation of the clauses in the collective agreement respecting seniority rights." This statement was not necessary to the outcome of the *Dinham* case although it may have influenced the arbitrator in the *Dominion Tar and Chemical* case. Of course,

⁵¹ (1959), 10 L.A.C. 121 (Hanrahan).

⁵² (1960), 19 L.A.C. 121 (Hanrahan).

⁵³ , [1960] S.C.R. 3.

Judson J. in *Bell Canada* converts this *dictum* into law: but until then it was merely the gratuitous comment of a Supreme Court Justice and as such was not binding. Moreover, Abbott J. failed to give any genuine reasoning leading up to his conclusion — a trait all too common in the Supreme Court of Canada.

The last arbitration award to be reviewed is the *Canadian Forest Products*⁵⁴ case. The grievor was retired pursuant to a newly-announced policy of the company to retire employees at the age of 70 with compensation, and in this case the arbitrator, in an apparent act of blind obeisance to Mr. Justice Abbott, held that the effect of the *obiter dictum* in *Dinham*, and the more recent decision of the Ontario Court of Appeal in *Sandwich Windsor and Amherst Rly. Co.*,⁵⁵ was to establish "a unilateral right of management to dismiss employees because of age at an age to be decided by management It is a right to dismiss for cause, the cause being age . . . and a cause which can be unilaterally established by the employer." Of course, the Supreme Court of Canada in the *Dinham* case held no such thing nor does a close reading of the Court of Appeal decision that he cited justify this conclusion. In the *Sandwich* case, the company had unilaterally instituted a compulsory retirement policy for all employees in the face of a *negotiated* pension plan which referred to retirement due to old age and/or sickness rendering the employee physically unfit or unqualified for his job. The majority of the Court of Appeal reversed the trial judge and board of arbitration and held that this provision did not, either expressly or by necessary implication, cut down on the power of management to retire employees. This decision focused specifically on the clause in the agreement dealing with the pension plan and did not deal with the question whether this 'common law' management power or right might be limited by a discharge clause or the seniority clause. Over the years there has been a growing tendency on the part of some arbitrators to give an overly broad reading to judicial statements and this case is quite representative.

This ends our review of the pre-existing arbitration pronouncements. Aside from a few other cases,⁵⁶ the jurisprudence (and I use that word charitably) says no more until the *Bell Canada* award. It is apparent that this string of cases created a wide range of arbitral opinion with no unanimity in the reasons given for the decisions. While it is true that in every case where the pension plan or retirement policy ante-dated the collective bargaining relationship and

⁵⁴ (1962), 12 L.A.C. 25 (Wilson).

⁵⁵ (1961), 26 D.L.R. (2d) 704 (Ont. C.A.).

⁵⁶ *Durham-Bush (Canada) Ltd.* (1964), 15 L.A.C. 270 (Lang); *Re Montreal Newspaper Guild, Loc. 111, and Montreal Star Co. Ltd.* (1962), 12 L.A.C. 301 (Poisson); *Re U.A.W., Loc. 399, and Anaconda American Brass Ltd.* (1963), 14 L.A.C. 52 (Cross); and more recently, see *Re U.S.W., Loc. 1500, and Ontario Malleable Iron Co. Ltd.* (1967), 19 L.A.C. 1 (Palmer); *Re Pulp and Paper-workers of Canada and MacMillan-Bloedel Industries Ltd.* (1970), 21 L.A.C. 148 (Bird); *London and District Building Service Workers Union, Loc. 220, and Perth County Board of Education* (1972), 24 L.A.C. 91 (Hinnegan); *Re Shell Canada Ltd., and Oil, Chemical and Atomic Workers Int'l Union, Loc. 9-600* (1973), 3 L.A.C. (2d) 229 (Bellan). The last case was quashed in *Shell Canada Ltd. v. Oil, Chemical and Atomic Workers Int'l Union, Loc. 9-600*, [1974] 1 W.W.R. 660 (Man. Q.B.). Note that for the purposes of brevity I have omitted *B.C. Forest Products* (1958), 8 L.A.C. 153 (Carrothers) from the preceding analysis.

the employees were compulsorily retired with pension, the company's actions were upheld, these cases can be understood on the bases of both estoppel or a tacit recognition by the union of the company's power in this area. Admittedly, the *Canadian Car and Foundry* case, and the *Libby McNeil and Libby* case, do concede that retirement is different than discharge and need not be justified, but one cannot fathom their reasoning in arriving at such an important conclusion, and therefore these cases can be properly ignored. Accordingly, our intuitive response to *Bell Canada's* substantive claim has remained intact — that clear and specific wording in a collective agreement should be required before an employer can terminate an employee without cause and without consent. In other words, prior to Mr. Justice Judson's few words, there was no clear legal justification supporting the company's actions as a matter of principle, and this is what Professor Weiler held. He ruled that compulsory retirement is to be considered *prima facie* a discharge. His concluding remarks are worth reproducing.

There does seem to be a conflict in the arbitration decisions, then, about whether retirement is a form of discharge, and a decision in this case cannot be made on the basis of any consensus in the precedents. It must instead rest on a judgment about the substantive merits of the contrasting positions. When one attempts to fathom the reasons for the distinction, it is interesting to note the total absence of any argument made in its favour in the cases which draw it. We are simply told that "retirement" is different from "discharge" and that is that. It is true that "retirement" is obviously different from a "lay-off" because in the latter case, what is intended is only a *temporary* cessation of active employment, with the employee retaining status as such under the collective agreement (at least until his seniority rights lapse after an extended period). Retirement is intended to be a permanent cessation of all employment rights, both actual and in the future. Ordinarily, in its linguistic sense, we think of retirement as the *voluntary* act of a person who decides he no longer wants, or needs, or is able to work because of his age. There is no doubt of the distinction between discharge and retirement in this voluntary sense. *Compulsory* retirement occurs when an employee is told by the Company he no longer is going to be allowed to work because of his age, even though he thinks he is able, and still wants, to work. It is a permanent termination of the employment relationship, against the will of the employee, and in the interests of the Company, and shares each of these characteristics with discharge. It is not enough to call this severance by another name — Retirement — in order to avoid the discharge clause in the Agreement . . .

The typical collective agreement clearly shows why *compulsory* retirement should be considered, *prima facie*, to be a form of discharge. An employee's security of tenure in an on-going firm is ordinarily protected against *temporary* interruption by limitations on lay-off or recall or by a suspension. It is ordinarily protected against *permanent* interruption by limitations on discharge. From the employee's point of view, the significance of compulsory retirement appears to be exactly the same as an admitted discharge. He has lost his job, his seniority rights, and earning opportunities, permanently, against his will, and because of a Company decision in its own interests and discretion. Moreover, it is vital to note that in this case, as in many of those reported, the Company decision to retire is taken only after consideration of the situation and work-potential of the individual grievor. "Retirement" is not simply based on the impersonal application of a general rule and instead involves the same exercise of individualized discretion as takes place in the typical dismissal case. . . . Hence, as regards this first issue, which was presented to me as a preliminary objection relating to arbitrability, I find that compulsory retirement is a "dismissal" and subject to Article 8 of the Agreement.⁵⁷

Can one characterize this reasoning as "outrageous?" Is it anything other

⁵⁷ See, *supra*, note 31.

than reasonable? In fact, in light of the previously described plight of older workers Weiler appears to have been clearly right, and Mr. Justice Laskin's masterful understatement suggests that he thought so too. In this regard the pre-eminent Canadian labour arbitrator, before his elevation to the Bench, wrote:

I repeat my opinion that it was open to an arbitrator to conclude that an employee should have the benefit of the grievance and arbitration machinery whenever his employment is terminated, and not be exposed to an arbitrary distinction between dismissal and retirement based on a unilateral employer policy and on a unilateral use of language which had never been incorporated into the collective agreement to make the distinction which is now put forward as being a matter of law.⁵⁸

If any opinion has to be characterized as "outrageous" or unreasonable, I would bluntly submit that it must be Mr. Justice Judson's, and so I ask, who will review the judges? But less presumptuously, the purpose of this comment is to stress that the courts not equate judicial review with a full appeal on the merits lest labour arbitration's "final and binding" qualities be completely eroded. Moreover, it is similarly essential that the human qualities of litigation never be overlooked. The Court had a very important human issue before it — an aspect of the hardships faced by the older worker. The restraint reflected in the judgment of Mr. Justice Laskin would have permitted the Court to recognize and accommodate both the institutional and the human considerations present. Instead the fate of the older worker now resides entirely with the legislature. Hopefully, through changing societal attitudes, more progressive social legislation will provide these people with the legal support they need. It is unfortunate that the Supreme Court of Canada, a court whose performance should epitomize the creative capacity of law, failed to take, and possibly failed even to see, an important step in this direction.

A peasant makes his old father eat out of a small wooden trough, apart from the rest of the family; one day he finds his son fitting little boards together. "It's for you when you are old," says the child. Straight away the grandfather is given back his place at the family table.⁵⁹

⁵⁸ *Id.*

⁵⁹ De Beauvoir, *supra*, note 18.

