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# THE EFFECT OF JUDICIAL REVIEW ON GRIEVANCE ARBITRATION

By S. A. TACON\*

## A. INTRODUCTION

It has been said that the genius of the common law lies in its flexibility, its ability to adapt traditional concepts and doctrines to the needs of a changed environment. Cynics perhaps would rephrase the adage to read that the genius of the common law lies in its ability to survive as a powerful force in society despite radical socio-economic changes. That is, the common law has 'adapted' only after conducting a fierce rearguard action in defending out-moded doctrines and in the face of a clear threat to its existence, namely, replacement of the common law by statute. Nowhere is the cynic's view more decidedly supported than in the field of labour relations.

It is overly simplistic and probably unfair to depict the judiciary of the nineteenth and early twentieth centuries as a last bastion of defence of the *laissez-faire* economy. Nonetheless, the common law did respond to the tremendous changes wrought by the Industrial Revolution by repressing attempts to alter the *status quo*. The efforts of trade unions, through collective bargaining, to effect a redistribution of wealth and power in employer-employee relations were definitely hampered by the wide application of tort doctrines, such as conspiracy and inducing breach of contract.

Furthermore, the courts refused to recognize the realities of the growth of trade unions and their place in society. Contractual concepts of privity and intention to create legal obligations continued in their historic form and, thereby, emasculated the collective agreement. This attitude was crystallized in the case of *Young v. Canadian Northern Railway*<sup>1</sup> in which the court ruled that collective agreements created obligations which were legally unenforceable; the appropriate means of redress was to be the calling of a strike.

Strikes and lockouts, however, were and are a notoriously inefficient means of dispute settlement, enormously costly to both employer and employee. As the judiciary obviously regarded the emerging labour relations field as a pariah in the traditional legal system, the trade unions and employers turned to an alternative formula to resolve disputes arising during the term of the collective agreement, namely, consensual arbitration. To be sure, arbitrators borrowed heavily from existing legal doctrines, often by analogy, to fashion remedies appropriate to the industrial setting. Nevertheless, an ar-

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<sup>1</sup> (1931), 1 D.L.R. 645 (P.C.).

bitral jurisprudence did develop, insulated from judicial interference by the judiciary's own reticence *vis à vis* a collective bargaining regime.<sup>2</sup>

Faced with the hostility of the common law, trade unions turned to the legislatures for legitimization and protection. Through amendments to the *Criminal Code* removing criminal liability for union activities, and through positive statutory enactments,<sup>3</sup> the legislature has responded by institutionalizing the collective bargaining process.

While industrial peace has obviously become a major governmental policy objective, *The Labour Relations Act of Ontario (OLRA)* also specifies the means to this end:

Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.<sup>4</sup>

Thus, the arbitration system likewise found favour with the legislators as the most appropriate means of enforcing a collective agreement.

The courts were now confronted with a respectable institution rather than a ragtag assortment of ruffians spouting heretical economic doctrines.<sup>5</sup> Here the genius, or opportunism, of the common law surfaced. The judiciary seized upon the *OLRA* requirement of an arbitration clause in collective agreements to characterize arbitration boards as statutory tribunals, implicitly inferior to the extant court structure, and thereby subject to judicial review.

Much has been made of the distinction between judicial review and appellate jurisdiction. In theory, the latter permits full examination of the legal reasoning of the inferior court with corresponding authority to correct errors and substitute the 'right' decision. Judicial review, however, is to be confined to the prerogative writs of *certiorari*, *mandamus*, prohibition, and has now been simplified procedurally in Ontario by a single application for judicial review which includes the remedies of all the prerogative writs.<sup>6</sup> Even a cursory glance at the instances of judicial review of arbitration boards, however, reveals the semantic nature of the distinction; it is all too easy and tempting to cast intervention by an appellate body as a review for "excess of jurisdiction."<sup>7</sup> Already familiar with a judicial hierarchy, the courts would not or

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<sup>2</sup> See, A. W. Carrothers, *Labour Arbitration in Canada* (Toronto: Butterworths, 1961) at 17. The author concludes, however, that the new "industrial" jurisprudence is far from fully developed.

<sup>3</sup> *Industrial Disputes Investigation Act, 1907*, 6-7 Edw. VII, c. 20.

<sup>4</sup> R.S.O. 1970, c. 232, s. 37(1); as amended by S.O. 1975, c. 76, s. 37.

<sup>5</sup> For the influence of communism and socialism on the development of the trade union movement, see, Abella, *Nationalism, Communism and Canadian Labour; the C.I.O., the Communist Party and the Canadian Congress of Labour, 1935-1956* (Toronto: U. of T. Press, 1973) and Lipton, *The Trade Union Movement of Canada, 1827-1959* (Montreal: Can. Social Publications, 1966).

<sup>6</sup> *The Judicial Review Procedures Act*, A.S.O. 1971, c. 48.

<sup>7</sup> See, *Jarvis v. Associated Medical Services Inc. et al.*, [1964] S.C.R. 497; 44 D.L.R. (2d) 407; *R. v. Arthurs, Ex parte Port Arthur Shipbuilding Co.*, [1969] S.C.R. 85; (1969), 70 D.L.R. (2d) 693.

could not countenance a sovereign jurisdiction in arbitration boards within the field of collective agreement disputes.

It is suggested that this incorporation of arbitration boards into the hierarchical structure of the regular court system is inimical to the development of a fully adumbrated body of industrial jurisprudence and, consequently, injurious to the "harmonious relations between employers and employees."

The essence of arbitration is the impartiality of the arbitrator (in the sense of being free from bias), tempered with the acceptability, to the immediate parties, of both the arbitrator himself and his award.<sup>8</sup> The jurisdiction of the arbitrator is founded on the consent of the parties, and he is directly accountable to them; his continued employment depends upon his reaching viable solutions or compromises in the instant dispute which do not alienate either party. While this feature of arbitration has been criticized as a weakness of the system,<sup>9</sup> it actually represents the touchstone of arbitration.<sup>10</sup>

The remedies utilized by the courts and arbitrators also indicate the differing nature of the two processes. The judiciary has always stressed money damages as its primary form of relief, although equitable remedies have been available in certain circumstances. Specific performance of a contract of employment, however, has traditionally been refused on the ground that it is odious to one's sense of decency to compel an individual to employ or be employed by another against his will. Arbitration awards, however, are replete with instances of specific performance, *i.e.*, where the grievor is reinstated on terms specified by the award. The amount of compensation due in such cases is frequently left for determination by the parties, unlike court-dictated damages.

Finally, the courts represent an intensely individualistic proceeding, albeit the public interest influences some decisions. Labour arbitration is much more a group process, involving a collection of individuals constituting the employer (seldom is the employer a single individual) and a corresponding collection of individuals constituting the union. Although numerous grievances are brought on behalf of individual employees, many comprise group, union, or policy grievances dealing with a broader range of issues. Also, it is important to note that the individual grievance is conducted on behalf of the employee by the union.<sup>11</sup>

Several standard arguments commending arbitration over the judicial process in the field of labour relations deserve brief mention: the expertise resulting from constant contact with labour problems; the informality and flex-

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<sup>8</sup> Arthurs, *The Three Faces of Justice — Bias in the Tripartite Tribunal* (1963), 28 Sask. Bar Rev. 147.

<sup>9</sup> Hayes, *Labour Arbitration: A Dissenting View* (1966).

<sup>10</sup> The Ministerial criteria for the appointment of arbitrators under s. 37(4) of the OIRA stresses the necessity for the mutual acceptability of such arbitration in this essentially 'private' process.

<sup>11</sup> It is not within the scope of this paper to deal extensively with the duty of fair representation or the right of an individual to conduct his own grievance despite union opposition. See, generally, Palairé, *Tilting Against the Windmill: The Individual's Right to Arbitration* (1970), 8 Osgoode Hall L. J. 485.

ibility of arbitration; the lack of *stare decisis* as an operative principle; the relative speed in handling grievances.

These distinctions have been drawn before but merit repetition if only to emphasize the obvious: arbitration boards and the courts perform different functions and fulfill differing needs for different communities. Each possesses a distinct jurisprudence. And in each, "the law" is a dynamic and evolutionary, rather than static, process.

Canada has prided itself on its tolerance of difference. Unfortunately, this tolerance has not been characteristic of the judiciary in its treatment of arbitration tribunals. This is doubly unfortunate since the seeds of pluralism in our legal system were sown early in Canadian history and reaffirmed in the *British North America Act* itself.<sup>12</sup> Clearly, the effect of the Act was to permit uniformity where desired in the common law provinces but the continuation of the civil law system in Quebec. And today, the Supreme Court of Canada determines appeals from the Province of Quebec according to the Civil Code. The courts could review arbitration awards employing arbitral jurisprudence rather than common law principles. This would preserve the judicial hierarchy intact while respecting the integrity of the arbitration process. In conflict of laws terminology, the courts would apply the "proper law" of the contract, *i.e.*, industrial law, and ignore the substantive rules of the forum.<sup>13</sup>

Judicial review is, however, not simply a vertical process. Arbitrators cannot fail to be affected by the courts' treatment of their decisions. And, while arbitral awards are not binding *inter se*, *stare decisis* theoretically should apply for judicial decisions in respect of later arbitrations. Given the current stance of the judiciary, it falls to the arbitrator to integrate the *dicta* of the courts and arbitral jurisprudence so as to preserve industrial law as intact as possible.

In three important instances, the decision of an arbitrator was reversed by the Supreme Court of Canada or the Ontario Court of Appeal: *Re Port Arthur Shipbuilding Co.*,<sup>14</sup> *Re Hoogendoorn and Greening Metal Products and Screening Equipment Co.*,<sup>15</sup> *Re General Truckdriver's Union, Local 938 v. Hoar Transport Co. Ltd.*<sup>16</sup> In each case, the arbitrator's reasoning had balanced staid common law notions of contract with an awareness of the dynamics of the labour relations field. And, in each instance, the higher court dis-

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<sup>12</sup> (1867), 30 & 31 Victoria, c. 3, ss. 94 and 129.

<sup>13</sup> Arthurs, *Developing Industrial Citizenship* (1963), 45 Can. Bar Rev. 786 at 828-29.

<sup>14</sup> (1966), 17 L.A.C. 109; quashed (1967), 60 D.L.R. (2d) 214 (Ont. H.C.); *rev'd.* (1967), 62 D.L.R. (2d) 342 (Ont. C.A.); [1969] S.C.R. 85; (1969), 70 D.L.R. (2d) 693.

<sup>15</sup> [1968] S.C.R. 30; (1967), 65 D.L.R. (2d) 641; *rev'd* [1967] 1 O.R. 712; 62 D.L.R. (2d) 167 (Ont. C.A.); [1967] C.C.L. 237, which *aff'd*, subject to a variation, [1966] 2 O.R. 746; 58 D.L.R. (2d) 338.

<sup>16</sup> [1968] S.C.R. 634; 4 D.L.R. (3d) 449; *aff'g*, [1968] 1 O.R. 705; 67 D.L.R. (2d) 484. (*sub nom. R. v. Weiler, ex parte Hoar Transport Co.*) which *rev'd*, [1967] 2 O.R. 554; 64 D.L.R. (2d) 400; [1967] C.C.L. 1370.

carded the arbitrator's *ratio* as unsound, and affirmed the paramountcy of the common law doctrine.

## B. PORT ARTHUR SHIPBUILDING: THE REMEDIAL AUTHORITY OF THE ARBITRATOR

The Legislature affirmed the use of consensual arbitration for resolution of disputes arising under the collective agreement by empowering arbitrators to reach a "final and binding" determination of differences in s. 37 of the *OLRA*. Yet, collective agreements invariably contain a clause to the effect that the arbitrator may not "amend, alter or modify" the terms of the agreement. The question, then, becomes: what is the reach of this restriction on the arbitrator's power in the collective agreement in the face of the mandate from the parties and the legislature to adjudicate the dispute? That is, what is the nature and source of the authority of the arbitrator to resolve differences between the parties?

### 1. *Polymer: The Basis of Arbitral Authority*

The arbitration award in *Port Arthur* was handed down in June, 1966. But the reasoning in that case had its origins several years earlier in the arbitral decision of Professor Laskin in *Re Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers*.<sup>17</sup>

In *Polymer*, the company sought a declaration that the union had engaged in an illegal strike and claimed damages for losses suffered. The arbitrator upheld the company's position and awarded damages; the decision was affirmed at all levels of appeal. But in reaching this conclusion, Professor Laskin analysed the function of arbitration and argued that that functional basis had specific implications for the nature of arbitral authority:

As a matter of history, collective agreements in Canada had no legal force in their own right until the advent of collective bargaining legislation. Our Courts refused to assume original jurisdiction for their enforcement and placed them outside the legal framework within which contractual obligations of individuals were administered. The legislation, which in the context of encouragement to collective bargaining sought stability in employer-employee relations, envisaged arbitration through a mutually accepted tribunal as a built-in device for ensuring the realization of the rights and enforcement of the obligations which were the products of successful negotiation. Original jurisdiction without right of appeal was vested in boards of arbitration under legislative and consensual prescriptions for finality and for binding determinations.<sup>18</sup>

The jurisdiction of the arbitrator to resolve disputes arising under the collective agreement was to be distinguished from the power or authority of the arbitrator to devise an award which did, in fact, resolve such disputes. "Effective adjudication" was predicated upon remedial as well as declaratory authority in the arbitrator. In *Polymer*, it was found that the innocent party would only be vindicated by an award of damages; absent arbitral authority

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<sup>17</sup> (1959), 10 L.A.C. 51.

<sup>18</sup> *Id.* at 55-56.

to so award, the legislative scheme for dispute settlement in a collective bargaining regime would become an "empty vehicle."

Once the parties have submitted to the jurisdiction of a board of arbitration authorized to adjudicate on an alleged violation of a collective agreement obligation, they have accepted the full range of the tribunal's adjudicative powers (unless expressly limited) which is immanent in such adjudication. To seek to thwart their exercise by appeal to a fictional intention of the parties is to seek indirectly to nullify the duty of observance and performance of collective agreement terms.<sup>19</sup>

Although the damage award was upheld, and the Ontario Court of Appeal and the Supreme Court of Canada affirmed the reasoning of McRuer, C.J.H.C. in the Ontario High Court,<sup>20</sup> the judiciary though, did not endorse the arbitrator's characterization of the basis for arbitral authority. Rather, "the jurisdiction of the arbitrators to award damages must be found in the language used by the parties as an expression of their 'intention'."<sup>21</sup>

Although such power was not explicitly granted to the arbitrator in the collective agreement in question, the Courts found such an implication from the broad language regarding the disposition of grievances, and from the statutory obligation to settle all differences without stoppage of work.<sup>22</sup> Thus, the extent of arbitral remedial authority was considered a question of jurisdiction to be determined according to the intention of the parties as expressed or implied by the language of the collective agreement.

The arbitrator and the Courts, therefore, clearly differed in their views of the nature of the remedial authority of arbitrators. But they concurred in the result in *Polymer*, and the Courts failed to openly disapprove of the arbitrator's reasoning. Arbitrators, then, in subsequent grievances could freely rely on Professor Laskin's analysis in *Polymer* in the absence of express provision in the collective agreement.<sup>23</sup>

## 2. *The Exercise of Remedial Authority Before Port Arthur*

The consensus among arbitrators seemed to favour the *Polymer* view that the arbitrator's authority stemmed from the collective bargaining regime itself.<sup>24</sup> In the words of Professor Krever in *Re The Canadian Salt Co. Ltd.*,

<sup>19</sup> *Id.* at 60.

<sup>20</sup> [1961] O.R. 438; 28 D.L.R. (2d) 81; *aff'g*, [1961] O.R. 176; 26 D.L.R. (2d) 609. *Aff'd* (*sub. nom. Imbleau v. Laskin*), [1962] S.C.R. 338; (*sub. nom. Re Polymer Corp. and Oil, Chemical & Atomic Workers Union Local 164*), 33 D.L.R. (2d) 124.

<sup>21</sup> *Per* McRuer, C.J.H.C., (1961), 26 D.L.R. (2d) 609 at 614.

<sup>22</sup> *Id.* at 614-15.

<sup>23</sup> *Sec. Re Harding Carpets Limited* (1963), 14 L.A.C. 93 (Hanrahan). But, as is indicated *infra*, prior to *Port Arthur*, arbitral consensus supported the exercise of remedial authority in discipline grievances irrespective of the terminology of the collective agreement.

<sup>24</sup> It must be stressed that arbitral consensus as to the source and nature of arbitral authority long pre-dated *Polymer*, although the examples cited are restricted to the mid-1960's. Generally, see, *Re Massey-Harris-Ferguson Ltd.* (1958), 8 L.A.C. 256 (Cross); *Re Canadian General Electric Co. Ltd. (Peterboro)* (1949), 1 L.A.C. 320 (Laskin); *Re Sandwich Windsor & Amherstberg Ry.* (1950), 2 L.A.C. 684 (Hanrahan); *Re Peterboro Lock Mfg. Co. Ltd.* (1952), 3 L.A.C. 935 (Lang).

"The right of an employee to grieve is sufficient to extend jurisdiction to an arbitrator to consider the severity of a suspension and to change the penalty imposed by the company even when the agreement contains a 'no power to amend, alter, or add to' clause."<sup>25</sup> The arbitrator was seen to possess broad powers of review of the discipline imposed by the employer.

The emphasis in the arbitral judgments lay not on the issue of remedial authority itself, but on the fashioning of guidelines for the exercise of such powers. For example, demotion was deemed to be an improper disciplinary measure; an employee could only be demoted for his inability to perform his tasks efficiently or in a general reduction of the work force as permitted by the collective agreement.<sup>26</sup> In *Re Tecumseh Products of Canada*,<sup>27</sup> the arbitrator substituted a two day suspension for insubordination, overturning an improper demotion. Likewise, the elimination of seniority rights was not justified, although a six day suspension was warranted for a three day absence without leave in *Re Wickett & Craig Ltd.*<sup>28</sup> While the collective agreement provided for automatic loss of seniority upon absence without leave for more than two days, given the proven illness of the grievor as the reason for such absence, a literal application of the collective agreement was rejected as too drastic a consequence for the breach of duty in question.<sup>29</sup>

Further, it was not considered a proper use of management's powers to mete out discipline in an arbitrary, capricious or discriminatory manner. For example, the grievors were reinstated in *Re Long Sault Yarns Ltd.*,<sup>30</sup> as the company had unreasonably selected these employees for discharge after a wildcat strike without regard to their degree of guilt relative to the other employees participating or among the grievors themselves. To quote the arbitrator in *Re Findlays Ltd.*, "The concept of non-discrimination involved treating employees who are something less than equal in such a way that the difference in treatment that they receive bears a reasonable relationship to differences in their performance."<sup>31</sup> In assessing appropriate penalties, the arbitrator was to consider not just the specific grievance, but also the broader role of discipline in the collective bargaining regime:

The singling out of the grievor for this type of penalty while other tardy employees were not warned or otherwise penalized, was apt to create a harmful employer-employee relationship, and the imposition of disciplinary penalties in industry is a quasi-judicial function such that justice must not only be done, but must appear to be done.<sup>32</sup>

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<sup>25</sup> (1966), 17 L.A.C. 322 at 322.

<sup>26</sup> *Re Central Supermarkets Ltd.* (1964), 15 L.A.C. 332 (Arrell); *Re Findlays Ltd.* (1968), 19 L.A.C. 364 (Christie).

<sup>27</sup> (1968), 19 L.A.C. 180 (Weatherill).

<sup>28</sup> (1968), 19 L.A.C. 310 (Weatherill).

<sup>29</sup> *Id.* at 310-11.

<sup>30</sup> (1968), 19 L.A.C. 257 (Curtis).

<sup>31</sup> (1968), 19 L.A.C. 364 at 364. That case dealt with discriminatory demotion rather than discriminatory discipline *per se* but the principle formulated applies in both instances.

<sup>32</sup> *Re Thibodeau Express Ltd.* (1966), 18 L.A.C. 28 (Hanrahan), where a three-day suspension was reduced to one day; on the facts the grievor had a record for tardiness but was only one minute late on the day in question.



There seemed to be considerable agreement on the test to be applied: the discipline must be "within the range of reasonable responses to the situation."<sup>33</sup> That is, the arbitrator must look to the discipline imposed in the light of all the circumstances of the case.<sup>34</sup> However, only in *Re Concrete Pipe* was there any reference to the collective agreement's expressly conferring on the arbitrator the right to vary a penalty imposed by the company.<sup>35</sup>

Arbitrators, then, came to exercise remedial authority according to definite principles, but irrespective of express mandate in the collective agreement to modify the discipline imposed by the employer, and usually in the face of a standard "no alter, amend or modify" clause.<sup>36</sup>

### 3. *The Rule in Port Arthur*

There was no dispute as to the facts in *Port Arthur*: three employees had taken unauthorized leaves of absence, accepting temporary employment elsewhere, and had been discharged. The collective agreement contained a "just cause" provision governing dismissal, and the usual "no alter, amend or modify" clause. The arbitrator rejected the common law rules of the master-servant relationship as inappropriate in the context of a collective bargaining regime in which collective agreements shelter employees from termination except for "just cause". Instead of the common law rule of employment terminable virtually at the will of the employer, arbitrators had fleshed out the concept of "just cause":

It is common knowledge that over the years a distinctive body of arbitral jurisprudence has developed to give meaning to the concept of 'just cause' for discharge in the context of modern industrial employment. Although the common law may provide guidance, useful analogies, even general principles, the umbilical cord has been severed and the new doctrines of labour arbitrators have begun to lead a life of their own.<sup>37</sup>

For arbitral jurisprudence, the issue was formulated by Arbitrator

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<sup>33</sup> *Re International Harvester Co. of Canada, Ltd.* (1967), 18 L.A.C. 237 (Weatherill).

<sup>34</sup> (1966), 17 L.A.C. 408 (Reville). For examples of the application of this test, see, *Re Slater Steel Industries Ltd.* (1968), 19 L.A.C. 110 (Palmer); *Re C.N.R. Co., Hotel Department* (1968), 19 L.A.C. 401 (Hanrahan); *Re Phillips Cables Ltd.* (1968), 19 L.A.C. 274 (O'Shea); *Re Precision Products Canada Ltd.* (1968), 19 L.A.C. 406 (Weatherill).

<sup>35</sup> (1966), 17 L.A.C. 419 (Hanrahan).

<sup>36</sup> The case of *Re Canadian Gypsum Ltd.* (1968), 19 L.A.C. 341 (Weiler) does not really dissent from this view. Rather, the collective agreement in question did not provide for any review of company discipline action, *i.e.*, there was no "just cause" limitation. The arbitrator refused to imply such a provision solely from the existence of the collective agreement.

<sup>37</sup> *Re Port Arthur Shipbuilding Co.* (1966), 17 L.A.C. 109 (Arthurs) at 112. It should be noted that the Supreme Court of Canada recently held that the common law contract doctrine of fundamental breach is inapplicable to a collective bargaining regime. In *McGavin Toastmaster Ltd. v. Ainscough et al.* (1975), 54 D.L.R. (3d) 1, the Supreme Court of Canada refused to treat an unlawful strike by the employees as a repudiation of their contract of employment; the company remained liable to those employees for severance pay on the closing down of the plant as required by the terms of the collective agreement.

Arthurs as: "To find 'just' cause for discharge we must have regard both to the offence and to the penalty."<sup>38</sup> Despite the acknowledged serious nature of the incident, given the considerable seniority of the grievors, their excellent work record, and the minimal likelihood of repetition of such behaviour, the arbitrator found that the discharge was not for proper cause.<sup>39</sup>

In formulating the issue as he did, the arbitrator was relying on established industrial jurisprudence. *Re KVP Co. Ltd.* had settled the arbitral law regarding discipline:

The prevailing rule now appears to be established that when the question arises whether or not the penalty was for just cause, the company must establish just cause not only for the imposition of a penalty but for the particular penalty imposed.<sup>40</sup>

Then, citing *Polymer* for the proposition that "the arbitrator may fashion appropriate remedies pursuant to his general mandate to make a final and binding determination of the issues presented to him",<sup>41</sup> the arbitrator reinstated the grievors but imposed lengthy suspensions.

The majority in the Ontario Court of Appeal upheld the award, essentially adopting the arbitrator's reasoning:

It cannot be the case (although there was some suggestion of this in argument) that the company's judgment that the dereliction of the employees merited discharge was beyond review by the arbitration board. This would empty an arbitration board's function in discharge cases of any substance once misconduct was proven. The collective agreement clearly makes 'proper cause' an arbitrable issue.<sup>42</sup>

<sup>38</sup> *Re Port Arthur Shipbuilding Co., id.* at 113.

<sup>39</sup> In the lower court, there was an attempt to distinguish "proper" and "just" cause, but this argument was rejected as merely semantic in the Appeal Court, where the words were treated as synonymous. It must be stressed that the arbitrator in *Port Arthur* found, as a matter of arbitral law, that there was no "just cause" for discharge. The case of *R. v. Bigelow, Ex. p. International Nickel Co.*, [1959] O.R. 527 was, therefore, clearly distinguished. There the arbitrator had reinstated the grievor subject to a suspension to the date of the award due to mitigating factors. But rather than citing the "other circumstances" as going to the "justness" of the discipline, *i.e.*, whether the penalty imposed was proper in the context, the arbitrator held that "just cause" for discharge did exist; his attempt to alleviate the penalty was quashed in the Ontario Court of Appeal as an excess of jurisdiction. The argument is not merely semantic: when the collective agreement stipulates that just cause for discipline must be shown, a finding of just cause necessitates the dismissal of the grievance. In *Port Arthur*, however, the term in the collective agreement requiring proper cause for discharge had not been satisfied.

<sup>40</sup> (1965), 16 L.A.C. 73 (Robinson) at 96. This principle was derived from *dicta* in preceding arbitrations, particularly, *Re Canadian General Electric Co. Ltd.* (1954), 5 L.A.C. 139 (Laskin); *Re Dow Kingsbeer Brewery Ltd.* (1960), 11 L.A.C. 129 (Cross); *Re Canadian Food Products Sales Ltd.* (1965), 15 L.A.C. 443 (Reville); and *Re Teskey Ready-Mix Ltd.* (1963), 14 L.A.C. 136 (Hanrahan).

<sup>41</sup> *Supra*, note 33 at 113.

<sup>42</sup> *R. v. Arthurs, Ex p. Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342 at 360. It should be noted that the judgment of the Ontario Court of Appeal was relied on in *Re Sentry Department Stores Ltd.* (1968), 19 L.A.C. 378 (Hanrahan) to justify substitution of a two-week suspension in lieu of dismissal where the collective agreement was silent as to the arbitrator's authority to modify the decision imposed.

To use the phraseology of *Polymer*, the board had jurisdiction to review company's action by virtue of the proper cause provision and had the power to fashion an appropriate remedy in order to fulfill the statutory and contractual mandate to render a final and binding determination of the dispute where the company's response was found to be improper.

On appeal to the Supreme Court of Canada, the company's position was vindicated and the award quashed. The Court, as in *Polymer*, treated the issue as going to jurisdiction:

The task of the board of arbitration in this case was to determine whether there was proper cause. The findings of fact actually made and the only findings of fact that the board could possibly make establish that there was proper cause. Then there was only one proper legal conclusion, namely, that the employees had given the management proper cause for dismissal . . . Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration.<sup>43</sup>

The Court did not deal explicitly with the argument raised by Laskin, J.A. (as he then was) in the Ontario Court of Appeal (nor with his earlier analysis in *Polymer*) that the statutory requirement of arbitration to reach a final and binding adjudication of disputes necessarily implies a remedial authority for arbitrators. Further, the Court ignored precedents<sup>44</sup> referred to by the arbitrator on discipline clauses in the industrial context. Although arbitration boards were deemed statutory tribunals and thereby subject to judicial review by virtue of the *OLRA*, the authority of the arbitrator, in the Court's view, was delimited solely by the words of the collective agreement in question. The rule in *Port Arthur* was straight-forward:

An arbitration board of the type under consideration has no inherent powers of review similar to those of the Courts. Its only powers are those conferred upon it by the collective agreement and these are usually defined in some detail. It has no inherent powers to amend, modify or ignore the collective agreement.<sup>45</sup>

#### 4. *The Response of the Arbitrators: Obedience*

It is fair to state that the arbitrators were surprised by the *dicta* in *Port Arthur*: the Court had completely rejected as unsound what was accepted arbitral practice, namely, the right of arbitrators to modify penalties where the discipline was felt excessive.

One response was unquestioning obedience to the rule in *Port Arthur* without any attempt to mitigate against the harshness of the doctrine in the particular circumstances. For example, in *Re Northern Telephone*, the grievors had refused to reside in unsanitary living quarters; when denied permission to sleep in the trucks, they had returned home. The company's allegation of a "voluntary quit" was rejected by the arbitrator on the facts. However, as the employees were not entirely innocent, the discharges were upheld:

Clearly, the grievors had left themselves open to some disciplinary action and,

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<sup>43</sup> *Port Arthur Shipbuilding v. Arthurs et al.* (1968), 70 D.L.R. (2d) 693 (S.C.C.) at 696.

<sup>44</sup> *Re KVP Co. Ltd.*, *supra*, note 40 and cases cited therein at 96-97.

<sup>45</sup> *Supra*, note 43 at 702.

by virtue of the holding in the Port Arthur Shipbuilding case, this board cannot question, in the words of Judson, J. 'the particular form chosen'.<sup>46</sup>

In *Re Dupont of Canada Ltd.*,<sup>47</sup> the dismissal of an employee who engaged in horseplay contrary to company rules was affirmed. The arbitrator felt the *Port Arthur* decision was "on all fours" with the instant grievance; he, therefore, was without jurisdiction to "substitute" a lesser form of discipline. Again, in *Re Trane Co. of Canada Ltd.*,<sup>48</sup> the arbitrator held that the rule in *Port Arthur* required specific words authorizing a variation of a disciplinary measure and refused to interfere in the company's choice of penalty (dismissal) for the grievor's carelessness.<sup>49</sup>

Such responses are understandable, perhaps, as an expression of frustration at the Court's intervention with a functioning system of resolving disputes, but did little to alleviate an unjust penalty imposed on the grievor. While arbitrators may also have been motivated by fidelity to judicial pronouncements under the principle of *stare decisis*, there was now enthusiastic approval among arbitrators of the *dicta* in *Port Arthur*.

It should be noted that one probable consequence of *Port Arthur* was the inclusion in collective agreements of a specific provision authorizing the arbitrator to modify any disciplinary penalty imposed by the company. Whereas prior to the Court's ruling only the rare case made mention of such a provision, the arbitrators in a number of the unreported decisions in 1970, before the enactment of the legislative amendment which gave the arbitrator authority to substitute a penalty, referred to such clauses as grounding their authority to vary penalties.<sup>50</sup> But, of course, the union would have to bargain away some other advantage to obtain the acquiescence of the company to include such a provision in the collective agreement. In one reported decision, *Re Stancor Central Ltd.*,<sup>51</sup> the arbitrator relied on a clause authorizing him to reach a "just and equitable result" in order to reinstate the grievor subject to a one day suspension; the clause was deemed sufficiently specific authorization to override the rule in *Port Arthur*. The Ontario Court of Appeal in *R. v. McCullogh, Ex. P. Dowty Equipment of Canada Ltd.* held that a collective agreement permitting the arbitration board to review the discharge and confirm the dismissal, reinstate the grievor with compensation or reach

<sup>46</sup> (1968), 19 L.A.C. 129 (Palmer) at 136.

<sup>47</sup> (1969), 20 L.A.C. 37 (Lane).

<sup>48</sup> (1969), 20 L.A.C. 107 (Palmer).

<sup>49</sup> Additional cases illustrating this approach include *Re Kysor of Ridgetown Ltd.* (1970), 22 L.A.C. 23 (Hinnegan); *Re Dunham-Bush of Canada Ltd.* (1970), 22 L.A.C. 46 (Hinnegan); *Re Dupont of Canada Ltd.* (1970), 21 L.A.C. 376 (Brown); *Re Pamour Porcupine Mines Ltd.* (1969), 20 L.A.C. 321 (Godin); *Re Dominion Tape of Canada Ltd.*, unreported, 1970 (Brandt); *Re F. W. Fearman Co. Ltd.*, unreported, 1970 (Palmer).

<sup>50</sup> *Re Hyde Spring & Wire (Canada) Ltd.*, unreported, 1970 (Brown); *Re Canadian Carborundum Co. Ltd.*, unreported, 1970 (Roberts); *Re Gibson Cartage Ltd.*, unreported, 1970 (Brown); *Re Rubbermaid (Canada) Ltd.*, unreported, 1970 (Weiler); *Re Loblaw Groceteria Co. Ltd.*, unreported, 1970 (Brown); *Re Massey-Ferguson Industries Ltd.*, unreported, 1970 (Johnston); *Re Massey-Ferguson Industries Ltd.*, unreported, 1970 (Weatherill); *Re Jockey Club Limited*, unreported, 1970 (Simmons).

<sup>51</sup> (1970), 22 L.A.C. 184 (Weiler).

"any other arrangement which may be deemed just and equitable" was sufficiently precise to authorize the board to substitute a three month suspension for discharge notwithstanding specificity in the plant rules providing for dismissal for the alleged offence.<sup>52</sup>

##### 5. *Redefining the Issue to Avoid the Port Arthur Rule*

Arbitrators, however, did utilize several arbitral doctrines to limit the reach of the *dicta* in *Port Arthur* and thereby preserve the earlier jurisprudence. One approach was to characterize the issue as other than a matter of varying the penalty imposed by the company. For example, arbitrators affirmed the earlier principle that innocent absenteeism is not grounds for discipline in the sense of penalizing culpable conduct.<sup>53</sup> By defining absenteeism for medical reasons as other than a disciplinary matter, the arbitrator avoided the imputation that he was modifying a "penalty" imposed by the company.<sup>54</sup>

Discipline for breach of company rules would be upheld only after a threshold question as to the propriety of the rule itself had been affirmatively answered. To quote the arbitrator in *Re General Spring Products Ltd.*, "Where breach of a rule is relied on as the basis of discipline, the rule must be consistent with the collective agreement, clear and unequivocal, known to the employee, consistently enforced and reasonable."<sup>55</sup> To be adjudged "reasonable", the rule must directly relate to matters affecting the employment relationship itself. In that case, the grievor was convicted for possession of stolen property and the rules provided for discharge upon proof of a criminal conviction. But the arbitrator held that, as the rule was unrelated to the grievor's actual job, there was no just cause for discipline. In restricting management's right to formulate regulations defining culpable activities, arbitrators achieved a prior modification of management's right to impose discipline.<sup>56</sup>

In a similar vein, arbitrators utilized the doctrine of culminating incident: the company could rely on the past work record to satisfy the just cause standard only if the culminating incident itself was adequately proved to merit discipline. While the entire record of the grievor may have justified some discipline (and under *Port Arthur* the arbitrator could not restrict the severity of the form chosen), in *Re Fiberglas Canada Ltd.* the culminating incident itself was not proved to warrant discipline and the grievance succeeded.<sup>57</sup>

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<sup>52</sup> (1969), 2 O.R. 331 at 333.

<sup>53</sup> Arbitrators did recognise management's right to terminate the employment of an individual for excessive absenteeism.

<sup>54</sup> See, *Re Seiberling Rubber Co. of Canada Ltd.* (1969), 20 L.A.C. 267 (Weiler); *Re Power Super Markets* (1969), 20 L.A.C. 73 (Krever).

<sup>55</sup> (1968), 19 L.A.C. 392 (Weatherill) at 394.

<sup>56</sup> This approach was followed in *Re Brock University* (1970), 21 L.A.C. 146 (Brown). Further, in *Re National Steel Drum Co. Ltd.* (1969), 20 L.A.C. 402 (Palmer), the company rule imposing dismissal in the event of a wage assignment or garnishee order was considered an inappropriate way of protecting the company's interest; the grievor was reinstated conditional upon obtaining a consolidation order.

<sup>57</sup> (1968), 20 L.A.C. 11 (Hanrahan).

Arbitrators seemed to be moving toward the imposition of a duty on the company to act fairly and reasonably in imposing discipline. For example, in *Re Findlay Foundry Ltd.*,<sup>58</sup> the arbitrator found that the procedural foundations for such a severe form of discipline as discharge had not been laid. That is, a general warning that production must increase, without specifying that dismissal was a possible consequence of non-improvement was insufficient preparation for discharge. In *Re Canadian Curtis-Wright Ltd.*,<sup>59</sup> the grievor failed to return immediately after completing union business. The test in *Port Arthur* was satisfied, i.e., "Could an honest management, looking at the group of employees as a whole and at the interest of the company, have reached the conclusion that they did?"<sup>60</sup> But the arbitrator held that the company's "discretion" in selecting the disciplinary response "must be exercised in a judicious fashion after considering the individual employee and the particular circumstances giving rise to the issue of just cause."<sup>61</sup>

Thus, arbitrators sought to soften the effect of *Port Arthur* by redefining the problem from a matter of the measure of discipline, which could not be altered, to the fulfilling of an arbitrarily-imposed condition as a prerequisite to the valid imposition of discipline. This tactic, however, had a severe limitation. The arbitrator, in effect, would be relieving the grievor from any penalty since a more appropriate disciplinary response could not be imposed. The choice lay between exoneration of the grievor from any wrongdoing and upholding an excessive form of discipline. The case of *Re Upper Lakes Shipping Ltd.*<sup>62</sup> illustrated the dilemma. The grievor was dismissed for using insolent language to a superior, contrary to the regulations under the *Canada Shipping Act*. The arbitrator held that this was not discharge for just cause. Precluded from substituting a lesser penalty under the *Port Arthur* rule, the arbitrator indicated he was compelled to order full reinstatement with compensation. The facts of the grievance, therefore, would have to be particularly compelling for the arbitrator to uphold the union's claim.

#### 6. Attempts to Contain the Rule in *Port Arthur*

Despite the apparent breadth of the *dicta* in *Port Arthur*, arbitrators did evolve some positive doctrines to alleviate the harshness of the rule. In *Re International Nickel Co. of Canada Ltd.*, the arbitrator acknowledged the binding effect of *Port Arthur* but rejected the imputation that the issue in discipline grievances was simply whether the company had just cause to impose any penalty; the language of the case could not be viewed in isolation. In the words of the arbitrator, "We consider it an unfair gloss on the Court's language to say that proper cause ('in the air', so to speak) is to be, *simpliciter*,

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<sup>58</sup> (1970), 22 L.A.C. 48 (Adell).

<sup>59</sup> (1970), 21 L.A.C. 404 (Shime).

<sup>60</sup> *Supra*, note 43 at 697.

<sup>61</sup> *Supra*, note 59 at 408. For further examples, see, *Re Rahn Metals Ltd.* (1969), 20 L.A.C. 217 (Brown); *Re Northern Foodmarts Ltd.* (1969), 20 L.A.C. 214 (Godin); *Re Douglas Aircraft* (1969), 20 L.A.C. 362 (Brown); *Re International Nickel Co.* (1969), 20 L.A.C. 288 (Brown).

<sup>62</sup> (1969), 20 L.A.C. 149 (Weatherill).

the subject of determination. The cause must be proper or appropriate to the action taken."<sup>63</sup> Superficially, the arbitrator seemed to defer to the *dicta* in *Port Arthur*. But what was actually accomplished was the replacement of the Court's test — "Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review"<sup>64</sup> — with the earlier arbitral doctrine that the discipline must be commensurate with the offence. On the facts, the arbitrator found that the two day suspension for refusal to work in allegedly unsafe conditions was not excessive given the circumstances; the grievance was dismissed. But in reaching that conclusion, the arbitrator laid down a supposedly alternative formulation of the *Port Arthur* rule:

It is not our task to decide what discipline we might have imposed, but only to determine whether the penalty imposed was just; that is, whether it fell within the range of reasonable disciplinary responses to the situation.<sup>65</sup>

However, under this doctrine, the arbitrator could again consider such other factors as provocation, seniority, work record, and the particular circumstances of the incident in assessing the justness of the penalty.

Some arbitral awards cited such mitigating factors to hold that no just cause for the discipline existed despite some wrongdoing by the grievor. In *Re Hayes-Dana Ltd.*,<sup>66</sup> the grievor was given an indefinite suspension for assault and insubordination. The evidence revealed that the foreman's action provoked an automatic, although violent, response of the employee. It was held that the foreman was solely responsible for the incident and the grievor was reinstated with full compensation. In *Re Associated Freezers of Canada Ltd.*,<sup>67</sup> absence from a work shift without prior notification to the company resulted in the grievor's discharge. Given the silence of the collective agreement and plant regulations as to whether discharge would result from such failure, and given the grievor's telephone request of a fellow employee to notify the foreman, the arbitrator held that just cause for dismissal had not been established. The grievor was reinstated with compensation. The decision of *Re Baton Broadcasting Ltd.* likewise required the company to show just cause for the particular form of discipline selected in light of all the circumstances. Further, "[t]here is an obligation on the company before discharging an employee to make a proper assessment of all the available evidence and all the pertinent factors prior to imposing the penalty";<sup>68</sup> the pre-*Port Arthur* award of *Re Sperry Gyroscope*<sup>69</sup> was cited as founding this duty.

In fact, the discipline imposed by the company was modified in several decisions. In *Re Tank Truck Transport Ltd.*,<sup>70</sup> a unanimous board deter-

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<sup>63</sup> *Re International Nickel Co. of Canada Ltd.* (1968), 19 L.A.C. 118 (Weatherill) at 121.

<sup>64</sup> *Supra*, note 43 at 696.

<sup>65</sup> *Supra*, note 63 at 124.

<sup>66</sup> (1969), 20 L.A.C. 410 (Hanrahan).

<sup>67</sup> (1969), 20 L.A.C. 285 (Hanrahan).

<sup>68</sup> Unreported, (O'Shea) at 32.

<sup>69</sup> (1966), 17 L.A.C. 426 (Hanrahan).

<sup>70</sup> (1969), 20 L.A.C. 403 (Hanrahan).

mined that the grievor's refusal to work in the circumstances could not be considered insubordination but was deserving of some censure; the five day suspension was reduced to two and one half days. The arbitrator in *Re Union Carbide Canada Ltd.*<sup>71</sup> held that the fight for which the grievor was dismissed neither interrupted production nor tarnished the company's public image. Further, as the grievor had been seriously provoked, suspension in lieu of discharge was deemed the proper penalty.

It is unlikely that the collective agreements in such cases authorized such variation, since they commonly couple a just cause provision with a standard "no alter, amend or modify" clause, as in *Port Arthur* itself. Rather, it seems that the arbitrators either were prepared to risk reversal on judicial review or had succeeded in rephrasing the Court's *dicta* to permit such an award. Support for the latter interpretation is found in *Re Fabricated Steel Products (Windsor) Ltd.*<sup>72</sup> In that case, the arbitrator held that just cause for dismissal had not been established. But an interesting interpretation was placed on *Port Arthur*. There, the Court stated that proper cause for discipline did exist; the arbitrator was precluded from modifying the penalty. From this, Arbitrator Weatherill concluded that, where just cause was not established, the arbitrator could assess "consequential relief." That phrase had been applied in *Port Arthur* to the arbitrators' proper award of damages in *Polymer*, as distinct from the "erroneous" substitution of discipline in *Port Arthur*. In *Re Fabricated Steel Products*, however, the consequential relief involved the reinstatement of the grievor.<sup>73</sup>

The reasoning in *Re International Nickel* and *Re Fabricated Steel Products*, therefore, combined to significantly undercut the rule in *Port Arthur*. For example, in *Re De Haan Cartage Co. Ltd.*,<sup>74</sup> the arbitrator found that a four week suspension lay beyond the "reasonable range of responses", so that just cause was not established; a three week suspension with compensation for the last week was ordered as "consequential relief."

The case of *Re SKD Manufacturing Ltd.* also deserves mention. The arbitrator recognized the authoritative nature of the Court's ruling "to the extent that the Supreme Court has stated the law regarding the interpretation of this type of collective agreement provision."<sup>75</sup> The language of the judgment, though, have to be read in the context of the particular facts of the case. That is:

We would interpret this language as related to a context of admitted *serious* breach of an *explicit* provision of the collective agreement which has been found by the Court to constitute *proper cause for dismissal*, as a matter of law.<sup>76</sup>

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<sup>71</sup> (1970), 22 L.A.C. 210 (O'Shea). See, also, *Re East Side Stamping Co. Ltd.* (1969), 20 L.A.C. 23 (Christie).

<sup>72</sup> Unreported, 1970.

<sup>73</sup> See, also, *Re Ford Motor Co. of Canada, Ltd.* (1970), 22 L.A.C. 35 (Weatherill); *Re Bendix-Eclipse of Canada, Ltd.*, unreported, 1970 (Weatherill).

<sup>74</sup> Unreported, 1970 (Weatherill).

<sup>75</sup> (1969), 20 L.A.C. 231 (Weiler) at 234.

<sup>76</sup> *Id.* at 237.



It was concluded that the rule in *Port Arthur* did not necessarily preclude arbitral review of the quality of discipline imposed where less serious breaches occurred. Firmly established arbitral doctrines were referred to as grounding the arbitrator's right to assess the appropriateness of the discipline chosen as a function of the entire circumstances of the incident. The phraseology echoes that of Weatherill in *Re International Nickel*: "Management must not select a penalty which is unreasonably out of proportion to the particular offence in the circumstances."<sup>77</sup> Additionally, the collective agreement was interpreted as granting special authority to the arbitration board to review the company's dismissal of an employee thereby, fulfilling the requirement in *Port Arthur* that express words in the collective agreement were needed to justify interference with the penalty selected.<sup>78</sup>

Thus, despite the seemingly broad scope of the language in *Port Arthur*, some arbitrators rapidly developed rationales to soften the severity of the rule. But the arguments relied on seem to have imposed an interpretation on the Court's reasoning with which the Court would be unlikely to agree. For this reason, many arbitrators felt bound by *Port Arthur* to reach an admittedly unpalatable result. Clearly, the number and importance of discipline grievances could not be underestimated. Employee frustration as a result of arbitrators' inability to relieve against an unwarranted form of discipline would not facilitate harmonious employer-employee relations. Arbitral semantics alone could not effectively correct the problem: it remained for the Legislature to intervene.<sup>79</sup>

### 7. Legislative Intervention

The Ontario Legislature in November, 1970 enacted s. 37(8) of the *OLRA* authorizing, as a substitute for discharge or discipline, such other penalty as "seems just and reasonable in all the circumstances." The amendment was proclaimed in force in January, 1971. However, arbitrators were precluded from exercising such discretion where the collective agreement provided a specific penalty for the alleged infraction. This *caveat* is not likely to represent any significant reduction of the arbitrator's powers, for collective agreements do not often attain such particularity in disciplinary matters, although a few such instances have arisen.<sup>80</sup>

Arguments may be made for and against the exception in s. 37(8). On the one hand, there are compelling reasons for upholding arbitral discretion regarding discipline irrespective of specific penalties in the collective agreement. Penal responses are not likely to be uniform throughout an industry, so

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<sup>77</sup> *Id.* at 242.

<sup>78</sup> Arbitrators generally seemed to prefer the guidelines formulated in *International Nickel* but *Re SKD Manufacturing* was also cited in later arbitral awards, notably in *Re Phillips Cables Ltd.* (1974), 6 L.A.C. (2d) 35 (Adams).

<sup>79</sup> A letter to Dalton Bales in November, 1968, urging statutory reform of the effect of judicial intervention in *Port Arthur* and several other cases was signed by all practising arbitrators in the province except those former members of the judiciary.

<sup>80</sup> See, *Re Canada Packers Ltd.*, unreported, 1970 (O'Shea); *Re Great Lakes Papers Co. Ltd.*, unreported, 1971 (Duthie); *Re Spruce Falls Power and Paper Co. Ltd.*, unreported, 1972 (Abbott); *Re Lake Ontario Steel*, unreported, 1975 (O'Shea).

the arbitrator should be free to fashion the remedy appropriate to the infraction in the particular context. However, the collective agreement remains a contractual document, albeit a unique one. Where a specific penalty for a particular infraction emerges as a result of the negotiation process, this expression of the parties' intention should not be simply disregarded.

Arbitrators have not commented on the issue; rather the collective agreement is stated to permit or exclude arbitral authority under s. 37(8). However, in *Re Dufferin Material & Construction Ltd.*,<sup>81</sup> the arbitrator did hold that company rules stipulating a specific penalty for insubordination did not come within the exception to arbitral discretion in s. 37(8) as such rules were an expression of company policy and not a result of collective bargaining.

There has been one instance of judicial review on the point. In *Re Hamilton Street Railway Co.*,<sup>82</sup> the collective agreement provided that the company could discharge an employee for reasonable cause and that reporting to work with alcoholic breath was deemed to constitute sufficient cause for dismissal. The arbitrator ruled that the clause merely defined one instance where dismissal may be imposed; that is, the power to modify the penalty under s. 37(8) continued unabated. On *certiorari*, the award was quashed. Hughes, J. reasoned that the combined effect of the collective agreement terms was to provide for a specific penalty for the infraction, thereby coming within the exception in the amendment. It may be, therefore, that arbitrators will tend to interpret the collective agreement so as to avoid the restriction on their authority contained in s. 37(8) except where such a conclusion is inescapable.

There is no doubt that the amendment authorized, or reinstated, the remedial power of the arbitrator in discipline grievances. But arbitrators did not seem to view the amendment as an open invitation to modify penalties without restraint. Words of caution abound in the awards issued shortly after the legislative change. In *Re Gould Manufacturing of Canada Ltd.*, it was said that the arbitrator should use his wide powers under s. 37(8) "not frivolously or capriciously but with some attempt at objectivity."<sup>83</sup>

Indeed, some arbitrators sounded unnecessarily cautious in formulating guidelines for the invocation of s. 37(8): in *Re Galt Metal Industries Ltd.* the arbitrator approved of substitution only where "the penalty imposed is, viewed objectively, manifestly unjust or unreasonable in all the circumstances."<sup>84</sup> The inappropriateness of such deference to management in disciplinary cases (as contrasted with promotion grievances where management's judgment and expertise are respected by arbitrators) was strongly argued

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<sup>81</sup> Unreported, 1972 (Brown).

<sup>82</sup> [1972] 1 O.R. 270.

<sup>83</sup> (1972), 1 L.A.C. (2d) 314 (Shime) at 319. See, also, *Re Canadian Heat Treaters Ltd.*, unreported, 1973 (Brown).

<sup>84</sup> See, also, *Re Atlas Steels Ltd.*, unreported, 1971 (Simmons); *Re Massey-Ferguson Ltd.*, unreported, 1975 (McCulloch); *Re Allied Chemical Canada Ltd.*, unreported, 1972 (Rayner); *Re Gilbarco Canada Ltd.*, unreported, 1973 (Carter); *Re Brockville Chemical Industries Ltd.* (1971), 23 L.A.C. 336 (Shime).

in *Re Phillips Cables*.<sup>85</sup> The expressions of caution are somewhat puzzling. One would have thought no apology was needed for the exercise of a discretion only recently restored to the arbitrator's power by a legislative pronouncement. It may be, though, that arbitrators are attempting to demonstrate to the courts a self-imposed restraint in order to avoid a judicial construction of s. 37(8) limiting the scope of the amendment.

More commonly, arbitrators have relied on the test formulated in *Re International Nickel*;<sup>86</sup> that is, the scope of the amendment was coextensive with penalties considered beyond the range of reasonable disciplinary responses. Arbitrators also revived the earlier jurisprudence indicating the type of penalty appropriate to the alleged infraction.<sup>87</sup> Finally, arbitrators seemed to return to the notion in *Re Hawker Siddley Canada Ltd.*<sup>88</sup> that the company must show "just cause" for its action, and the union may establish "other" circumstances militating against the penalty imposed.<sup>89</sup>

The arbitral awards for 1971 and 1972 in which the discipline imposed by the company was modified in some way can be tabulated according to the stated grounds for the substitution of management's penalty:

Authorization for substitution:	1971	1972
S. 37(8) of the <i>OLRA</i>	7	13
Term in collective agreement	14	7
S. 37(8) and collective agreement	2	22
No Authority Stated	9	22

The results are interesting for several reasons. Arbitrators had previously relied on terms of the collective agreement in order to alter penalties; after the amendment, that reliance sharply decreased. Correspondingly, express reliance on the authority of s. 37(8) increased, and, in fact, doubled. The statutory provision apparently granted greater discretion to arbitrators than did the clauses in the collective agreements. Surprisingly, the arbitrators referred to s. 37(8) as altering the rule in *Port Arthur* in only four cases in 1971 and two in 1972. It can be inferred that arbitrators were pleased with the amend-

<sup>85</sup> (1974), 6 L.A.C. (2d) 35 (Adams).

<sup>86</sup> *Supra*, note 63. This approach was adopted in *Re University of Guelph*, unreported, 1971 (Roberts); *Re C. R. Snelgrove Co. Ltd.*, unreported, 1971 (Roberts); and *Re Ford Motor Co.* (1973), 3 L.A.C. (2d) 166 (Weatherill). Often, the reasonable range test led to the dismissal of the grievance, as in *Re Hamilton Gear and Machine Co. Ltd.* (1971), 22 L.A.C. 155 (Weatherill); *Re Corporation of the Town of Dundas* (1972), 1 L.A.C. (2d) 161 (Reville); *Re Kimberly Clark of Canada* (1972), 2 L.A.C. (2d) 195 (Brown); and *Re Douglas Aircraft Co. of Canada Ltd.* (1972), 2 L.A.C. (2d) 56 (Weiler).

<sup>87</sup> For example, in *Re Allied Chemical Canada, Limited*, unreported, 1975 (Brandt), a five-day suspension for insubordination was held consistent with arbitral precedents. The acceptability of provocation as a mitigating factor in previous arbitral awards was cited in *Re Liquid Carbonic Canada Ltd.* (1972), 24 L.A.C. 409 (Weiler) as justifying reinstatement.

<sup>88</sup> (1968), 19 L.A.C. 375 (O'Shea).

<sup>89</sup> *Re Air Terminal Transport Ltd.*, unreported, 1972 (Brown).

ment but wished to ignore the reason for its enactment. But of more interest is the large number of cases in which no authority was stated. In a number of decisions even in the first year of the legislative amendment, arbitrators simply returned to their former practice of exercising remedial authority in discipline grievances as if *Port Arthur* had never existed. A random sampling of 1973 cases by the author bears out this trend. There was virtually no reference to the collective agreement authorizing substitution of penalties and the number of decisions giving no authority was twice as great as the instances referring to s. 37(8).

It may be concluded that for discipline grievances the amendment erased the effect of the *Port Arthur* case. The remedial authority of the arbitrator to fashion appropriate penalties for disciplinary acts was restored, except where the collective agreement stipulated a specific penalty. Earlier arbitral jurisprudence outlining factors in mitigation of disciplinary measures again became useful. The legislation, of course, could not undo the injustice inflicted under the *Port Arthur* rule.

#### 8. *Postscript*

In *Re Honeywell Controls Ltd.*, the arbitrator refused to follow *Port Arthur* in order to uphold the discharge of the grievor, commenting that "the case itself cannot be considered to be strong at this time since the Act has been amended since that case was decided."<sup>90</sup> It would not be accurate, however, to depict the legislation as sounding the death-knell of the *dicta* in *Port Arthur*.

The notion that the arbitrator may not "usurp the function of management" occupies a prominent place in promotion grievances, where considerable deference is paid to the judgment of management in selecting employees for promotion. For example, in *Re C.G.E. Co. Ltd.*,<sup>91</sup> the arbitrator determined that the grievance should succeed, but, in order to avoid assuming the role of management, ordered that the grievor be given an opportunity to demonstrate the requisite ability; the company was to promote the grievor if his performance proved relatively equal to the incumbent's. This approach follows the Ontario Court of Appeal's holding in *Re Falconbridge Nickel Mines Ltd.*<sup>92</sup> that once an arbitration board finds that the company has erred in selecting an applicant for promotion, the matter should be referred back to the company for reconsideration with appropriate directions. According to the *Port Arthur* ruling, an arbitration board that determines which candidate should succeed to the vacancy commits reversible error.

*Port Arthur* is also frequently cited as requiring a literal or strict reading of the collective agreement. That is, the arbitrator, in going outside the words of the collective agreement, is really effecting a modification of that agreement contrary to the authoritative pronouncement of the court that he has no jurisdiction to do so.

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<sup>90</sup> Unreported, 1971 (Campbell).

<sup>91</sup> (1973), 3 L.A.C. (2d) 359 (Johnston).

<sup>92</sup> [1973] 1 O.R. 136.

Thus, the legacy of *Port Arthur* goes beyond the substitution of one disciplinary measure for another. Rather, the Court's judgment in that case was predicated on a narrow view of arbitration. The remedial authority of the arbitrator was derived from and defined by the words of the collective agreement. This position stands in direct contrast to the arbitrator's approach in *Polymer* that the Legislature had vested original jurisdiction without right of appeal in arbitrators to effect a final and binding settlement of disputes under the collective agreement. While the s. 37(8) amendment displaced the *Port Arthur* rule from the field of disciplinary grievances, it left untouched the application of the *dicta* to other areas of labour arbitration.

### C. HOOGENDOORN — NATURAL JUSTICE IN A COLLECTIVE BARGAINING REGIME

#### 1. *The Issues: The Substantive Rights of Individual Employees*

The *OLRA* reflects the intention of the legislature to institutionalize the collective bargaining regime. A nascent union is insulated from employer interference, whether directed against the union itself or against individual employees seeking to organize or obtain membership in a union, by virtue of the unfair practice provisions. Elaborate certification procedures are available should the union fail to secure (or not wish to secure) voluntary recognition by the employer. The result of such certification or voluntary recognition is to further buttress the union's position because it is thereby recognized as the exclusive bargaining agent of the employees in the bargaining unit.

The principle of the exclusivity of the union's right to bargain with the employer represents a significant reduction of individual rights. Firstly, it must be stressed that the union, once certified, represents all employees in the bargaining unit whether or not they are members of the union itself. The individual employee loses his right to negotiate the terms of his employment in return for the right to share in those terms and conditions secured by the negotiation of a collective agreement covering all employees in the bargaining unit.<sup>93</sup> Moreover, the individual employee is not entitled to participate as an individual in the negotiation of that collective agreement; the bargaining is conducted by the representatives of the union.<sup>94</sup>

Patently, proper subjects for negotiation include wage rates, hours of

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<sup>93</sup> The leading case is *Le Syndicat Catholique des Employes des Magasins de Quebec Inc. v. La Compagnie Paquet Ltee.* (1959), 18 D.L.R. (2d) 346 (S.C.C.). *Per* Judson, J. at 353-54, where the union is certified:

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.

<sup>94</sup> Obviously, some of the union representatives will be employees in the bargaining unit; but their right to participate at the bargaining table is derived from their status as union representatives, not employees.

work, shift schedules, seniority clauses, and similar matters. But beyond this, the union is specifically authorized under s. 38(1) of the *OLRA* to bargain concerning its own security. That is, the collective agreement may require, as a condition of employment, membership, and/or dues payment to the trade union. This approval by the Legislature of the union's right to secure its position through the collective agreement further restricts the scope of individual freedom. The individual may be required to join the union before hiring (as in the closed shop), within a specified period after employment commences (as in a union shop) or to remit the equivalent of dues to the union through a check-off procedure without actually becoming a member (as in the "Rand formula").

This abridgement of individual rights has been justified on several grounds. The leverage of the union at the bargaining table is a function, *inter alia*, of employee solidarity with its bargaining representative and that representative's financial resources. At the very minimum, employees who secure the benefits of collective bargaining should be obliged to support their bargaining agent. That is, if all the employees in the bargaining unit must be represented by the union, that union should be entitled to look to those employees for financial contributions. Further, since it is legislative policy to encourage a collective bargaining regime, any financial advantage, such as relief from dues payment, in remaining outside this system should be denied. Finally, the presence of non-union workers undermines the bargaining strength of the union. The greater the union control over the labour supply available to the employer, particularly during a strike, the greater the pressure on the employer to accede to union demands at the bargaining table. Compulsory union membership, then, secures a union monopoly over the supply of labour.

The legislature was clearly seeking countervailing power blocs — the union, as exclusive bargaining agent for all the employees in the bargaining unit (and, thereby, controller of the supply of labour) versus the employer who controlled employment opportunities, that is, the offer of wage payments in return for labour. It was recognized that organization of the workers was the only effective means of ensuring a more equitable distribution of the profits from labour. And it was felt that the institutionalization of collective bargaining was the most desirable method of permitting organization of labour and yet securing industrial peace. Fundamental was the right of every person to join a trade union of his own choice and to participate in its lawful activities.<sup>95</sup> However, the advancement of individual employee rights was predicated upon a cohesive trade union. It was not simply a matter of subordinating individual freedoms to some utilitarian notion of the "greatest good for the greatest number" but rather a conviction that the freedom of an individual employee in the labour market was ephemeral. The Legislature did not regard the common law doctrine of freedom of contract in an employment context as relevant or realistic. It was recognized that those with only their labour to sell could not negotiate on an equal basis with employers; in reality, the contract of employment was dictated by the hirer. Absent the voluntary agreement of

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<sup>95</sup> See, *OLRA*, *supra*, note 4, s. 3.

*both* parties to the contract, contractual freedom became a meaningless principle. The individual rights supposedly abrogated by union security clauses and exclusive bargaining rights were illusory.

The negotiation of the collective agreement, therefore, was restricted to only two parties, the union and the employer. This exclusivity was continued in the administration of the bargain. The collective agreement and arbitral awards, where the mandatory arbitration provision had been invoked to settle disputes, were made binding on the employer, the trade union and the employees in the bargaining unit.<sup>96</sup> Yet, the parties to the negotiation, arbitration and grievance processes comprise only the union, as exclusive agent for the employees, and the employer. The *OLRA* is silent regarding the rights of individual employees to initiate or participate in such matters other than under union auspices.

The perspective of the judiciary, however, is primarily individualistic. The doctrine of natural justice, although difficult to define, was developed to protect individual rights. A denial of natural justice would result in the quashing of the decision of the tribunal by the courts on review and the substitution of the "correct" decision or the remission of the case to the relevant tribunal (although perhaps differently constituted) with directions.

The touchstone of natural justice was fairness: in the words of Lord Loreburn, "they [boards] must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything."<sup>97</sup> And, fundamental to this fairness was the *audi alteram partem* rule, that is, any person who will be directly affected by the decision of the tribunal was entitled to participate in the proceedings as a party thereto. To quote Perdue, C.J.M. in *Canadian Northern Railway v. Wilson*,

It is an elementary principle of law that a man shall not suffer in person or in property unless he has had an opportunity of being heard. This principle has been reiterated in case after case for the last 300 years, not always expressed in the same words, but with the same force and meaning.<sup>98</sup>

Since the function of arbitration boards is to adjudicate rights under the collective agreement, the principles of natural justice are applicable to the proceedings of such bodies.

But natural justice does not exist "in the air." The doctrine affords procedural safeguards where the authority of tribunals encroaches on substantive rights of individuals; it cannot create those substantive rights or guarantee justice except in so far as proper process tends to secure that end. The question, then, is what are the substantive rights of employees in a collective bargaining regime? It is only to those substantive rights that the principles of natural justice can have application.

## 2. *The Rule in Bradley*

The issue remitted to arbitration in *Re Bradley and Ottawa Professional Fire-Fighters Association* concerned the proper interpretation of the promo-

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<sup>96</sup> *OLRA, id.*, ss. 42, 37 (9).

<sup>97</sup> *Board of Education v. Rice*, [1911] A.C. 179 at 182.

<sup>98</sup> *Canadian Northern Railway v. Wilson* (1918), 3 W.W.R. 730 at 735.

tion clause in the collective agreement. However, the arbitrator went beyond a declaratory ruling and ordered five of the six contested positions filled by the grievors.<sup>99</sup> While the incumbents were aware of the arbitration proceedings, and, in fact, three were present, none had been given notice that their promotions would be directly affected. Laskin, J.A. (as he then was) expressed the view of the Ontario Court of Appeal:

The common law has been specially sensitive to deprivation of property or contractual advantages in proceedings of an adjudicative character without previous notice thereof to persons likely to be directly affected, unless there is clear statutory exclusion of such notice.<sup>100</sup>

The contractual advantages in question were the increased employment benefits attached to the promotion. The court viewed the collective agreement as creating substantive employment rights for individuals:

A collective agreement is a unique legal institution because, despite the generality of its terms as part of a bargain made between a representative union and an employer, its existence and application result in personal benefits to employees who are covered by it.<sup>101</sup>

Individual employees were entitled to the protection afforded by the doctrine of natural justice in any proceedings where these rights would be affected. Generally, the parties to an arbitration proceeding could be expected to fairly represent both sides of the issue; the requirement of natural justice would, therefore, be satisfied. But once

the representative union is put to a choice between employees who competed for the same preferment as to which it will support as against a different choice made by the employer, substantive employment benefits of particular employees are put in issue and they are entitled to protect them if the union will not.<sup>102</sup>

While the employer would be expected to urge affirmation of its position, such action would not always be a certainty. Further, as the employer in no way represents the interests of the employees affected, they, as individuals, should be permitted to adduce argument on their own behalf.

But the test to be applied was the directness of the effect on the employment benefits. Where the union seeks a prospective ruling or a declaration, the interests of employees would only be indirectly affected; the common law notice requirement would be inapplicable. However, where vested employment benefits are jeopardized and the union ceases to represent all employees for that arbitration, the affected employees are entitled to notice; they may participate in the proceedings as parties.

The court specified the indicia of adequate notice as follows: written indication of the issues, date, time and place of hearing; a right to be represented by counsel, service personally or by registered mail sufficient to permit a reasonable period of preparation.<sup>103</sup>

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<sup>99</sup> *Re Bradley and Ottawa Profession Fire Fighters Association* [1967] 2 O.R. 311, 63 D.L.R. (2d) 376, (Ont. C.A.).

<sup>100</sup> *Id.* at 317, 382.

<sup>101</sup> *Id.* at 316, 381.

<sup>102</sup> *Id.* at 316, 381.

<sup>103</sup> *Id.* at 317, 382.



### 3. *The Rule in Hoogendoorn*

In *Hoogendoorn*, the arbitrator interpreted the union security clause as requiring union dues checkoff as a condition of employment but further indicated that the discharge of a named individual employee would be required unless the dues deduction was authorized, despite that individual's religious and political objections thereto.

Laskin, J.A. (as he then was) delivered the judgment in the Court of Appeal. Individual freedom was not considered an absolute value:

Our society secures to every one the right to adhere to a religion of his choice and to hold a self-determined political creed. It does not, however, give liberty to insist on religious conviction or political creed or both in contexts which the law does not regard as relevant to their free enjoyment and as a ground for thwarting agreements binding on all irrespective of religious or political persuasion.<sup>104</sup>

That the union is authorized to negotiate collective agreements and conduct arbitration proceedings as the representative of the employees to the derogation of individual freedom is recognized as legitimate legislative policy. The policy grievance here "is an extension of the administration of the bargain by the parties who concluded it."<sup>105</sup> Just as individual employees are not entitled to participate in the negotiation of the collective agreement, although affected by the result, so too, they may not intervene as of right in a policy grievance involving the interpretation of the collective agreement, although likewise affected by the result. While it was not strange that the arbitrator personalized his award in light of the circumstances of the case, reference to *Hoogendoorn*, if it went beyond the issues properly raised at the arbitration, was severable from the decision. Thus, the Ontario Court of Appeal considered individual rights at common law in the context of statutory enactments in the labour relations field.

This reasoning was echoed in the dissent of Judson, J. in the Supreme Court of Canada:

No individual employee is entitled as of right to be present during bargaining or at the conclusion of such an agreement. To require that notice and the right to be present be given to each employee on any occasion when a provision in a collective agreement having general application to all employees was being interpreted would be to destroy the principle of the bargaining agent and to vitiate the purpose of the Act.<sup>106</sup>

The majority of the Court, however, reversed the Court of Appeal and quashed the arbitrator's award. The court focussed entirely on the background of the case:

On the facts it is obvious that the proceeding was aimed entirely at securing *Hoogendoorn's* dismissal. . . . The arbitration proceeding was not necessary to determine that *Hoogendoorn* was required so to do (authorize the dues deduction) . . . The union actively took a position completely adverse to *Hoogendoorn*. It wanted him dismissed.<sup>107</sup>

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<sup>104</sup> (1967), 62 D.L.R. (2d) 167 at 178; [1967] 1 O.R. 712 at 723.

<sup>105</sup> *Id.* at 180, 725.

<sup>106</sup> (1967), 65 D.L.R. (2d) 641 at 644; [1968] S.C.R. 30 at 34.

<sup>107</sup> *Id.* at 648-49; 38-39.

The fact that the arbitrator's ruling could not have affected Hoogendoorn, and that the union could not have required his discharge, had he authorized the dues deduction, was ignored.

The Court rested its decision on a denial of natural justice. Yet the very case it referred to in support, *University of Ceylon v. Fernando*<sup>108</sup> is readily distinguishable. The procedures appropriate to protect the rights of an individual accused of cheating and faced with expulsion from university may be analogized to the criminal law safeguards afforded an accused, *i.e.*, the right to know the charges, present his case, and face an impartial tribunal acting in good faith. But, the possibility (probability) that Hoogendoorn would be 'expelled' from his employment does not justify adoption of the reasoning in *Fernando*. For the points of contrast with *Fernando* are more significant: in *Hoogendoorn*, the union was seeking a declaratory ruling from an arbitrator under the *aegis* of the *OLRA*; a union security clause similar to that in question was specifically permitted under the Act; the arbitrator's decision dealt with all the employees and did not constitute a 'sentence' for Hoogendoorn unless he refused to abide by the ruling. Finally, the reason for permitting the accused to participate in *Fernando* was to ensure the elucidation of all relevant facts and thereby achieve a just result. But the participation of Hoogendoorn in a policy grievance dealing with the proper interpretation of the union security clause would only serve to interject his personal antipathy toward joining a union and paying dues.

The Court's decision reaffirmed the common law *audi alteram partem* rule as a procedural requirement in labour arbitration. The Court refused to distinguish the *Bradley* decision, ignoring the reasoning of the Court of Appeal in that case, or to heed the warning of Judson, J., cited earlier, that an unrestricted notice requirement would hamstring the collective bargaining regime at the arbitration level. Thus, the doctrine of natural justice was declared applicable to arbitration proceedings without any clarification of the substantive right of the employee which that doctrine was to protect. Labour arbitrators were simply left with the *dicta* that it would be reversible error if the appropriate parties were not given adequate notice of and opportunity to participate in the proceedings.

#### 4. *The Arbitrators' Response*

It is fair to say that arbitrators reacted with surprise to the Court's ruling on notice. The mandatory arbitration clause had been viewed as a necessary adjunct to a collective bargaining regime where the right to strike during the term of the collective agreement was denied. Just as the negotiation of the collective agreement intimately affected individual employees but was solely within the control of the union and the company, so, too, the arbitration proceedings were considered to be restricted to the same 'parties'. Arbitration had previously functioned quite effectively without reliance on the common law *audi alteram partem* rule. Arbitral reaction was best expressed by Professor Johnston:

It has been necessary for this Board to undertake this rather extended analysis

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<sup>108</sup> [1960] 1 All E.R. 631.

of a legal principle because of the novelty of the notice provision in Canadian labour arbitration and because of the turbulent sea into which the principle has been cast in the *Bradley* and *Hoogendoorn* decisions.<sup>109</sup>

Arbitrators generally tried to restrict the scope of the *Hoogendoorn dicta* to *Bradley*. Again, in the words of Johnston,

It is our view that the law as stated in *Hoogendoorn* and *Bradley* then only requires notice to a third party when that party's rights are directly affected by the result of an arbitration. In the present case, a union policy grievance claiming certain classifications come within the scope of the agreement, there is not such a direct effect.<sup>110</sup>

Nonetheless, as the company had requested that the four affected employees be notified and the union did not object, and so as to avoid risk of reversal on *certiorari*, the arbitrator concluded that notice should be given "as a matter of fairness."<sup>111</sup>

Even where the rule should clearly apply, as in grievances alleging wrongful promotion in violation of the seniority rights clause, some arbitrators tried to balance the indicia of proper notice against the exigencies of arbitration.<sup>112</sup> Technically, notice should be in writing, giving all particulars of the hearing, and in the absence of proof of such 'reasonably formal and complete notice', the arbitrator should adjourn the proceedings.<sup>113</sup> To be sure, some arbitrators, notably former members of the judiciary, insisted on strict compliance with such requirements. In *Re Brockville Chemical Industries*,<sup>114</sup> verbal notification by the union to affected employees was rejected as insufficient; proceedings were adjourned to permit adequate compliance with the *Bradley* notice rules. Informal notice was similarly rejected in *Re Corporation of the Town of Essex*<sup>115</sup> with the hearing adjourned to a later date. In four other instances, the initial hearing was postponed to permit proper notification of appropriate parties.<sup>116</sup>

Several methods of sidestepping the necessity for adjournment developed

<sup>109</sup> *Re Air Canada Ltd.*, unreported, 1972 (Johnston).

<sup>110</sup> *Id.*

<sup>111</sup> By way of contrast, however, in *Re Falconbridge Nickel Mines Ltd.*, (1974), 7 L.A.C. (2d) 389 (Brown), notice was given to all "employees who might have had an interest in the result of this grievance . . . of their right to attend and participate in the hearing, none of whom did so"; the issue in the case was only one of compensation. It is difficult to conceive of a 'direct' effect on employees sufficient to invoke the *Bradley* rule where the ruling might order the company to pay compensation to other employees.

<sup>112</sup> *Re Carling Breweries Ltd.* (1968), 19 L.A.C. 110 (Christie).

<sup>113</sup> Such proof of formal service was tendered and accepted at the hearing in *Re Toronto Hydro-Electric System*, unreported, 1972 (Schiff).

<sup>114</sup> (1972), 24 L.A.C. 423 (Reville). It should be noted that neither adjournment proved of value: in *Brockville*, there is no indication that any affected employees even appeared and in *Town of Essex*, unreported, 1971 (Steward), such individuals attended the hearing but in no way participated in the proceedings.

<sup>115</sup> *Id.*

<sup>116</sup> *Re General Refractories Co.*, unreported, 1975 (Shime); *Re Honeywell Controls Ltd.*, unreported, 1972 (Egan); *Re Ford Motor Co.*, unreported, 1972 (Palmer); *Re Regency Tower Hotel Ltd.*, unreported, 1973 (Schiff). Again it must be mentioned that the notified employee(s) failed to register an appearance, except in the *General Refractories* case where the individual did participate.

where lack of proper notice became apparent at the hearing. In *Re Orenda Ltd.*,<sup>117</sup> counsel initially agreed that no employees were entitled to notice under the *Hoogendoorn-Bradley* rule. After commencement of the proceedings, three individuals, called as union witnesses, were found to be so entitled. The arbitrator informed them their rights and reviewed for their benefit the evidence of a previous witness. The three then remained as parties in the grievance. The arbitrator in *Re Gilbarco Canada Ltd.*<sup>118</sup> decided to hear the company's evidence, then adjourn if need be, in order to permit adequate notice if an individual's job appeared in jeopardy. However, as the company provided a complete refutation of the alleged improper promotion, adjournment proved unnecessary. Again, in *Re Carling Breweries*,<sup>119</sup> the arbitrator acknowledged that the incumbent should have been notified, but "as the grievance has been denied . . . there is no reason to be concerned about notice."<sup>120</sup> Since the grievance is dismissed in the vast majority of instances,<sup>121</sup> the policy of receiving evidence and giving notice only where the grievance may be upheld circumvents the Court's *dicta* regarding notice.

Other arbitrators accepted verbal notice, even at the commencement of proceedings, in lieu of written contact. In *Re The Griffith Mine*,<sup>122</sup> an alleged case of wrongful promotion, the incumbent had not been notified of the hearing; the arbitrator contacted the individual at work by telephone and advised him of his rights. Having been satisfied that the employee freely declined to attend or participate, the arbitrator continued the proceedings. In *Re Canadian Acme Screw & Gear*,<sup>123</sup> both union and company counsel were ordered to advise the incumbent of his rights by telephone; given the report that the employee had no desire to attend or be represented at the hearing, the arbitrator resumed the hearing.

Finally, in two recent instances, arbitrators adjudicated the dispute but delayed implementation of the award until satisfactory notice had been given. The arbitrator in *Re Edwards of Canada* ordered that

should the ruling (upholding the grievance) detrimentally affect another employee in the bargaining unit not given notice of hearing, he is to be apprised of this award immediately upon its receipt by the parties, and be given 7 days to submit reasons to this arbitrator outlining why the award is in error and why he should not be replaced by the grievor.<sup>124</sup>

<sup>117</sup> (1972), 1 L.A.C. (2d) 73 (Lysyk).

<sup>118</sup> (1973), 1 L.A.C. (2d) 348 (Carter).

<sup>119</sup> *Supra*, note 112.

<sup>120</sup> Recognizing that "this, however, is obviously *ex post facto* justification", the arbitrator indicated that in a future case the hearing would be adjourned pending satisfactory notification. The instant case, though, escaped adherence to the common law rule.

<sup>121</sup> See, Table 6, *infra*, at p. 697.

<sup>122</sup> Unreported, 1973 (Abbott). In that case, the counsel for the company also discussed the defence of the employee's interests, as the company's choice, by telephone.

<sup>123</sup> (1970), 22 L.A.C. 80 (Hanrahan).

<sup>124</sup> (1974), 6 L.A.C. (2d) 137 at 147. Curiously, the arbitrator added at 147: "While I think the interests of any such person have been adequately represented by the company, I believe the reasoning in *Hoogendoorn* supports this kind of opportunity being afforded." The Court in *Hoogendoorn* would likely express astonishment that the *audi alteram partem* rule could properly be transformed into an opportunity to prove the arbitrator in error after the award had been issued.

Again, in *Re McMaster University*, the arbitrator determined that although

counsel for both parties who are very experienced in these matters submitted that it was not necessary that [another named employee] be given notice of the proceedings . . . the Board deems it advisable that [said employee] be served with a copy of this award and that it is the responsibility of both parties to see that he is served with a copy of the award.<sup>125</sup>

The named employee was given 10 days thereafter to inform the Board in writing of his desire to make representations.

Aside from technical arguments as to the constituent elements of proper notice, it must be stressed that a significant number of arbitrators have simply ignored the Court's *dicta* in *Hoogendoorn* and *Bradley*. Of the cases surveyed, fully 40 per cent did not comply with the *audi alteram partem* rule. In those cases which could be classified as 'policy grievances', the figures rose to 45.8 per cent. Even in instances comprising 'individual grievances' within the *Bradley* rule, in 39.8 per cent of cases proper notice was lacking.<sup>126</sup>

The broad language regarding notice in *Hoogendoorn* presented the arbitrators with a dilemma. To ignore the ruling meant risk of reversal on review for a denial of natural justice. To comply fully with the court's notice formula required an adjournment of the hearing should some individual come within the rule. And adjournment inevitably increased costs to the parties and sometimes hindered the presentation of the case itself, as in situations where witnesses had left the employ of the company. But of even greater importance was the thwarting of the purpose of arbitration: to provide a speedy resolution of disputes, thereby reducing employee frustration with the collective bargaining regime. The *audi alteram partem* rule, far from affording justice to the individual, represented an unwanted and undesirable technicality.

Further, the notice requirement presumes that the company and the union may not adequately present all the issues and facts, and that the latter may in some way be biased.<sup>127</sup> While the majority in the Supreme Court would find in *Hoogendoorn* support for this presumption, other members of that Court (and other courts) would disagree. But the point is that the presumption belies the collective bargaining process itself. To accord an affected employee the right to intervene as a party in an arbitration hearing accomplishes

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<sup>125</sup> Unreported, 1975 (Shime).

<sup>126</sup> The data is broken down in more detail, *infra*. The mention here of gross statistics, however, serves to indicate the magnitude of the arbitral response of simply ignoring the courts.

<sup>127</sup> This imputation of bias usually overlooks the fact that the 'affected' individual is commonly a member of the bargaining unit. For example, in *Re Domtar Fine Papers Ltd.* (1974), 5 L.A.C. (2d) 191 (Simmons), the union stressed that the grievance did not represent favouritism as both individuals were local members, but a disagreement over the proper application of the collective agreement regarding promotion; the union would have acted, similarly if it was felt that the 'affected' employee had had his rights abused. Another arbitrator only thinly disguised his displeasure with the notice requirement and its allegation of unfairness: the incumbent had been informed "of his right to appear personally with counsel but he has not indicated any dissatisfaction with the representation of his interest by the Borough." *Re Corporation of the Borough of North York*, unreported, 1971 (Weiler).

little when it is not within the power of that employee to bring the matter to arbitration in the first place. For just as the union may choose not to proceed with the grievance, and deny the grievor a hearing,<sup>128</sup> so too, the company may settle the grievance before arbitration by rescinding the promotion or otherwise accepting the union's position. And, whereas the aggrieved individual may succeed on an application before the OLRB alleging breach of the duty of fair representation if the union refuses to process a grievance,<sup>129</sup> the affected individual has no such rights as against the company — unless, of course, the union processes his grievance.

The Court in *Hoogendoorn* reaffirmed the common law notice rule as a prerequisite to valid labour arbitration. What the court did not do was indicate the limits of the doctrine or offer a compelling rationale for its promulgation. Responses varied, not surprisingly, in view of the number and backgrounds of the arbitrators, but distinct patterns did emerge.

##### 5. *The Reach of Bradley and Hoogendoorn: Contracting Out*

The *Bradley ratio* clearly limited notice requirements to employees covered by the collective agreement; the *dicta* in *Hoogendoorn* seemed to indicate that anyone who might be adversely affected by the arbitral award was entitled as of right to participate as a party. A literal reading of *Hoogendoorn* would include those persons performing work which the union claimed rightfully belonged to the bargaining unit.<sup>130</sup>

*Re Somerville Industries Ltd.*<sup>131</sup> represents the high water mark of the notice rule. The grievance alleged performance of work by non-bargaining unit employees while union members were laid off. Another union representing those employees doing the disputed work wished to intervene on the grounds that, if the grievance were upheld, its members would be adversely affected. The grieving union contended that *locus standi* to intervene was restricted to those who enjoyed rights under the collective agreement in question and were bound by the arbitral award. The arbitrator cited *Bradley* and *De Smith*<sup>132</sup> as supporting a broad view of *locus standi*: "Clearly, in the instant situation, the intervening union will possibly be affected by a decision of this board, the potential importance of this effect being sufficient to warrant

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<sup>128</sup> Unless the collective agreement specifically provides for the right of an individual to process a grievance irrespective of union sponsorship.

<sup>129</sup> *OLRA*, *supra*, note 4, s. 60.

<sup>130</sup> The cases in this section were not included in the statistics as policy grievances although it is recognized that a grievance alleging wrongful contracting out (*e.g.*, to an independent contractor or another union) does shade into a grievance alleging wrongful work assignment (*e.g.*, to a foreman). While the awards are not always clear on the point, it was attempted to distinguish 'contracting out' cases, which for the most part involved persons outside the company from 'policy grievances' dealing with work assignments to employees of the company but outside the bargaining unit.

<sup>131</sup> (1967), 20 L.A.C. 404 (Palmer).

<sup>132</sup> S. A. de Smith, *Judicial Review of Administrative Action*, (3d ed. London: Stevens, 1973).

their participation in this matter."<sup>133</sup> The Board ruled that the intervening union might attend hearings, present evidence, cross-examine witnesses and submit argument. The Board saw "a positive advantage to all parties by such a hearing as this should tend to promote the speedy resolution of this matter."<sup>134</sup>

The decision can be criticized on several grounds. First, *Bradley* was misinterpreted; that case clearly urged a limited scope for the *audi alteram partem* rule in that the persons entitled to notice must be covered by the collective agreement. Secondly, the ruling misconceives the arbitrator's role. He is to adjudicate disputes arising under a specific collective agreement, not to usurp the OLRB's authority regarding union jurisdictional questions nor to sit as a court of law. The power of the courts to permit the joining of interested third parties under Rule 609 of the Ontario *Rules of Practice* is designed to avoid a multiplicity of proceedings; arbitration is conceived as a vehicle to permit efficient functioning of a collective bargaining regime. The procedures appropriate to the former are not identical to those needed for the latter.<sup>135</sup> If the parties may include other unions (and presumably their members as individuals whose interests may not be coextensive with their union) and independent contractors (and their employees), the touchstone of labour arbitration — the collective agreement between a union and employer — is lost. As a practical matter, such proceedings would become unwieldy and exorbitantly expensive.<sup>136</sup> Finally, the evidence in contracting-out situations may be assumed to be adequately adduced by the union and employer. That is, the interveners, as witnesses could describe their jobs and perhaps their reasons for preferring the *status quo*, but they would not be helpful in determining the issue remitted to the arbitrator — the interpretation of the collective agreement.

Fortunately, the argument, in *Re Somerville Industries* attracted few adherents. In *Re Orenda Ltd.*,<sup>137</sup> the grievance alleged that non-bargaining unit employees were wrongly given a work assignment. Notice to the individuals who might be affected by the award was given, and three such employees represented themselves at the hearing but did not otherwise participate. In *Re Omega Marble Co. Ltd.*<sup>138</sup> where the arbitrator held he lacked jurisdiction to settle a dispute which was properly the subject of an OLRB

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<sup>133</sup> *Supra*, note 131 at 405. It should be noted that the arbitrator felt that even if participation as of right were not possible, the discretionary power of the board under s. 34(7) of the Act should be exercised to permit such intervention.

<sup>134</sup> *Id.* at 406.

<sup>135</sup> This point was raised by the arbitrator in *Re A. V. Hallam Lathing & Plastering Ltd.*, unreported, 1974 (Weatherill) where the grievance sought damages for the assignment of work to another union: "There is no provision for any form of interpleader proceedings, although the right of parties directly affected by an award to appear has, in cases involving individuals, been upheld by the courts in certain cases".

<sup>136</sup> And it must be remembered that costs are borne, by statutory prescription, only by the original union and employer.

<sup>137</sup> *Supra*, note 117.

<sup>138</sup> (1971), 22 L.A.C. 221 (Johnston).

application, the arbitrator suggested that the other union should at the very least be heard.<sup>139</sup>

For the most part, however, arbitrators have rejected the extension of the common law notice requirement to cases of alleged improper contracting out — usually the issue is not even raised.<sup>140</sup> It must also be mentioned that the arbitrator in *Somerville Industries* did not pursue this issue; notice to individuals outside the bargaining unit, who might be affected by the outcome of the grievance, was not given in three subsequent cases.<sup>141</sup>

The foregoing discussion does, however, graphically illustrate the potentially disastrous effects of transplanting the common law notion of natural justice into the labour relations context without careful analysis of the function of that doctrine in the legal context and the extent to which that function is necessary in labour arbitration.

## 6. Policy Grievances

The term policy grievance contrasts with an individual grievance, that is, a grievance processed by the union on behalf of a specific individual or individuals alleging a breach of a provision in the collective agreement depriving them of an immediate benefit. Individual grievances most commonly involve promotions, wage payments, overtime opportunities, and the like. A policy grievance (sometimes called a union or group grievance), however, deals with the interpretation of the collective agreement, and seeks a declaration as to such matters as the composition of the bargaining unit, the meaning of the union security clause, or the effect of the seniority provisions (including calculation of seniority). Essentially, as indicated by Laskin, J.A. (as he then was) in *Hoogendoorn*, a policy grievance is a continuation of the collective bargaining process; it is an “extension of the administration of the bargain by the parties who concluded it.”<sup>142</sup>

The Court of Appeal in *Bradley* hinted at the holding made explicit in *Hoogendoorn* by finding that the *audi alteram partem* rule was inapplicable

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<sup>139</sup> By way of contrast in *Re Cooper Construction (Eastern) Ltd.* (1971), 23 L.A.C. 62 (Hinnegan), the arbitrator assumed jurisdiction in a dispute essentially over work assignment where the collective agreement specifically authorized this, but commented at 70 that “nor is it foreseeable that the rights of any third party would be affected.”

<sup>140</sup> *Re Robertson – Yates Corp. Ltd.* (1972), 1 L.A.C. (2d) 91 (Weatherill); *Re Douglas Aircraft Co.* (1969), 21 L.A.C. 240 (O’Shea); *Re Bendix-Eclipse of Canada Ltd.* (1972), 21 L.A.C. 19 (Christie); *Re Air Canada* (1971), 23 L.A.C. 406 (Bairstow); *Re Alexander Centre Industries Ltd.*, unreported, 1974 (Rayner); *Re Algoma Central Railway*, unreported, 1973 (Weatherill); *Re Allied Chemical Canada Ltd.*, unreported, 1973 (Weatherill).

<sup>141</sup> *Re Hydro-Electric Power Commission* (1973), 3 L.A.C. (2d) 45 (Palmer); *Re Toronto Hydro-Electric System* (1972), 24 L.A.C. 308 (Palmer); *Re Wean – McKay of Canada Ltd.* (1971), 23 L.A.C. 27 (Palmer).

<sup>142</sup> *Supra*, note 104 at 180.



to policy grievances because the effect on employees was only indirect.<sup>143</sup> The terms of the Supreme Court of Canada decision however, extend to both policy and individual grievances; the requirements of notice depend on possible effects on individuals' contractual and property rights, and not on classification of the grievance.

Theoretically, arbitrators should have been bound by the rule in *Hoogenboom* and thus have given notice where the interests of individuals might be affected by the outcome of the grievance. Practice, however, did not follow the principle of *stare decisis*. A sample of 59 arbitral decisions (reported and unreported) for the period of 1969-1975 which could be classified as policy grievances shows the following breakdown: 8 dealt with the assignment of work to individuals outside the bargaining unit; 17 with the scope of the bargaining unit; 5 with deduction of union dues; 2 with wage increments in violation of the collective agreement; 22 with seniority rights in general, e.g. layoff and recall order, seniority lists, and return of employees to the bargaining unit; 1 with a reduction in work hours in lieu of layoff; and 2 with 'other'.

TABLE 1

<i>Individuals</i>	<i>Policy Grievances</i>
Not Notified	27
Notified	32
Attended	13)
Participated	11) overlap
Did not Attend	17

As Table 1 indicates, the number of policy grievances in which no notice was given was roughly equal to the number in which 'affected' individuals were notified. But the contacted individuals attended the proceedings in fewer than half (13) of the 32 cases in which formal notice was sent. In only 11 of the 32 cases was there any participation.<sup>144</sup>

The cases were then tabulated by year and by arbitrator. The data, however, did not reveal any clear pattern in either instance. The number of 'notice' and 'no notice' cases neither increased nor decreased steadily from 1969 to 1975, but fluctuated from year to year. The only point to mention is that 7 of the 'no notice' cases occurred in 1975; data for 1976 and 1977

<sup>143</sup> The label 'indirect' really amounts to a conclusion, not a rationale; what seems to be meant by the term is that the consequences of a policy grievance for employees correspond to the consequences of negotiating the collective agreement itself — and, as employees are not entitled to participate in negotiations *qua* individuals, so too, such participation should not enure as of right in policy grievances.

<sup>144</sup> If anything, the attendance and participation figures are high in that, if eight employees were given notice and just one attended, as in *Re City of Toronto* (1974), 7 L.A.C. (2d) 53 (Simmons), the case was entered under the 'attended' column. The term 'participation' included any activity beyond testifying as a witness, *i.e.*, some indication that the individual was involved in the proceedings as a party.

would be needed to indicate a trend toward avoiding the notice issue in policy grievances. Similarly, classification by arbitrator yielded inconclusive results: while some arbitrators gave no notice more often than others *e.g.*, Weatherill (6), Palmer (4), O'Shea (3) and Brandt (3), the figures likely only reflect a greater arbitration load on these men because they did give notice approximately as often, *e.g.*, Weatherill (5), O'Shea (5), and Palmer (3).

TABLE 2

<i>Subject</i>	<i>Notified</i>	<i>Not Notified</i>	<i>Participation</i>
Work Assignment Outside Bargaining Unit	7	1	2
Scope of Unit	6	11	5
Dues Deduction	2	3	1
Wage Rates Changes	2	0	0
General Seniority Rights	12	10	1
Reduction in Work Hours	0	1	0
Other	3	1	2
Total	32	27	11

Table 2 further indicates the uncertainty regarding notice requirements. Generally, the figures in both categories are roughly the same. But there is one notable difference. Where the issue concerned the assignment of work to individuals outside the bargaining unit, those individuals almost always received notice of the proceedings (87.5 per cent); where the subject was the scope of the bargaining unit, *i.e.*, whether certain individuals were to be covered by the collective agreement, the likelihood of notice dropped to about 1 in 3. Yet, where notice was given, individuals were far more likely to participate in the proceedings when the issue affected their possible inclusion in the bargaining unit, *i.e.*, in 5 of 6 cases.

Several tentative conclusions may be drawn. First, arbitrators have not embraced the rule in *Hoogendoorn*; in almost half the cases of policy grievances where notice should have been required, none was given. In addition, arbitrators have not fashioned guidelines restricting the notice requirements, for example, to the criteria set out by the Court of Appeal. Notice seems to depend on chance events, such as the parties readily identifying an individual, or, perhaps, one of the parties raising the matter. For the most part, arbitrators appear to be avoiding the issue entirely. For example; of the 59 cases, only 3 even mentioned *Hoogendoorn* or *Bradley*.

This point is further illustrated in four awards whose fact situations are reminiscent of *Hoogendoorn*. In *Re Vibrapipe Concrete Products*,<sup>145</sup> the union sought dues payments and the dismissal of certain employees unless union membership was obtained. Several of the employees were represented by counsel. The grievance was upheld, subject to a union undertaking to pro-

<sup>145</sup> Unreported, 1973 (McCaughy).

cess the applications without discrimination and levy the regular initiation fees. In *General Concrete of Canada Ltd.*,<sup>146</sup> five named employees, represented by counsel, were ordered to join the union within 30 days of the award. In *Re Ottawa Citizen*,<sup>147</sup> the union sought the dismissal of two employees, who were represented by counsel; the grievance was denied on the basis that the union had wrongfully rejected membership applications because the men had refused to participate in an illegal strike. None of these cases referred to the court's *dicta* concerning notice.

Only in *Re Ralph Milrod Metal Products Ltd.*<sup>148</sup> was *Hoogendoorn* cited. There the union security clause had been changed from a dues checkoff to a closed shop; two employees refused to join and the company was ordered to dismiss the men. However, as the employees had attended under the auspices of the company, and not as parties to the proceedings, the discharge award was not to be implemented for 30 days to allow the employees to make individual representations. Despite the *obiter* in *Bradley*, the arbitrator did not wish to increase costs for the parties or delay settling the dispute by granting an adjournment. The arbitrator felt constrained by the court's ruling to grant some opportunity for the individual employees to 'make representations' on their own behalf, but his choice of means reveals his estimation of their probable impact on the decision.

What the arbitrators wished to avoid was best illustrated in *Re Algoma Steel Corp. Ltd.*<sup>149</sup> The issue concerned the alleged inclusion of 60 named employees in the bargaining unit. The arbitrator dismissed the grievance on the grounds of laches. But citing *Bradley*, the arbitrator required notice be given to all employees,<sup>150</sup> of whom 57 were represented by one counsel and one appeared on his own behalf. The union's argument that the costs due to the protracted length of the proceedings, in large part attributable to the participation of 58 individual employees, should be shared among all 'parties' was rejected. Because the collective agreement was silent regarding costs for or against a third party, and because the *OLRA* only provided for costs against the union and employer, it was held that the fees for the hearings over many months fell on the union and company alone.<sup>151</sup>

Arbitrators, then, have split on the notice requirement in policy grievances. That is, almost as many cases have lacked the notice provision, mandatory under the *Hoogendoorn* rule, as have followed it. Even where notice

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<sup>146</sup> Unreported, 1976 (Beatty).

<sup>147</sup> Unreported, 1971 (Lane).

<sup>148</sup> Unreported, 1975 (Shime).

<sup>149</sup> Unreported, 1973 (Andrews).

<sup>150</sup> The prejudice requirement consisted of the loss of fringe benefits by those employees if required to join the bargaining unit.

<sup>151</sup> The latter, however, usually has the resources to endure such litigation. For the union, the possibility of costs on this scale could well necessitate the abandonment of the grievance.

was given, the arbitrators have seldom enunciated reasons for so doing. The impression remains that although arbitrators feel bound by the *audi alteram partem* rule, or do not wish to risk reversal on judicial review, there is little enthusiasm for discussing a principle which, to many, appears anomolous in labour arbitration.

### 7. Individual Grievances

Whatever the differences between the *dicta* in *Hoogendoorn* and *Bradley* as regards policy grievances, both cases held that notice was required in individual grievances, that is, where any success for the grievor directly affected another individual employee. Since a Supreme Court decision is binding in subsequent arbitrations, it would be expected that a statistical survey of notice in later arbitral awards would reflect the *Hoogendoorn* rule.

TABLE 3

	A. Seniority Upward	B. Seniority Downward
Notified	110	20
Not Notified	72	12

Yet the data indicate a remarkable resistance by arbitrators to assimilating the common law notice principle. In category A, involving the 'upward' exercise of seniority rights, *i.e.*, alleged wrongful promotion, notice was not given to the incumbent in 39.6 per cent of such cases. In category B, dealing with 'downward seniority' (including reliance on seniority rights to permit bumping, prior recall, *etc.*), 37.5 per cent of the arbitrations ignored the notice requirement.

Overall, in just under 40 per cent of over 200 arbitrations where the effect on an identifiable employee was 'direct', and potentially involved loss of certain employment benefits should the grievance be upheld, notice was lacking.<sup>152</sup>

Arbitrators did attempt to justify the lack of notice in some instances by arguing that the case did not involve a 'competition' between employees for benefits. This notion stemmed from the Court of Appeal comment in *Bradley* that the *audi alteram partem* rule applied only where individual employees were in 'competition' for benefits and the union was put to an election as to whom it would support. The reasoning went as follows: if a new employee

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<sup>152</sup> While it is possible that in some instances arbitrators may have verbally enquired as to notice and not reflected this in the award, it is unlikely for two reasons. Firstly, such an assumption would not explain the reference to the notice issue in other similar cases by the same arbitrator. Secondly, one would presume that, as lack of proper notice constituted grounds for reversal on review, the arbitrator, if he had been satisfied on the notice issue, would have included some reference to the fact that the Court's ruling had been followed.

were hired to fill the post, or if the seniority clause only demanded that the grievor satisfy the job requirements (rather than be rated more highly than other applicants), there would be really no 'competition' between employees covered by the collective agreement. The rule in *Hoogendoorn*, then, did not apply. Even granting this exception to the *Hoogendoorn* rule (it must be confessed that the argument is not compelling, as the interests of another individual would still be detrimentally affected), only 9 of the 'no notice' awards spoke to this issue.

TABLE 4

A *Notice Given (Seniority Upward)*

Brown	21	Hinnegan	4	
Palmer	13	Curtis	4	
O'Shea	9	Rayner	4	
Weiler	7	Egan	4	
Shime	6	Weatherill	1	Total: 73 of 110

B *Notice Given (Seniority Downward)*

Brown	6	Weatherill	2	
Hinnegan	3	Palmer	1	
Schiff	2			Total: 14 of 20

C *No Notice Given (Seniority Upward)*

Weatherill	19	Roberts	3	
O'Shea	19	Hinnegan	2	
Brown	7	Egan	2	
Shime	3	Rayner	2	
Palmer	3	Schiff	1	Total: 61 of 72

D *No Notice Given (Seniority Downward)*

Brown	3	Egan	1	
O'Shea	1	Curtis	1	
Weatherill	1			Total: 7 of 12

Table 4 indicates the number of arbitral awards rendered by specific arbitrators in each category. It must be pointed out that, to some extent, the results reflect increased arbitral caseloads. However, some observations are in order. The arbitrators most carefully following the *Hoogendoorn* rule include Brown, Palmer, Hinnegan and Shime with notice: no notice ratios of 27:10, 14:3, 7:2 and 6:3, respectively. Two arbitrators, namely Weatherill and O'Shea, often disregard the common law notice rule, with ratios of 3:20 and 9:20, respectively. Yet it must be said that these two individuals are among the most respected and sought-after arbitrators.

TABLE 5

Year	No Notice		Notice	
	(A) Seniority Up	(B) Seniority Down	(C) Seniority Up	(D) Seniority Down
1968	—	—	1	—
1969	—	1	1	—
1970	7	—	3	1
1971	12	4	11	3
1972	10	2	28	9
1973	8	2	19	3
1974	19	1	19	2
1975	16	2	27	2
1976	—	—	1	—
	<hr/> 72	<hr/> 12	<hr/> 110	<hr/> 20

Table 5 represents the number of grievances by year in each category. The data are far from conclusive but there seems to be a general trend away from compliance with the notice provisions. That is, the figures in column A are increasing somewhat and those in column C decreasing. Complete figures for 1976 and 1977 are needed to assess whether the 27 notice cases in 1975 represent an aberration, *i.e.*, whether as more time elapses since the *Hoogendoorn* decision, arbitrators will more freely depart from its *dicta*.

TABLE 6

Result of Grievance	No Notice	Notice
Denied	63	90
Upheld	15	30
Other	6	10
Total	<hr/> 84	<hr/> 130

Table 6 indicates the disposition of the grievance by category. 'Denied' and 'upheld' are self-explanatory; 'other' for the most part includes such orders as remitting the matter to the company for reconsideration. What is obvious from the statistics is that remarkably few grievances alleging wrongful promotion or other infringement of seniority rights succeed. Excluding the 'other' category, only 22.5 per cent of such grievances were upheld; this figure drops to 19.2 per cent of grievances where no notice was given to the incumbent.<sup>153</sup> Thus, arbitrators who disagreed with the court's imposition of the common law notice requirements could refuse to follow the ruling and yet be unlikely to be upbraided by the court on judicial review. The 'affected' employee whose promotion had been confirmed by the arbitral award but who had not received notice would be unlikely to reopen the issue on a procedural point. As the union is under a duty to notify employees who may be affected

<sup>153</sup> Only the highest scoring in each category were selected, although the results were given for arbitrators in all categories once a high score had been obtained, to illustrate contrast.

by the outcome of the grievance, the union cannot take advantage of its own omission and obtain judicial review on this ground. Therefore, the possibility of court review is limited to under 20 per cent of such grievances.<sup>154</sup>

This figure is likely further reduced because of constraints on the incumbent. If the employee is also a member of the bargaining unit, he will probably be unwilling to challenge the union openly by invoking the judicial review procedure, since it is to that body that he must turn for protection against breach of the collective agreement by the employer. It is not a matter of fear of reprisal but of loyalty and recognition, that his economic security and employment benefits depend upon union strength.

TABLE 7

	<i>Seniority Upward</i>	<i>Seniority Downward</i>	<i>Overall</i>
Not Attend	56 (50.9%)	10 (50%)	50.8%
Attend	24 (21.8%)	4 (20%)	21.5%
Participate	30 (27.3%)	6 (30%)	27.7%
Notice	110	20	

TABLE 8

<i>Year</i>	<i>Not Attend</i>	<i>Seniority Upward Attend</i>	<i>Participate</i>
1968	1	—	—
1969	1	—	—
1970	3	—	—
1971	5	4	2
1972	18	5	5
1973	10	5	4
1974	6	4	9
1975	11	6	10
1976	1	—	—

Table 7 deals with those grievances where notice was given in both categories, but breaks down the figures according to the response of the affected employee. Table 8 further reduces the data to a yearly basis. The meaning of the 'not attend' group is readily apparent. But the phrases 'attend' and 'participate' need a word of explanation. The response was classified as 'attend' if the individual presented himself at the hearing. 'Participate' included additional indication of involvement in the proceedings. Because, however, reference to the action of the affected employee was often oblique, discretion was exercised in favouring a positive response. That is, indications that the employee testified were interpreted as 'attend'; any hint that the employee 'represented himself' or asked questions was counted as 'participate'.

In approximately half of the grievances where notice was given, the affected employees did not even appear at the hearing. Apparently, there is

<sup>154</sup> Where notice is given, 25 per cent of grievances are upheld.

considerable reluctance on the part of employees to become embroiled in what is seen as essentially a partisan proceeding between the union and the employer. The psychological constraints inhibiting an individual from challenging an arbitral award by way of judicial review also operate to restrict individual participation as a party to the proceedings. This aspect of the *Bradley* rule was suggested in *Re Toronto Electric Commissioners*:<sup>155</sup> "The practical implications of the *Bradley* decision may, therefore, be negligible; if this case is any indication, there may be very little interest amongst employees in engaging in controversy with their bargaining agent."<sup>156</sup> It should also be noted that in only 10 of the 30 'participation' cases is there clear evidence of active involvement, such as retention of counsel, examination of witnesses, or submission of argument. In another 5 instances, there was reference to the employee 'appearing on his own behalf' without further comment. Thus, halving the figure of 30 would probably be more indicative of the frequency of serious intervention by the affected individual.

The right to participate as a party may be waived by the employee. But only two instances of waiver have emerged so far. In *Re Consolidated Bathurst Packaging*,<sup>157</sup> an executed statement acknowledging receipt of the notice of hearing, including the employee's right to be represented by counsel and participate as a party, and waiving such rights, was tendered in evidence. In *Re Association of Canadian Television and Radio Artists*,<sup>158</sup> the successful applicant waived his right to intervene in the proceedings. While the practice of obtaining a waiver from an affected employee may be more prevalent than the Table indicates, one would expect such action to be reflected in the award, either to show compliance with the Court's ruling or to demonstrate the inadequacy of the notice requirement.

One final point deserves mention. In Table 8, 19 of the 30 instances of participation occurred in 1974 and 1975. This figure may not represent a trend toward increased individual involvement in arbitration; data for later years are needed to justify this inference. But it should be remembered that the past few years have witnessed increased dissatisfaction with union leaders by the rank and file. Wildcatting and non-ratification of collective agreements represent two means of expressing such discontent. Increased employee intervention in arbitration hearings where individual rights are at issue may well be another. Should the incidence of participation rise significantly, labour arbitration would certainly be affected. Procedures would need revision to deal with a multi-party hearing (*e.g.*, cost liability, evidentiary rules, *etc.*). But more important, the nature and purpose of arbitration would be squarely put in issue. For the foundation of the collective bargaining regime — the exclusive authority of the union to represent employees in the bargaining unit — would be destroyed, if at arbitration the affected employee(s), (and presumably the grievor) were permitted to intervene as of right. The intention of the *OLRA* to substitute a collective agreement for individual contracts of employment would be thwarted.

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<sup>155</sup> (1967), 19 L.A.C. 75 (Arthurs).

<sup>156</sup> *Id.* at 83.

<sup>157</sup> Unreported, 1975 (Gorsky).

<sup>158</sup> Unreported, 1970 (Weiler).



Individual grievances are definitely within the scope of the *Hoogendoorn* rule. Yet in almost 40 per cent of such cases, notice was not given, in defiance of the court's ruling. Even in the instances of compliance with the common law notice requirement, the issue was virtually ignored. It is a simple inference that arbitrators disagreed with the court on this matter, and chose to disobey or quietly endure judicial intervention.

### 8. Conclusion

Only two instances of judicial review on the narrow point of denial of natural justice for failure to comply with the *audi alteram partem* rule were unearthed.

In *Re J.A. Wotherspoon & Son Ltd.*,<sup>150</sup> Addy, J. quashed one of two arbitration awards (plus that part of a third award dealing with compensation in the quashed decision) for error of law on the face of the record; the collective agreement had been given an interpretation which it could not reasonably bear. But apart from this, the award would have been quashed and remitted for reconsideration for lack of proper notice. The arbitrator had treated as *res judicata* an earlier interpretation of the collective agreement before determining the merits of the grievance at the hearing at which those served with notice were present. In the opinion of the judge:

It is completely improper for any tribunal, where a person is entitled to appear and be represented on the issue before it, to first of all, without such person having been notified, decide in his absence a basic question such as the interpretation of an agreement on which that person's rights later will be decided, without affording him an opportunity to appear and be heard on that fundamental matter.<sup>160</sup>

The court, therefore, followed *Hoogendoorn*, holding that where an issue involves the interpretation of the collective agreement, it cannot be decided until proper notice has been given to those individuals who might be affected by the outcome. Although *Bradley* is the case cited, the court glosses over the notion implicit in the Court of Appeal's judgment that policy matters, such as collective agreement interpretation, are within the purview of the union and employer alone.<sup>161</sup>

The other instance of judicial review dramatically illustrates the futility and inappropriateness of the common law notice doctrine. In *Re Western Freight & Overland Express*,<sup>162</sup> the issue involved the merger of two companies with the consequent problem of integrating both seniority lists. The new company had under-estimated its staffing requirements and had to recall addi-

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<sup>150</sup> (1972), 2 O.R. 154.

<sup>160</sup> *Id.* at 162.

<sup>161</sup> It should be mentioned that the court refused to quash the other arbitration award involved for lack of notice in that it was only the company, who had not requested affected employees receive notice at the original hearing, which was attacking the decision. That is, while the award might well be voidable as against affected employees who were denied proper notice, the decision was valid both jurisdictionally and on the merits as against the union and the company who were present.

<sup>162</sup> Unreported, 1972 (Brandt).

tional employees from the original pool of workers. The difficulty concerned the seniority entitlement of those men, for the lists had been integrated only for those men kept on at the time of merger. The arbitrator ordered the entire seniority lists dovetailed; employees already at work were to remain on the job, but as men were recalled from layoff, they would receive seniority according to the master list. The court quashed the award on February 18, 1972 for denial of natural justice as the affected employees had not received notice of their right to intervene. At a second hearing the parties, all represented by counsel, included the union, the company, the five grievors, and seven of the affected employees. The second award reached the same conclusion on the basis of the same reasoning, in much the same language, as in the first decision. Reversal on judicial review did not result in justice for the affected employees because the first decision had not been unjust. The intervention of several affected employees raised no new issues or argument. What the court did accomplish, though, was to significantly increase the costs to be borne by the company and the union and to delay the resolution of the collective agreement dispute for four months.

In creating a collective bargaining regime designed to achieve industrial peace, the legislature focussed on the creation of countervailing power blocs. Through the union, the individual employee would gain economic strength. The *laissez faire* era had passed — and with it the notion that a man selling his labour for wages could hope to achieve a fair return for his work. The weakness of negotiating an individual contract of employment was to be replaced by the strength of collective bargaining with a union controlling the supply of labour. The cost of buttressing the union's position was restriction of the theoretical individual freedom of contract in the labour relations context. The negotiation of the collective agreement and the arbitration process to resolve disputes under the collective agreement were entrusted to the union as exclusive representative for the employees in the bargaining unit. Without doubt, injustice to some individuals seeking enforcement of their employment rights has occurred. But this must be weighed against the deleterious effects on the collective bargaining regime if the union were no longer entrusted with the processing of grievances on behalf of employees and the 'parties' were expanded beyond the union and the employer.

The judiciary, however, has not comprehended the spirit of labour legislation. Its emphasis has continued to be on the rights of individuals. However commendable the doctrine of natural justice may be in the administrative law field, it is unwholesome in labour arbitration. The *audi alteram partem* rule serves to escalate costs, delay dispute resolution, and render arbitration proceedings unwieldy. But *Hoogendoorn* is a clear statement of the courts' fidelity to the common law notice requirement, irrespective of the context.

What is surprising is the extent of the disregard for a ruling of the highest court in the land. As indicated earlier, in 50 per cent of policy grievances and roughly 40 per cent of individual grievances, the arbitrators ignored the *Hoogendoorn dicta*. Further, there seems to be little point to the exercise required by the judiciary, when over 50 per cent of those receiving notice did not even attend the arbitration hearing. Only 27 per cent of such affected employees participated in the proceedings; this figure dropped to 9 per cent

when participation was restricted to retention of counsel, examination of witnesses, and submission of argument.

The courts, though, are still enamoured of the notice doctrine, as illustrated by the two instances of judicial review. The matter has reached a stalemate: the courts do not wish to revise the notice rule and the arbitrators are resisting its application. Predictions are hazardous at best, but several observations may be noted. First, it is likely that the *Hoogendoorn* rule will be increasingly disregarded over time. Further, because of the remote possibility of judicial review on this narrow ground, the courts will have little opportunity of enforcing their views. Provided that the rates of active participation by individuals in arbitral proceedings do not drastically increase, third party intervention, although troublesome and costly, will not seriously undermine the functioning of grievance arbitration. Finally, arbitrators are likely to continue to refrain from discussing the *Hoogendoorn dicta*; even where notice is given, reasons for so doing are almost invariably passed over in silence. This is one area where ignoring the problem may bring about its elimination.

### C. HOAR TRANSPORT: THE ARBITRATION PROCESS

A collective agreement has been termed a unique document in that, while it represents the agreement of two parties — the union and the employer — it creates substantive benefits for third parties — the employees. The agreement is unique in another sense as well; it is a contract and the product of negotiation, but statutory obligations are superimposed upon the free will of the parties with regard to the contents of the agreement.<sup>163</sup> Considerable difficulty has arisen over the integration of the doctrine of contractual freedom and the statutory requirement in s. 37(1) of the *OLRA* that arbitration be the obligatory means of resolving disputes under the collective agreement. Does the statutory obligation to adjudicate differences through an arbitral process necessarily create an arbitral jurisdiction and authority immune from modification by the parties to the collective agreement?

The authority implicit in the mandate to reach a 'final and binding settlement' has been discussed in Section A from the point of view of the remedial authority of the arbitrator — his power to fashion the remedy appropriate to the collective agreement violation. This section examines the issue of arbitral control over the process of arbitration.

The *OLRA* merely requires the arbitration of disputes; the arbitral procedure — indeed, any grievance stage prior to arbitration — is seemingly

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<sup>163</sup> For example, the collective agreement must run for a minimum term of one year under s. 44(1); the union security provision in the first collective agreement is somewhat restricted under s. 38(4); the agreement must contain a prohibition against strikes and lockouts during the term of the contract under s. 36; and the agreement must contain a recognition clause that the union is the exclusive bargaining agent of the employees in the bargaining unit under s. 35(1). Of course, the parties retain considerable freedom to negotiate as to wages, hours, seniority and other such matters.

within the control of the parties.<sup>164</sup> It is usual for collective agreements to specify several levels of the grievance process involving various representatives of the parties in an effort to settle the matter prior to arbitration. The parties almost invariably stipulate that the grievance is to be handled within definite time limits. The question then becomes, does "the import conveyed by an agreed resort to final and binding arbitration"<sup>165</sup> include an arbitral authority to modify the procedure of the grievance and arbitration process to insure effective adjudication?

### 1. *Arbitral Authority Prior to Hoar Transport*

The issue in theoretical terms was the conflict between arbitral obedience to the provisions of the collective agreement, as an expression of the will of the parties, and the institutional imperatives of the arbitration process as a vehicle for dispute adjudication. In practice, however, the question focussed on breaches of the time limits set out down in the grievance procedure. Did the violation of such a limitation period bar resort to arbitration, or could the arbitrator relieve against technical breaches in the interest of resolving the dispute on the merits? It must be remembered that the limitation periods in many collective agreements were extremely brief, usually a matter of a few days, and statutory policy supported such speedy resolution of grievances; arbitration rather than the more cumbersome court process was selected for its ability to reach determinations quickly. Further, collective agreements often contained a specific penalty for the violation of the limitation period, *i.e.* the grievance was deemed abandoned. Most collective agreements contained a standard "no alter, amend, or modify" clause. In determining the scope of arbitral authority to relieve against technical breaches of the collective agreement, arbitrators faced the general restriction in the "no alter, amend or modify" clause and, often, a specific term indicating the intention of the parties as to the disposition of the grievance.

Arbitrators developed several approaches to these issues. One approach was founded on s. 86 (now s. 103) of the *OLRA*:

No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

The arbitrator in *Re Toronto Parking Authority*<sup>166</sup> contended that s. 86 extended arbitral authority beyond that flowing from the express provisions of the collective agreement. The function of grievance arbitration was to replace economic force with reasoned adjudication and negotiation; this necessitated an informal flexibility rather than a literal compliance with procedural provisions in the collective agreement. Only actual prejudice to a party would

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<sup>164</sup> Arbitral procedure does not here refer to such questions as the order of proceedings, or the admissibility of evidence, *etc.*; *i.e.* those matters determined by the arbitrator at the hearing. Rather, such procedural issues as the time within which one party must notify the other of its intention to proceed to arbitration, select an impartial chairman, *etc.* are referred to as being 'controlled' by the parties.

<sup>165</sup> *Supra*, note 17 at 60.

<sup>166</sup> (1966), 17 L.A.C. 37 (Arthurs).

justify invalidating a "proceeding under this Act" — phraseology interpreted as including procedural requirements antecedent to the constitution of the arbitration board. Therefore, arbitral authority was extended to cover the prior grievance procedure. Irregularities in that procedure, including breaches of the time limits, could not operate to bar the right conferred under s. 37(1) to have disputes resolved by arbitration.

This s. 86 argument was followed in *Re Union Carbide Ltd.*<sup>167</sup> and *Re Hoar Transport Co. Ltd.*<sup>168</sup> The arbitrator contended that the grievance process, including provisions barring access to arbitration, should be considered "proceedings under this Act" and, thus, subject to the arbitrator's authority to relieve against technical irregularities. To hold otherwise would result in the deemed dismissal of grievances on violation of a limitation period without an adjudication on the merits. Yet the legislative policy of industrial peace required resolution of grievances on the merits to avoid employee frustration with a collective bargaining regime which prohibited strikes during the term of the collective agreement. The right to have differences arbitrated under s. 37(1) would be rendered nugatory if the grievance procedure were beyond the reach of arbitral authority to alleviate against the harsh consequences of a technical breach of the grievance or arbitration procedure.

Arbitrators, however, were far from unanimous on the issue. This analysis was rejected in *Re Canada Decorating and Painting Co. Ltd.*<sup>169</sup> and *Re Northern Electric Co. Ltd.*<sup>170</sup> in favour of contract doctrines governing arbitral authority. That is, the arbitrators considered themselves bound by the terms of the collective agreement.

Other arbitrators focussed on the distinction between mandatory and directory provisions in the grievance procedure. As expressed in *Re City of Toronto*,<sup>171</sup> a "mandatory" provision operated to preempt arbitral jurisdiction to determine the grievance on the merits, whereas "directory" stipulations permitted consideration of the grievance subject to "substantial compliance" with the collective agreement and actual prejudice to the innocent party. The test employed to distinguish between the two types of clauses centered on the inclusion or exclusion of a specific penalty for breach of the limitation period. Where a specific penalty was provided, the clause was considered "mandatory"; where the collective agreement was silent as to the consequences of the breach, the provision was "directory". This analysis was adopted in *Re City of Hamilton*<sup>172</sup> to hold that once the provision was declared directory, the merits of the grievance alleging unjust discharge could be determined.

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<sup>167</sup> (1967), 18 L.A.C. 74 (Weiler).

<sup>168</sup> Unreported, 1967 (Weiler).

<sup>169</sup> (1966), 17 L.A.C. 325 (Thomas).

<sup>170</sup> (1967), 17 L.A.C. 367 (Kennedy).

<sup>171</sup> It should be noted that O'Shea in *Re City of Toronto* (1967), 19 L.A.C. at 19-20 rejected the approach in *Re Toronto Parking Authority*: "S. 86 of the Act is directed to the Courts which might otherwise have power to quash or set aside a proceeding under the Act where there has been a defect of form or a technical irregularity even if no substantial wrong or miscarriage of justice has occurred."

<sup>172</sup> (1967), 18 L.A.C. 96 (Hanrahan).

A directory time limitation provision, however, did not guarantee adjudication on the merits. The grievance must still be brought within a reasonable time period. Unreasonable delay by one party would preclude determination on the merits of the grievance regardless of compliance with the stipulation as to time in the grievance procedure.<sup>173</sup> The arbitrator's power to dismiss dormant grievances was said to rest not on the technical equitable doctrines of the courts, but on labour relations criteria, where amicable labour-management relations depended upon a speedy resolution of grievances.<sup>174</sup>

The courts appeared to recognize the authority of the arbitrator to determine whether a grievance should be barred on the grounds of laches or unreasonable delay even if there were no violation of the express terms of the collective agreement as to a limitation period. In fact, the failure of the arbitrator to consider the circumstances of the grievance and assess the effect of the delay would result in the quashing of the award on judicial review on the grounds of abnegation of jurisdiction.<sup>175</sup>

The concept of a "continuing grievance" was developed to side-step the issue of arbitral authority to modify procedural provisions in the collective agreement. If the dispute were characterized as a continuing grievance, the limitation period ran only from the time of the most recent breach of the agreement. Although the claim for damages might be time-barred, a grievance could still be determined on the merits provided the period between the most recent violation of the agreement and the initiation of the grievance or arbitration process complied with the time limits. The mandatory-directory distinction was irrelevant to the adjudication of such a grievance.<sup>176</sup> It should also be noted that time did not run until the aggrieved party became aware, or should have become aware, of the facts founding the grievance.<sup>177</sup>

Arbitrators looked to the substance rather than the form of the grievance. For example, an arbitrator refused to hear a "group grievance" where the matter should properly have been brought as an individual grievance; the mandatory time limits applying to individual grievances had expired whereas the provisions for processing group grievances were merely directory.<sup>178</sup>

For arbitrators, the provisions of the collective agreement as to the time limits for processing grievances were relevant. However, breach of these limits would not result in the automatic dismissal of the grievance if one party had explicitly or implicitly condoned the violation, or if that party were not entitled in fairness to rely on the breach. The doctrines of waiver and estoppel,

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<sup>173</sup> *Re Shipping Federation of Canada Inc.* (1967), 18 L.A.C. 174 (Weatherill).

<sup>174</sup> *Re Dow Chemical of Canada Ltd.* (1966), 18 L.A.C. 50 (Arthurs).

<sup>175</sup> *Ottawa Newspaper Guild, Local 205 and Bower v. The Ottawa Citizen* (1965), 66 C.L.L.C. at 14,108 (Gale).

<sup>176</sup> *Re Daal Specialties* (1967), 18 L.A.C. 141 (Weatherill).

<sup>177</sup> *Id.*

<sup>178</sup> *Re R. G. Dibble Co. Ltd.* (1969), 20 L.A.C. 293 (Weatherill).

then, were utilized by arbitrators to justify a modification of the terms of the collective agreement.<sup>179</sup>

Arbitrators were attempting to integrate a respect for the integrity of the collective agreement and the imperatives of an arbitral regime of dispute adjudication — a regime based on both statutory policy and the collective agreement itself. Familiar with the context of collective bargaining and the negotiation of such contracts, arbitrators sensed the danger of a literal reading of the collective agreement. A time limit intended to provide a rapid resolution of rights disputes would be transformed into a device to thwart the very purpose of the process should a “technical” breach occur. The analogy to the court’s authority under the Rules of Practice to enlarge or abridge time limits where appropriate (R. 178) and to relieve against formal objections to secure the advancement of justice (R. 185) was recognized.<sup>180</sup> To be sure, opinions on the breadth of arbitral power to relieve against such “technical” breaches were not unanimous, but arbitral jurisprudence on the issue was emerging.

## 2. *The Rule in Hoar Transport*

The issues in *Hoar Transport* and its companion case, *Union Carbide*, were similar. In the former, the union nominee was out of time in requesting the Minister of Labour to name a chairman for the arbitration board. In the latter, the union delivered notice of its intention to proceed to arbitration outside the limit provided in the collective agreement.

The arbitrator in *Union Carbide* adopted the reasoning in *Re Toronto Parking Authority*<sup>181</sup> that arbitral authority to cure “defects of form” or “technical irregularities” was grounded in s. 86 of the Act and extended to pre-arbitration proceedings. The statutory requirement of arbitration of disputes and the collective agreement provision as to the arbitration of differences founded arbitral authority to control the process of arbitration to the extent of ensuring the resolution of grievances on the merits, subject to other arbitral doctrines such as waiver or unreasonable delay.

The Supreme Court of Canada, however, decisively rejected this approach in favour of a strict application of contract doctrine. The authority of the arbitrator was to be determined by the wording of the collective agreement; the arbitrator had no inherent jurisdiction to modify the terms of that agreement. In *Union Carbide*, the Court held that s. 86 of the *OLRA* merely prevented the courts from quashing arbitral proceedings for technical irregularities on judicial review; the arbitrator was to be governed by the “plain and emphatic language of the written contract.”<sup>182</sup>

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<sup>179</sup> *Supra*, note 176; *Re Northern Telephone Ltd.* (1969), 20 L.A.C. 86 (Weatherill); *St. Catherines Public Utilities Commission* (1969), 20 L.A.C. 78 (Weatherill); *Re Crane Canada Ltd.*, unreported, 1969 (Andrews).

<sup>180</sup> *Union Carbide (Can.) Ltd. v. Weiler*, [1968] S.C.R. 966; 70 D.L.R. (2d) 333 at 77-79, *rev'g sub. nom. R. v. Weiler*; *Ex parte Union Carbide (Can.) Ltd.*, [1968] 1 O.R. 59; 65 D.L.R. (2d) 412.

<sup>181</sup> *Re Toronto Parking Authority* (1966), 17 L.A.C. 37 (Arthurs).

<sup>182</sup> *Supra*, note 180 at 336.

The Court in *Hoar Transport* cited its decisions in *Union Carbide* and *Port Arthur Shipbuilding* as binding, and reiterated that the collective bargaining regime was to be governed by contract doctrines:

The board of arbitration is bound by the terms of the collective agreement. Article 6.7 and 6.8 [re: time limits] are integral provisions of the agreement. They create obligations of a basic nature and the parties to the agreements are obliged to adhere to them. The board of arbitration cannot ignore or dilute the force of these obligations, nor change their purport by means of amendment or substitution.<sup>183</sup>

A full analysis of the judgments in *Union Carbide* and *Hoar Transport* is not intended; the primary focus here is on the effect of the court's reasoning on subsequent arbitrations. A few points deserve mention, however. In *Hoar Transport*, the Court approved the reasoning in the Court of Appeal. There, Aylesworth, J.A. concluded that there was no merit in the submission that the failure to adhere to the time limit was a mere technical irregularity within s. 86 of the *OLRA*:

These provisions are an integral substantive part of the agreement vital to its orderly operation. To dismiss the failure here of observation thereof as a 'technical irregularity' is to destroy the very intent, operation and effect of the procedure negotiated with respect to grievances.<sup>184</sup>

Yet there is no indication of either the "very intent" of the parties in negotiating the grievance procedure, or the possible effect of the relevant statute beyond a recitation of sections in the *OLRA* and the collective agreement.

Further, Aylesworth, J.A. states that

the utterly untenable reasoning that the obligations imposed by art. 6.7 of the agreement are merely 'directory' or that non-compliance therewith is merely a 'technical irregularity' is as completely fallacious as so to hold respecting any other of the substantive provisions throughout the agreement.<sup>185</sup>

The Court also ignored a contractual doctrine raised by the arbitrator that

there is substantial authority for the proposition that, as a matter of contract law, penalties provided for breaches of contract, which do not involve a legitimate attempt to pre-estimate liquidated damages, are unenforceable (*Shatilla v. Feinstein* (1923), 3 D.L.R. 1035). In substance the 'deemed withdrawal of the grievance' is a penalty or sanction for a breach of contract which is otherwise remediable in money damages.<sup>186</sup>

Nor did the court deal with the possibility of statutory illegality. If the purpose of the *OLRA* is to promote industrial peace through the arbitration of disputes under the collective agreement, contractual provisions purporting to preclude the operation of the statute and prevent the arbitration of unset-

<sup>183</sup> *Supra*, note 16 at 450-51.

<sup>184</sup> *R. v. Weiler; Ex parte Hoar Transport Co. Ltd.*, [1968] 1 O.R. 705 at 709; 67 D.L.R. (2d) 484 at 488 *rev'g.*, [1967] 2 O.R. 554; 64 D.L.R. (2d) 400. *Aff'd. (Sub. nom. General Truck Drivers Union v. Hoar Transport Co.)*, [1969] S.C.R. 634; 4 D.L.R. (3d) 449.

<sup>185</sup> *Id.* at 710 and 489.

<sup>186</sup> *Re Hoar Transport Ltd.*, unreported, 1968 (Weiler).



ted grievances should be declared contrary to public policy and severable from the contract.<sup>187</sup>

The judgment of the Supreme Court of Canada in *Hoar Transport* was handed down in April, 1969. Along with *Union Carbide*, the decision constituted clear judicial authority for two related propositions, namely, that the parties to a collective agreement were entirely free to construct a binding grievance procedure, including a penalty provision precluding resort to arbitration, and that the arbitrator was without jurisdiction to relieve against the harshness of that penalty, irrespective of the circumstances.

### 3. *The Arbitral Response: The Mandatory-Directory Analysis*

Judicial decree, however, did not ensure arbitral obeisance. Arbitrators were quick to seize upon the distinction between mandatory and directory time limits in the grievance procedure to circumscribe the reach of the Court's judgments. The court had declared the limits in *Hoar Transport* as mandatory by implication; it had dismissed the notion that the collective agreement provision was merely directory. Arbitrators, then, while acknowledging the authority of the judicial interpretation, could contend the decision did not affect truly "directory" provisions.

The analyses in *Re Imperial Tobacco Co. Ltd.*<sup>188</sup> and *Union Carbide Canada Ltd.*<sup>189</sup> laid down the test: if the collective agreement provided for a specific penalty for each of the time limits in the grievance procedure, then those limits were considered mandatory; in the absence of such penalty and despite the use of the imperative 'shall' in the relevant clause, the provision could be declared directory and thereby justify a hearing on the merits.<sup>190</sup> This approach proved quite popular, and was followed in approximately twenty unreported decisions.<sup>191</sup>

However, while arbitrators expressly stated that a classification of time limits as directory finessed the court's reasoning in *Hoar Transport*, proof of

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<sup>187</sup> See, D. M. Beatty, *Procedural Irregularities in Grievance Arbitration* (1974), 20 McGill L.J. 378 at 492, wherein the author contends that the scope of s. 36 (prohibiting the right to strike during the term of the collective agreement) and s. 37 (the arbitration clause) are coextensive and really constitute a *quid pro quo*: "To the extent that the union's freedom to strike has been eliminated, its right to arbitration should be ensured. Thus when faced with procedural provisions, the breach of which would otherwise deny the board's jurisdiction, the arbitrator must give effect to s. 37 and resolve the differences on their merits."

<sup>188</sup> (1969), 20 L.A.C. 319 (Shime).

<sup>189</sup> (1968), 19 L.A.C. 412 (O'Shea).

<sup>190</sup> But, see, *Re Maison Mere des Soeurs de la Charite d'Ottawa* (1973), 3 L.A.C. (2d) 392 (Beatty) for a finding of a directory time limit notwithstanding the use of the imperative "shall."

<sup>191</sup> *Re Dunham-Bush Ltd.*, unreported, 1972 (Brown); *Re Union Carbide Canada Ltd.*, unreported, 1975 (Hinnegan); *Re Mutual Electric Co. Ltd.*, unreported, 1975 (Ord); *Re Dominion Consolidated Truck Lines Ltd.*, unreported, 1975 (Fox); *Re Janin Building and Civil Works Ltd.*, unreported, 1970 (O'Shea); *Re John Inglis Co.*, unreported, 1974 (Weatherill); *Re Atikokan General Hospital*, unreported, 1974 (Aggarwal); *Re William Neilson Ltd.*, unreported, 1975 (Curtis); *Arlington Crane Service Ltd.*, unreported, 1972 (Weiler); *Re Weston Bakeries Ltd.*, unreported, 1971 (Gargrave).

actual prejudice to the innocent party would nonetheless bar a hearing on the merits.<sup>192</sup> Arbitrators drew some fine distinctions to retain jurisdiction under this analysis. In *Re Eldorado Nuclear Ltd.*,<sup>193</sup> the collective agreement was held only to be directory at the stage where the breach occurred, although "clearly" mandatory for the subsequent steps in the grievance procedure. In *Re Grey Mixing Equipment Ltd.*,<sup>194</sup> the collective agreement stated that the nominee should select a chairman within seven days but also provided for a Ministerial appointment if the nominees failed to agree. The arbitrator held both stipulations rendered the time limits directory and, further, as there was no evidence that the nominee had failed to "agree" on the chairman (as distinct from "notification of their agreement"), arbitral jurisdiction existed. Finally, mutual fault in selecting a chairman, coupled with the absence of a penalty provision, grounded arbitral jurisdiction in *Re Falconbridge Nickel Mines Ltd.*<sup>195</sup> The reasoning is interesting, in that a duty to select a chairman was imposed on both parties in order to preclude one party from relying on the time limits to prevent a hearing on the merits.<sup>196</sup>

A variation on the mandatory-directory analysis looked to the form of the grievance. That is, if the collective agreement could be taken to refer to individual grievances, arbitrators held that the s. 37(2) of the Act incorporated a directory arbitration clause in the collective agreement applicable to union or policy grievances. When faced with a mandatory provision in the collective agreement concerning individual grievances, arbitrators refused to infer that the parties intended such language to govern policy grievances. Under s. 37(2) of the Act, an arbitration provision is deemed part of the collective agreement if the contract omits such a clause. This section specifies time limits for the completion of various steps in the arbitration process but does not contain a penalty for breach of the limitation period. Policy grievances, therefore, were considered grounded by the statutory provision; as this clause was directory, the rule in *Hoar Transport* was inapplicable.<sup>197</sup>

Unfortunately, the directory analysis was severely limited in scope. This semantic device to circumvent *Hoar Transport* was relatively impotent in the face of a penalty provision for breach of the time limits.<sup>198</sup>

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<sup>192</sup> *Re Ault Milk Products Ltd.*, unreported, 1970 (Simmons); *Re Consumers' Gas Co.*, unreported, 1972 (Lysyk); *Re Alsteel Fabrications (Sudbury) Ltd.*, unreported, 1971 (Godin); *Re Kelsey-Hayes Canada Ltd.*, unreported, 1972 (Rayner); *Re Noront Steel Construction Ltd.*, unreported, 1970 (O'Shea).

<sup>193</sup> Unreported, 1971 (Hanrahan).

<sup>194</sup> Unreported, 1973 (O'Shea).

<sup>195</sup> Unreported, 1971 (Ord).

<sup>196</sup> The decision implicitly relies on estoppel; it would be unfair to permit a party in default of its own procedural obligations under the collective agreement to rely on a procedural breach by the other party to bar a resort to arbitration.

<sup>197</sup> *Re Sylvania Electric Canada Ltd.* (1972), 24 L.A.C. 361 (Simmons); *Re Thames Valley Ambulance Ltd.*, unreported, 1975 (Fox).

<sup>198</sup> Of course, it was open to the parties to alter the arbitration clause by deleting the penalty, thus rendering the provision directory. However, as the clause most often worked to the advantage of the company, the change would require the bargaining away of another benefit by the union. Negotiation, then, could not adequately redress the effect of the Court's judgment.

#### 4. *Unreasonable Delay*

Where limits were found to be directory, arbitrators continued to elaborate the notion of "reasonableness" as the only compelling limitation on their jurisdiction to adjudicate grievances on the merits. *Re Shipping Federation*<sup>199</sup> formed the touchstone of this doctrine: a hearing must be fair to *both* parties. Prejudice by reason of unjustifiable delay precluded such fairness because witnesses' recollections faded, documents were destroyed, *etc.*<sup>200</sup> In *Re Canadian Industries Ltd.*,<sup>201</sup> the arbitrator held that in view of company expenses incurred in training the successful job applicant, a five month delay by the union was sufficiently unreasonable to bar arbitration despite directory time limits. However, in another promotion grievance, the arbitrator refused to consider a six month delay unreasonable, perhaps because the union nominee had attempted to contact his counterpart and the message had been inadvertently mislaid.<sup>202</sup> Where prejudice was not established, however, delay was often held to be not unreasonable.<sup>203</sup> The unreported decisions tended to follow similar patterns.<sup>204</sup>

Reasonableness was held to be a function of the circumstances; in *Re Sault Ste. Marie Board of Education*,<sup>205</sup> the arbitrator excused a delay of three years due to the secrecy of the hiring. When the union became apprised of the facts, the grievance was processed with all due dispatch.

The consensus seemed to be that collective bargaining implicitly required a speedy settlement of grievances regardless of whether the collective agreement spoke directly to the matter of time limits.<sup>206</sup> Actions by either party which violated the spirit of dispute adjudication should preclude access to grievance arbitration.

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<sup>199</sup> (1967), 18 L.A.C. 174 (Weatherill).

<sup>200</sup> *Re Ottawa Citizen* (1969), 20 L.A.C. 27 (Weatherill); *Re Honeywell Controls Ltd.* (1971), 22 L.A.C. 310 (Hinnegan).

<sup>201</sup> (1970), 21 L.A.C. 136 (Metzler).

<sup>202</sup> *Re Union Gas Co. of Canada Ltd.* (1971), 23 L.A.C. 83 (Brown).

<sup>203</sup> *Re International Nickel Co. of Canada Ltd.* (1974), 6 L.A.C. (2d) 120 (Simmons); *Re Hydro-Electric Commission of the Borough of North York* (1974), 6 L.A.C. (2d) 113 (Carter); *Re Canadian Industries* (1969), 20 L.A.C. 386 (Palmer).

<sup>204</sup> For example, substantial compliance with the grievance procedure was held necessary and a nineteen-month delay unreasonable in *Re Noront Steel Construction Co. Ltd.*, unreported, 1970 (O'Shea); a six-month delay constituted prejudice to the company, which had specifically extended the time limits on several other grievances after negotiation, in *Re B.A.S.F. Wyandotte Corp.*, unreported, 1974 (Brandt); two years was a patently unreasonable delay in *Re Atlas Steel Co.*, unreported, 1972 (Brandt); serious financial liability was prejudicial to the employer in *Re Hydro-Electric Power Commission of Ontario*, unreported, 1971 (Fine) and *Re Savarin Tavern*, unreported, 1972 (Weatherill). Where prejudice was absent, however, the grievances were adjudicated, as in *Re Douglas Aircraft*, unreported, 1972 (Reville) and *Re Governing Council of the University of Toronto*, unreported, 1975 (Adell).

<sup>205</sup> Unreported, 1975 (Godin).

<sup>206</sup> *Re Abitibi Paper Co.*, unreported, 1973 (Palmer).

### 5. *The Continuing Grievance*

Another 'device' to avoid the rule in *Hoar Transport* was the doctrine of continuing grievances. If the gravamen of the complaint related to a repetitive or continuing breach of the collective agreement, the grievance was considered timely despite the date of the initial breach or the first filing of the grievance; each fresh infringement founded a new legal claim.<sup>207</sup> The concept was attractive in that it sidestepped the effect of a mandatory provision in the collective agreement as to the time limits for processing the grievance.<sup>208</sup> Compensation, however, was retroactive only for the limitation period stipulated in the collective agreement so that the innocent party's financial burden would not have been increased by the defaulting party.<sup>209</sup>

Most commonly, the subject matter appropriate for classification as a continuing grievance was the deduction of union dues in the form of a policy grievance.<sup>210</sup> But a continuing grievance was also found in *Re A. Schonbek & Co. Ltd.*,<sup>211</sup> where the grievance was held to relate to the continuing employment of an employee at a lower wage rate and classification, rather than the return to work at that lower rate. The use of non-union labourers while union members were on layoff was considered a repetitive violation, to avoid the mandatory language of the collective agreement regarding time limits, in *Re City of Toronto*.<sup>212</sup> In *Re Bendix Automotive of Canada Ltd.*,<sup>213</sup> an entitlement to sickness and accident benefits was likewise deemed a repetitive violation.

Obviously, the utility of the device was a function of the range of breaches which could be found to have a continuing nature. In *Re Dominion Glass Co. Ltd.*,<sup>214</sup> the concept was seriously restricted by the holding that a continuing grievance could only be found where there were repeated violations of the collective agreement rather than a single instance which produced "continuing effects." In that case, an alleged improper assignment of work outside the bargaining unit was considered a single violation of the collective agreement and, given the mandatory phrasing of the limitation period, the grievance was

<sup>207</sup> *Re Triangle Conduit and Cable Canada Ltd.* (1968), 21 L.A.C. 332 (Weiler).

<sup>208</sup> *Re United Aircraft of Canada Ltd.* (1970), 21 L.A.C. 64 (Curtis); *Re John Inglis Co. Ltd.*, unreported, 1974 (Weatherill); *Re Lustro Steel Products Co.* (1971), 22 L.A.C. 294 (Weatherill); *Re Beacon Hill Lodges of Canada Ltd.*, unreported, 1974 (McCulloch).

<sup>209</sup> *Re R.C.A. Victor Co.*, unreported, 1970 (Weiler); *Re Hart and Cooley Manufacturing Co. Ltd.*, unreported, 1972 (Rayner); *Re Automatic Screw Machine Products Ltd.* (1972), 23 L.A.C. 396 (Johnston); *Re Parking Authority of Toronto* (1974), 5 L.A.C. (2d) 150 (Adell).

<sup>210</sup> *Re Graves Foods Ltd.*, unreported, 1975 (Aggarwal); *Re Blue Mountain Pottery* (1973), 6 L.A.C. (2d) 215 (Johnston); *Re Lustro Steel Products Co.*, *supra*, note 208.

<sup>211</sup> (1966), 18 L.A.C. 30 (Lande).

<sup>212</sup> (1974), 7 L.A.C. (2d) 53 (Simmons).

<sup>213</sup> (1973), 3 L.A.C. (2d) 21 (Weatherill).

<sup>214</sup> (1972), 1 L.A.C. (2d) 151 (Reville).

dismissed for want of jurisdiction. On review,<sup>215</sup> Lacourciere, J. reversed the arbitrator. (The decision was subsequently cited as authority for an arbitrator's classification of a seniority calculation as a continuing grievance in *Re Maison Mère des Soeurs de la Charité d'Ottawa*.<sup>216</sup>) However, the Ontario Court of Appeal later restored Reville's award, thereby upholding a narrow construction of the doctrine.<sup>217</sup> The arbitrators in *Re Atlas Steels Ltd.*<sup>218</sup> and *Re Ralph Milrod Metal Products Ltd.*<sup>219</sup> considered themselves bound by the court's judgment. Thus, judicial review of *Re Dominion Glass* emasculated the concept of a continuing grievance as a means of alleviating the harshness of mandatory limits.

## 6. *Arbitral Obedience*

By far the most common response to *Hoar Transport* and *Union Carbide* was a perfunctory application of the Court's ruling. If the language was mandatory, the grievance was dismissed without a hearing on the merits.<sup>220</sup> From 1969 to 1975, over 50 cases were 'adjudicated' in this manner.<sup>221</sup>

Unfortunately, the constant repetition of the rule in *Hoar Transport*

<sup>215</sup> [1973] 2 O.R. 573; 34 D.L.R. (3d) 629 (DC) *rev'd* (1974), 1 O.R. (2d) 408; 40 D.L.R. (3d) 496; 74 C.L.L.C. 14,203 (*sub. nom. Dominion Glass Co. v. United Glass & Ceramic Workers*) 5 L.A.C. (2d) 224.

<sup>216</sup> (1973), 3 L.A.C. (2d) 392 (Beatty).

<sup>217</sup> [1974] 1 O.R. (2d) 408 (CA); 40 D.L.R. (3d) 496, 74 C.L.L.C. 14,203 (*sub. nom. Dominion Glass Co. v. United Glass & Ceramic Workers*), 5 L.A.C. (2d) 224; *rev'g*, [1973] 2 O.R. 573; 34 D.L.R. (3d) 629 (C.A.).

<sup>218</sup> (1974), 7 L.A.C. (2d) 24 (Rayner).

<sup>219</sup> Unreported, 1975 (Schiff).

<sup>220</sup> *Re Union Carbide Canada Ltd.* (1969), 20 L.A.C. 74 (Adell), *Re Ottawa General Hospital* (1970), 21 L.A.C. 135 (Palmer).

<sup>221</sup> *Re Windsor Utilities Commission* (1973), 1 L.A.C. (2d) 359 (Krever); *Re Municipality of Metropolitan Toronto*, unreported, 1972 (Reville); *Re W. C. Norris Ltd.*, unreported, 1971 (Brown); *Re Welland Canal Twinning Project Contractors Association*, unreported, 1973 (Brown); *Re Motor Transport Industrial Relations Bureau of Ontario*, unreported, 1973 (Brown); *Re Labatt's Ontario Breweries Ltd.* (1972) 1 L.A.C. (2d) 443 (O'Shea); *Re Alcan Canada Products Ltd.*, unreported, 1974 (Weatherill); *Re Toronto Construction Association*, unreported, 1973 (Brown); *Re Mutual Dairies Ltd.*, unreported, 1971 (Lysyk); *Re General Hospital of Port Arthur*, unreported, 1973 (Aggarwal); *Re Gidon Industries Inc.*, unreported, 1973 (Brown); *Re Steel Co.*, unreported, 1974 (Gorsky); *Re Steel Co. of Canada Ltd.*, unreported, 1974 (Brown); *Re Steinberg's Ltd.*, (1970), 21 L.A.C. 137 (Hanrahan); *Re National Grocer's Co. Ltd.*, unreported, 1973 (Lang); *Re Newman Structural Steel Ltd.*, unreported, 1973 (Falzetta); *Re Atomic Energy of Canada Ltd.*, unreported, 1971 (Weatherill); *Re Canadian Acme Screw & Gear Co.*, unreported, 1970 (Weiler); *Re Douglas Aircraft*, unreported, 1973 (Weatherill); *Re Dravo of Canada Ltd.*, unreported, 1972 (Brown); *Re St. Thomas Elgin General Hospital*, unreported, 1971 (Christie); *Re North York General Hospital*, unreported, 1970 (O'Shea); *Re Northern Electric*, unreported, 1970 (Simmons); *Re Sola Basic Ltd.*, unreported, 1971 (Brown); *Re St. Joseph Hospital*, unreported, 1972 (Falzetta); *Re Industrial Fasteners Ltd.*, unreported, 1975 (Adell); *Re Regional Municipality of Hamilton Wentworth*, unreported, 1974 (Krever); *Re McKinlay Transport Ltd.*, unreported, 1972 (Palmer); *Re Consumer's Gas Co.*, unreported, 1972 (Brown); *Re Letter Carrier's Union of Canada*, unreported, 1974 (Fraser); *Re Kendan Manufacturing Ltd.*, unreported, 1971 (Brandt); *Re Bestpipe Ltd.*, unreported, 1973 (Andrews); *Re Standard Brands Canada Ltd.*, unreported, 1975 (Brown).

seemed to inhibit arbitral creativity; when arbitrators were confronted with fact situations where the rule might have been 'bent', opportunities were passed over. For example, where in the past the company had waived time limits and the evidence was conflicting on waiver in the instant case, the arbitrator held that lack of proof of a written or specific verbal assurance resulted in an absence of jurisdiction.<sup>222</sup> In *Re Construction Products Incorp.*<sup>223</sup> the arbitrator accepted the company's testimony as to an oral objection to timeliness even though a written objection was not raised before the hearing. Where the collective agreement required a written waiver but the company did not raise an objection as to timeliness until the hearing, the contractual provision governed and the preliminary objection as to timeliness succeeded.<sup>224</sup> That the union, alleging discriminatory discipline, only learned of the lesser penalties to others at a later date was irrelevant; the arbitrator held that the fairness of the penalty was solely a function of the facts at the time the discipline was imposed.<sup>225</sup> The date of mailing of the disciplinary discharge, not that of its receipt, was considered critical in determining time limits, despite a delay in the Rural Route delivery of the registered letter to the grievor.<sup>226</sup>

It can be concluded that, once a limitation period was found to be mandatory, many arbitrators evinced considerable reluctance to use other arbitral doctrines to relieve against the harshness of the rule in *Hoar Transport*.<sup>227</sup> Some cases were truly tragic on the facts. For example, in *Re Lake Ontario Steel Co. Ltd.*, the grievor had requested a leave of absence because of serious marital difficulties, and the company granted one week. The shock from the death of the grievor's infant child during that week resulted in the grievor overstaying the leave — and his dismissal. The grievance was filed out of time and the limitation period was mandatory; citing *Union Carbide* as determinative the arbitrator dismissed the grievance.<sup>228</sup>

Thus, many arbitrators felt bound to follow the Court's ruling in *Hoar Transport*, despite recognition that a literal interpretation of the collective agreement as regards the grievance procedure often operated to thwart the arbitral resolution of grievances on the merits.<sup>229</sup>

## 7. Waiver

The Courts in *Hoar Transport* and *Union Carbide* had not commented on the prerogative of the parties to waive rights under the collective agree-

<sup>222</sup> *Re Haley Industries Ltd.*, unreported, 1975 (Brown).

<sup>223</sup> Unreported, 1972 (Brown).

<sup>224</sup> *Re National Steel Car Corp. Ltd.*, unreported, 1975 (Weatherill).

<sup>225</sup> *Re Barber-Ellis of Canada Ltd.*, unreported, 1973 (Palmer).

<sup>226</sup> *Re Alcan Canada Products*, unreported, 1974 (Brown).

<sup>227</sup> *Re Kelsey-Hayes Canada Ltd.*, unreported, 1973 (Brandt); *Re Emmanuel Products Ltd.*, unreported, 1973 (Brown).

<sup>228</sup> Unreported, 1973 (O'Shea). See, also, *Re Corporation of the City of London*, unreported, 1972 (Brown).

<sup>229</sup> Arbitrators also applied the judicial doctrine that failure to exhaust internal remedies deprived the courts of jurisdiction to hear a grievance: *Re Bomar Steel Co. Ltd.*, unreported, 1975 (O'Shea).

ment. In view of judicial silence on the issue, arbitrators applied the earlier jurisprudence. Despite strong mandatory language, the time limits in the collective agreement could therefore be "waived" by the innocent party; arbitral authority to determine the grievance on the merits would not be restricted by the terms of the collective agreement.

Waiver could be either express or implied from the circumstances. Waiver was said to be implied where the company had failed to raise the objection as to timeliness as soon as reasonably possible after the breach occurred.<sup>230</sup> If the innocent party treats the grievance on the merits at any stage in the procedure after violation of the time limits, the defect was considered to be impliedly waived.<sup>231</sup> The innocent party, of course, could take such steps expressly "without prejudice" to the alleged procedural objection; the doctrine of waiver would not apply in such circumstances.

In the case of *Re Regency Towers Hotel*,<sup>232</sup> the arbitrator summarized the doctrine of waiver. His reasoning, often cited by other arbitrators, established two applications of the doctrine: where the objecting party has induced the other to rely on a representation that the procedural requirement need not be satisfied (sometimes termed estoppel or promissory estoppel) and where the objecting party further processed the grievance on the merits before mentioning the procedural defect.<sup>233</sup> In *Re Douglas Aircraft Co. of Canada Ltd.*,<sup>234</sup> the arbitrator relied on the doctrine to find the company estopped, during a two week plant shutdown, from asserting that the time limits were running,

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<sup>230</sup> *Re Stratford General Hospital Corp.*, unreported, 1973 (Weatherill); *Re Long Sault Fabrics*, unreported, 1970 (Weatherill); *Re Iron Works Co.*, unreported, 1971 (Weatherill); *Re Falconbridge Nickel Mines Ltd.*, unreported, 1973 (Rayner); *Re Purolater Products (Canada) Ltd.*, unreported, 1972 (Rayner); *Re G.S.W. Appliances Ltd.*, unreported, 1974 (Brown); *Re Town of Pembroke* (1967), 18 L.A.C. 125 (Johnston); *Re C.G.E. Co. Ltd.*, unreported, 1973 (O'Shea); *Re Douglas Aircraft Co. of Canada*, unreported, 1970 (Christie) one of two grievances; *Re Falconbridge Nickel Mines Ltd.* (1973), 2 L.A.C. (2d) 195 (Rayner); *Re Janin Building and Civil Works Ltd.*, unreported, 1970 (O'Shea).

The objection as to timeliness, however, could be raised by implication: in *Re Liquid Carbonic Canadian Corp. Ltd.*, (1971), 23 L.A.C. (Rayner), the arbitrator held that the company had "inferentially" raised the issue of timeliness; one could not expect precise legal verbiage early in the grievance procedure. See, also, *Re Construction Products Inc.* (1970), 22 L.A.C. 125 (Brown), in which oral notice by the company was deemed sufficient to inform the union of its timeliness objection, although the arbitrator commented that good industrial practice would require confirmation in writing.

<sup>231</sup> *Re C.N.R. Telecommunications Department*, unreported, 1971 (Arthurs); *Re W. C. Norris Ltd.*, unreported, 1971 (Brown); *Re Automatic Screw Machine Co.* (1970), 21 L.A.C. 255 (Shime); *Re C.N.R. Telecommunications Department*, unreported, 1973 (Curtis); *Re U.S.W.A.*, unreported, 1972 (Weiler); *Re Sunar Industries Ltd.*, unreported, 1972 (Weiler); *Re Brown Forest Industries Ltd.*, (1969), 20 L.A.C. 76 (O'Shea).

<sup>232</sup> (1973), 4 L.A.C. (2d) 440 (Schiff).

<sup>233</sup> See, *Re Canada Building Materials Co.*, unreported, 1973 (Gorsky) where the arbitrator, after reviewing the arguments raised in *Regency Towers*, held that case's reasoning to be inapplicable to the facts of the instant grievance; contrast this with *Re Inglis Ltd.* (1974), 6 L.A.C. (2d) 288 (Johnston) where, after citing the *Regency Towers* case, the arbitrator did find factual evidence of waiver.

<sup>234</sup> Unreported, 1970 (Christie).

because there had been innocent misrepresentation in that the personnel department had indicated to the employee that the grievance could not be filed during the shutdown.

Waiver has less often been found to be express. In a very few instances, the company expressly agreed to waive its right to object to timeliness in order to permit determination of the grievance on the merits.<sup>235</sup> Rarely, both parties may be found to have waived all time limits and preliminary steps to quickly adjudicate the grievance.<sup>236</sup>

Surprisingly, arbitrators have often been unwilling to find waiver in the absence of a clear evidence.<sup>237</sup> In *Re Municipality of Metropolitan Toronto*,<sup>238</sup> the arbitrator warned that the facts must conclusively indicate that one party intended to relinquish its rights under the collective agreement. Furthermore, evidence of earlier waiver by the company did not preclude its right to object to a subsequent breach of the time limits.<sup>239</sup> In *Re Union Gas Co. of Canada Ltd.*,<sup>240</sup> it was held that waiver as to timeliness did not include a waiver as to the extent of compensation.

There was a distinct advantage to finding that waiver had occurred as a matter of fact. On review, the court would be bound by the arbitrator's holding unless there was no evidence to substantiate the conclusion.<sup>241</sup> It is surprising that waiver was not found in a number of cases where the facts showed sufficient confusion surrounding the processing of the grievance to give the union the benefit of the doubt.<sup>242</sup> It must be remembered that a finding of waiver cannot settle the grievance, but only allows its adjudication on the merits. It may be, however, that some arbitrators persuaded the company to withdraw its preliminary objection if they felt there were mitigating circumstances, but did not record this in their judgments. There is some tangible

<sup>235</sup> *Re Corporation of the Borough of North York*, unreported, 1974 (Simmons); *Re Livingstone Industries Ltd.*, unreported, 1971 (Shime); *Re Spruce Falls Power & Paper*, unreported, 1973 (Simmons).

<sup>236</sup> *Re Coulter Manufacturing Co. Ltd.*, unreported, 1972 (Weatherill). That the parties intended to extend time limits was found on the facts in *Re Plummer Memorial Public Hospital*, unreported, 1974 (O'Shea) and in the case of a signed waiver agreement in *Re Northern Electric Co. Ltd.*, unreported, 1971 (Gorsky).

<sup>237</sup> *Re Sperry Gyroscope*, unreported, 1975 (Roberts); *Re Board of Park Management & Sarnia Arena and Community Centre*, unreported, 1974 (Brown).

<sup>238</sup> (1974), 5 L.A.C. (2d) 311 (Coulter).

<sup>239</sup> *Re A.C. & S. Contracting Ltd.*, unreported 1974, (Dunn) and *Re Ontario Steel Products Ltd.*, unreported, 1971 (Palmer).

<sup>240</sup> (1972), 2 L.A.C. (2d) 45 (Weatherill).

<sup>241</sup> *Labour Relations Board v. Canada Safeway Ltd.*, [1953] 2 S.C.R. 46; 107 C.C.C. 75; [1953] 3 D.L.R. 641, rev'g 7 W.W.R. (N.S.) 145 and restoring 6 W.W.R. (N.S.) 510; [1952] 3 D.L.R. 855. The court dismissed an application for judicial review in *Re Parking Authority of Toronto and Toronto Civic Employees' Union* (1974), 4 O.R. (2d) 45, 47 D.L.R. (3d) 40 (D.C.), holding that where the arbitrator (reported at (1974), 5 L.A.C. (2d) 150 (Adell)) had found as a fact that neither element essential for the doctrine of laches (*i.e.*, acquiescence in the sense of an awareness that one's legal rights were being violated and detrimental reliance by the other party) had been proven, there was no error in law in failing to apply the doctrine.

<sup>242</sup> *Supra*, notes 217 to 222.



evidence that this may have occurred in some of the cases.<sup>243</sup> Further, the company may have decided unilaterally that the raising of a preliminary objection as to timeliness would more likely generate employee frustration (and increase the risk of economic retaliation) than result in a loss on a determination on the merits. In this event, the arbitration award would be completely silent on the issue.

#### 8. *Other Arbitral Means of Avoiding the Rule in Hoar Transport*

Arbitrators did continue to rely on pre-*Hoar Transport* arbitral jurisprudence to avoid the automatic dismissal of the grievance for breach of limitation periods. The doctrine of estoppel was applied to prohibit one party, where its actions were culpable to some degree, from relying on the breach of time limits by the other. For example, the default of one party at some stage in the grievance process could not thwart the innocent party's right to arbitration.<sup>244</sup>

In some instances, arbitrators avoided the consequences of the mandatory language in the collective agreement by defining the calculation of the time period to which the agreement referred. For example, in a grievance alleging improper payment of a travelling allowance, time was held to run from the date the employee received his paycheque, not the date the cheque was posted; the grievance accordingly fell within the limitation period.<sup>245</sup> In *Re Moffats Ltd.*,<sup>246</sup> in holding that time did not begin to run until the date the grievor became aware of the collective agreement violation, the arbitrator recognized the realities of the employment circumstances: the grievor had been transferred to another location and had not learned that another employee had been recalled from lay-off at the main plant until some time had passed. Where the chairman withdrew because of a conflict of interest, it was held that the steps in the grievance procedure must be retraced with reference to time limits.<sup>247</sup>

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<sup>243</sup> For example, in *Re Galt Metal Industries Ltd.*, unreported, 1973 (Lysyk), the company withdrew its objection at the hearing, and in *Re National Grocers Co. Ltd.*, unreported, 1974 (Palmer), the company likewise dropped its preliminary objection. After indicating orally that he would rule against the preliminary objection as to timeliness on the grounds of substantial compliance with the grievance procedure, the arbitrator in *Re Elite Sportswear Manufacturing Ltd.*, unreported, 1974 (Arthurs) persuaded the company to withdraw its objection.

<sup>244</sup> *Re Gabriel of Canada Ltd.* (1970), 21 L.A.C. 72 (Brown); *Re Canada Building Materials Ltd.* (1970), 21 L.A.C. 140 (Brown); *Re Harry Woods Transport Ltd.*, unreported, 1973 (Fox); *Re Libby, McNeill & Libby of Canada Ltd.*, unreported, 1973 (Simmons); *Re Federal Drilling Supplies*, unreported, 1971 (Lowney); *Re Fabricated Metal & Stampings Ltd.*, unreported, 1975 (Beatty).

<sup>245</sup> *Re Dominion Stores Ltd.*, unreported, 1975 (Curtis).

<sup>246</sup> Unreported, 1971 (Egan).

<sup>247</sup> *Re Municipality of Metropolitan Toronto*, unreported, 1972 (Rayner). The arbitrator also applied the analogy of the doctrine of frustration of contract, *i.e.*, the withdrawal of the chairman frustrated the performance of the arbitration board's function. Neither party was to be permitted to obtain any benefit (*i.e.*, the right to rely on the breach of the time limits in constituting a new board) as the failure to arbitrate the grievance was not the fault of either party.

In *Re O.S.F. Industries Ltd.*,<sup>248</sup> the arbitrator held that since the grievance should be dismissed on the merits, it was unnecessary to deal with the preliminary objection that the grievance had not been processed properly. In effect, the arbitrator ignored the rule in *Hoar Transport* and adjudicated the grievance on the merits. This useful procedure would not be difficult to follow, since arbitrators often receive all the evidence at the hearing while reserving their ruling on the preliminary objection as to timeliness. Indication that the grievance would not have succeeded on the merits in any event would have a considerable salutary effect since, in those instances, union frustration at the failure of arbitration to resolve disputes under the collective agreement would be lessened. Further, such a practice might well encourage the arbitrator to rely on other arbitral doctrines to avoid the rule where he felt the grievance would succeed on the merits.

In some cases where a preliminary objection as to timeliness was raised, arbitrators based their authority to resolve grievances on a combination of reasons; the collective agreement provisions would be found directory, the grievance characterized as continuing, and the company found to have waived its rights in any event. Obviously, arbitrators hoped that, on review, one of the "pegs" might stick to prevent the quashing of the award.<sup>249</sup>

### 9. Continued Judicial Review

Another factor which probably inhibited arbitral creativity was the omnipresent possibility of judicial review. In *Re Automatic Screw Machine Products Ltd.*,<sup>250</sup> the court held that the arbitrator had declined jurisdiction by not first determining a "collateral" issue, namely whether the grievance, signed by twelve employees, had been properly processed as a group grievance, and the case was ordered remitted to an arbitration board, preferably one differently constituted, for reconsideration. The arbitrator had held that while the language was not clearly mandatory, and although he doubted that the provision could be construed as directory, he was satisfied that the company had waived its rights to object to untimeliness by considering the grievance on the merits. The company referred to the limitation period in an earlier letter but the arbitrator did not conclude that the company had thereby reserved its right to refuse to consider the grievance.<sup>251</sup> The reasoning demonstrated a liberal view of waiver, intended to permit a determination on the merits — and was overturned. In *Re Municipality of Metropolitan Toronto*, the arbitrator had carefully scrutinized the collective agreement and held that the provision requiring the application for a ministerial appointment of a chairman within fifty days was directory, that is, the imperative "shall" was not conclusive, and the Ministerial request could be separated from the other steps in the grievance

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<sup>248</sup> Unreported, 1972 (Brown).

<sup>249</sup> *Re Janim Building and Civil Works Ltd.*, *supra*, note 226; *Re Erie Iron Works Co.*, *supra*, note 226; *Re Mutual Electric Co. Ltd.*, *supra*, note 187.

<sup>250</sup> [1971] 3 O.R. 30.

<sup>251</sup> The grievance had been upheld on the merits: see, (1970), 21 L.A.C. 255 (Shime). Further, it should be noted that part of the arbitrator's award, dealing with the admission of extrinsic evidence, (*i.e.*, the past practice of the company regarding lunch breaks) was also quashed as an error of law.

procedure which were subject to a penalty clause.<sup>252</sup> However, the decision was quashed upon application for judicial review. The court merely reiterated the rule that an arbitrator must not modify nor dilute the force of the provisions in the collective agreement by substituting a "reasonable" limitation period and held that the clause was clearly mandatory.<sup>253</sup>

These reminders of the attitude of the judiciary — that "creative" arbitral jurisprudence would face a hostile reception in the courts — undoubtedly repressed efforts to minimize the effect of *Hoar Transport*.

#### 10. *Legislative Intervention*

Some stories do have happy endings. As early as 1968, a number of arbitrators expressed their concern that several judicial decisions, including *Hoar Transport*, had jeopardized the future of labour arbitration. In July, 1975, s. 37(5a) of the *OLRA* was enacted:

Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any steps in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.<sup>254</sup>

As yet, the section has not been the subject of judicial interpretation. However, the wording seems broad enough to nullify the effect of the judicial decisions in *Hoar Transport* and *Union Carbide*. The section operates *unless* there are express words in the collective agreement to the contrary — and, realistically, it should prove exceedingly difficult for an employer to negotiate the inclusion of such a *non obstante* clause. The authority of the arbitrator to relieve against breaches of time limits is comprehensive — applying to "any steps" in the grievance procedure. There is a suggestion of vindication in the test adopted, *i.e.*, "reasonable grounds for the extension" subject to substantial prejudice to the other party, the very criteria the arbitrators had used where escape from the harshness of *Hoar Transport* had been possible.

In *Plasticap Ltd.*,<sup>255</sup> the new amendment was considered by an arbitrator. In that case the union was 21 days beyond the five days stipulated as binding in the collective agreement. The arbitrator held that the mandatory-directory analysis was irrelevant and where, as here, there was no prejudice to the employer, the limits should be extended under s. 37(5a). He further decided that the amendment applied despite the fact that grievance proceedings were initiated prior to the enactment; s. 37(5a) was held to be an excep-

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<sup>252</sup> (1973), 3 L.A.C. (2d) 126 (Schiff).

<sup>253</sup> [1974] 3 O.R. (2d) 180. The court also held that s. 37(4) of the *OLRA*, authorizing the Minister of Labour to appoint an arbitrator where the parties failed to agree on a chairman, did not empower the Minister to relieve against the terms of the collective agreement.

<sup>254</sup> S.O. 1975, c. 76.

<sup>255</sup> Unreported, 1975 (Simmons).

tion to the general rule that legislation is prospective in operation, since the section was clearly remedial and affected only "procedural" rights.<sup>256</sup>

With the enactment of s. 37(5a), the crisis posed by *Hoar Transport* has become moot. There is now specific statutory authority for arbitrators to do what many felt had always been a necessary implication of the *OLRA*: to adjudicate grievances on the merits subject to "substantial compliance" with the grievance procedure and the absence of prejudice.

## E. CONCLUSION

It has become clear over the past fifteen years that the courts have abandoned their earlier characterization of the collective bargaining regime as the outcast of the legal system; but while the instances of judicial intervention have increased, the hostility of the courts toward collective bargaining, with few exceptions, has continued. The judiciary has declared arbitration boards to be subject to judicial review as are other statutory tribunals; it is unlikely that increasingly complex privative clauses will successfully oust this jurisdiction.<sup>257</sup>

But it is urged that subjection to judicial review need not have a deleterious effect on the operation of arbitration as a means of dispute settlement under the collective agreement. It is the attitude with which that review has been undertaken that presents the threat. Courts have refused to treat labour arbitration as a structure for dispute resolution that is conceptually different from judicial adjudication. To be sure, arbitral jurisprudence borrows heavily from such common law doctrines of contract as waiver. This similarity, however, should not mask the significant differences: acceptability of the arbitrator and the award as the touchstone of arbitration; the arbitrator's remedies, particularly specific performance; the informality, speed and flexibility of the process; the absence of *stare decisis* amongst arbitral decisions; the expertise developed through familiarity with the issues in the labour relations field. Finally, it must be stressed that labour arbitration is not an hierarchical, uniform system; arbitration boards are *ad hoc* bodies determining grievances under a

<sup>256</sup> The arbitrator considered the limitation period in the collective agreement to convey only "procedural" rights, notwithstanding the conclusion of the Court in *Hoar Transport* and *Union Carbide*, that such terms constituted "substantive" provisions of the contract.

He also discussed the same section in *Re Covertite (Ontario), Ltd.*, unreported, 1975 (Simmons), citing the reasoning in his earlier award. However, as the employer did not pursue its preliminary objection as to timeliness, a definite ruling was not needed.

<sup>257</sup> The B.C. *Labour Code*, S.B.C. 1973, c. 122 as amended by S.B.C. 1975, c. 84, which purports to oust judicial authority to review arbitral decisions in almost all cases (see, especially ss. 32, 33, 34), has yet to be judicially considered. But the Supreme Court of Canada has repeatedly stressed its inherent authority to review arbitration boards as statutory tribunals. It is argued that an "effective" privative clause depends more on the tolerance of the courts for pluralism in dispute settlement than on legal draftsmanship. But, see, *Pringle v. Fraser*, [1972] S.C.R. 821; 26 D.L.R. (3d) 28, *rev'g* (*sub. nom. Re Fraser and Pringle*), [1971] 2 O.R. 749; 19 D.L.R. (3d) 129; for a recent indication that the courts may be prepared to recognize the legislative intent of privative clauses.

specific collective agreement, albeit with reference to "industrial jurisprudence".

*Port Arthur Shipbuilding*, *Hoogendoorn* and *Hoar Transport* graphically illustrate the danger of judicial review where arbitration is considered simply as an adjunct to the existing hierarchy of the courts. In *Port Arthur Shipbuilding* and *Hoar Transport*, the Court denied the arbitrator any implicit power on the basis of the arbitration clause to settle collective agreement disputes; his authority was derived from, and defined by, the express terms of the collective agreement. The arbitrator's mandate to reach a final and binding resolution of any differences arising under the collective agreement was not seen as implicitly conveying arbitral authority to fashion the appropriate remedy (as in *Port Arthur Shipbuilding*) or to control the arbitration process (including the grievance procedure) in order to ensure adjudication on the merits (as in *Hoar Transport*). In *Hoogendoorn*, the Court refused to countenance the suggestion that natural justice as defined by the common law may not have universal application. The judiciary failed to acknowledge that the substantive rights of individuals in the employment context were ephemeral until the advent of the collective bargaining regime, or that the rights of the individual under a collective bargaining system are preserved by the duty of fair representation imposed on the union. The individual's terms of employment are negotiated by his exclusive representative, the union, and enforced by that body, but the individual retains a right to participate in the activities of the union and be represented without discriminatory, arbitrary, or capricious practices by his designate. But the individual employee in the bargaining unit does not have a right to negotiate a separate contract of employment, to participate as an individual employee in settling the collective agreement, or to enforce his rights under the collective agreement except under union auspices, unless otherwise stipulated in the contract. The Court did not indicate the substantive rights of the individual to which the procedural requirements of natural justice attached.

The difficulty has been not merely that the courts have disagreed with the arbitrators' reasoning or implicit premises about collective bargaining, but that the judicial decisions have constituted a superficial reaffirmation of the common law doctrines without an analysis of the exigencies of the system onto which the common law is sought to be imposed. As Paul Weiler has said:

The trouble with absentee management by judges, though, is that they are not familiar with these implications of what they are doing and that they will not usually be troubled later on by what they have done. Yet, their authoritative statement is in the reported opinion, and its intrusive force may have consequences far different than were intended by the Court.<sup>258</sup>

The consequence in *Port Arthur* was the overturning of the established arbitral jurisprudence as to the authority of the arbitrator to modify an unreasonable penalty imposed by management. In *Hoogendoorn*, the result was the imposition of an unworkable notice requirement in arbitration proceedings and the right to participate as a party for all individuals "affected by the out-

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<sup>258</sup> *Supra*, note 8 at 66. The comment specifically referred to the *Port Arthur Shipbuilding* decision, but is equally appropriate to *Hoar Transport* and *Hoogendoorn*.

come" of the grievance, despite their reluctance or inability to use it. Finally, *Hoar Transport* required strict adherence to contractual terms concerning the grievance process, without recognition of the implicit arbitral authority to relieve against those time limits and determine the substantive issues between the parties. But, in practical terms, the consequence of the judicial judgments was the dismissal of grievances or an unwarranted delay in proceedings.

The arbitrators attempted to integrate the judicial pronouncements with existing, and developing arbitral jurisprudence so as to effect as little destruction as possible. The most successful example of this integration was *Port Arthur Shipbuilding*. To be sure, a number of cases could be classified as "hair shirt" decisions; the arbitrator mechanically applied the Court's holding and accepted all the negative implications for the arbitral system. Yet, the arbitrators also developed ways of circumventing those *dicta*. First, they redefined a number of issues, ranging from the question of the measure of the discipline imposed, to the fulfilling of an antecedent (and arbitrarily imposed) condition. Of more importance was the elaboration of the "proper" test in discipline grievances: was the grievance within the reasonable range of responses to the act in question? This phraseology of Weatherill in *Re International Nickel*<sup>259</sup> gained wide acceptance, permitting the arbitrator to consider the entire circumstances of the grievance, including such mitigating factors as provocation, seniority, and work record. Thus, even before the legislative amendment, arbitrators had begun to circumscribe the effect of the Court's intervention.

After *Hoogendoorn*, the arbitrators, in significant numbers, merely ignored the Court: of the cases surveyed, fully 40.7 per cent seem not to have complied with the *audi alteram partem* rule. What is striking about these awards is the minimal reference to the judicially imposed rules; the arbitrators did not even attempt to rationalize the lack of notice. Indeed, even where notice was given, few arbitrators commented that they did so pursuant to the *Hoogendoorn* or *Bradley* decisions. Noncompliance with the *Hoogendoorn* notice rule is likely to increase with time, particularly since the probability of judicial review on this narrow ground is remote. Therefore, although the potential harm to arbitration as a result of the *Hoogendoorn* notice rule is great, it is unlikely that the threat will materialize. Individuals are subject to significant restraints in challenging their exclusive bargaining agent for an independent right of participation in the grievance process because most realize that their economic security and employment benefits depend upon union solidarity. As more arbitrators feel free to discard the notice rule, *Hoogendoorn* should slowly fade away.

If *Port Arthur Shipbuilding* represented a relatively successful effort to contain the judicial *dicta*, *Hoar Transport* constituted a virtual failure of arbitral attempts to mitigate the harshness of the Court's ruling. To be sure, the mandatory-directory analysis was of some help in avoiding the rule, as was the doctrine of continuing grievances and the technique of redefining the calculation of the limitation period. But the most common arbitral response

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<sup>259</sup> See, *Table 6*, pp. 82-83.

was obedience; between 1969 and 1975, over fifty grievances were dismissed for breach of the limitation period in the grievance procedure. Further, arbitrators refused to fully utilize the doctrines of waiver or estoppel to contain the judicial rules in *Hoar Transport* and *Union Carbide*.

The different reactions of the arbitrators to *Port Arthur Shipbuilding* and *Hoar Transport* is, perhaps, understandable in the light of established arbitral jurisprudence at the time the decisions were handed down. Arbitrators had fleshed out the concept of just cause for discipline in the industrial context and confirmed the remedial authority of the arbitrator to modify penalties long before the Court intervened. Convinced that that jurisprudence was the most appropriate for labour arbitration, arbitrators were prepared to create a means of circumventing the Court's ruling in order to return to it. Arbitrators, however, had not reached consensus on the issue of arbitral authority to intervene in the grievance process to enable adjudication on the merits. Many arbitrators had not accepted the s. 86 argument that arbitrators could relieve against technical irregularities in the grievance proceedings. The mandatory-directory analysis and the doctrines of continuing grievance and unreasonable delay were approved formulae but did not expressly deal with the conflict between a legislative mandate to reach a final and binding settlement and the freedom of the parties to govern their relationship by negotiating a collective agreement. Thus, arbitrators faced the explicit holdings in *Hoar Transport* and *Union Carbide* without a consensus as to the appropriate jurisprudence to be followed; until statutory amendment, obedience presented fewer difficulties.

A consequence of the Court's decisions was widespread modification of the terms of collective agreements. Particularly after *Port Arthur Shipbuilding*, collective agreements more frequently included an express authorization that arbitrators could alter the discipline imposed by the company. To a much lesser extent, after *Hoar Transport* agreements occasionally deleted the "penalty" provision for breach of the grievance procedure, thereby preserving arbitral authority to relieve against such breach under the "directory" approach. But it must be stressed that while the parties may have been able to circumvent the Court's rulings in *Hoar Transport* and *Port Arthur Shipbuilding*, there was no assurance that collective agreements would be modified in all cases. The company had directly benefited from the judiciary's position and the union was required to bargain away some other advantage to achieve an alteration. While the inclusion of a clause authorizing the arbitrator to modify disciplinary penalties was probably worth a strike, the recasting of a limitation provision in the grievance procedure as directory was unlikely to be of high priority. Thus, the effect of *Port Arthur Shipbuilding* was more likely to be remedied in this fashion than the consequences of *Hoar Transport*. It should be recalled that the collective agreement was intended to establish the relationship between the employer and employee, and not to redress difficulties occasioned by judicial review of arbitration.

A direct consequence of the Court's rulings was the intervention of the Legislature. In 1970, s. 37(8) was added to the *OLRA*, empowering the arbitrator to substitute such penalty as seems "just and reasonable in all the

circumstances." In 1975, the statute was again amended to include s. 37(5a), whereby the arbitrator may "extend the time for the taking of any step in the grievance procedure, notwithstanding the expiration of such time", provided the other party has not been prejudiced thereby. Clearly, it is always open to the Legislature to 'correct' the 'error' of the judiciary by statutory amendment. However, the process is cumbersome and time-consuming; in the interim, as in *Port Arthur Shipbuilding* and *Hoar Transport*, the instances of injustice will accumulate. Indeed, such accumulation is often necessary to convince the Legislature that the problem requires statutory alteration.

It has been suggested that labour arbitration should not be incorporated into the judicial hierarchy. An alternative approach, which would permit judicial review but preserve the integrity of arbitral dispute adjudication, is already familiar to the courts in the conflict of laws context.<sup>260</sup> It is recognized that to determine the rights of parties without reference to the relevant foreign law which the parties expected to be applied would not fairly resolve the issue. Strong arguments support the notion that a collective bargaining regime operates in many respects as a self-contained system just as a foreign country's legal system is separate and independent. It is contended, then, that the courts should acknowledge the uniqueness of collective bargaining by viewing arbitration decisions as a product of 'foreign' law. On review, the courts would apply the 'proper law of the contract', that is, arbitral jurisprudence. This approach would permit judicial review but restrict judicial intervention to instances where the arbitral jurisprudence was wrongly applied or where public policy so required. It must be remembered, also, that such pluralism in judicial lawmaking is not unfamiliar. Indeed, cases on appeal to the Supreme Court of Canada from Quebec are determined according to the Quebec Civil Code while those from other provinces are determined according to common law. For the most part, the courts in the 1960's emphatically rejected any notion of pluralism in the judicial treatment of arbitral awards. But there is some evidence that the approach may be changing.

In *Re Gould Manufacturing of Canada Ltd. and the United Steelworkers of America*, the court refused to apply the common law doctrine of repudiation of contract to the collective bargaining context.<sup>261</sup> Further, the Ontario Court of Appeal recognized a broader scope for the remedial authority of the arbitrator in *Re Blouin Drywall Contractors Ltd. and United Brother-*

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<sup>260</sup> For a full discussion of the power of review given the courts under the B.C. Labour Code, see Arthurs, "*The Dullest Bill*": *Reflections on the Labour Code of British Columbia* (1974), 9 U.B.C. Law Rev. 280 at 319-39.

<sup>261</sup> [1973] 2 O.R. 279; 33 D.L.R. (3d) 527 (D.C.). Although a provision in the collective agreement provided that "nothing in this agreement shall be construed as waiving any rights or protection to either the Company or the Union under any applicable law", the court held that the employee's intentional misrepresentation did not justify the employer's repudiation of the collective agreement; the employee was entitled to the protection of the collective agreement, including the right to grieve his discharge.



hood of Carpenters and Joiners of America, Local 248,<sup>262</sup> suggesting that the judiciary may have altered somewhat the perception of the role and function of the arbitrator. Moreover, the Supreme Court of Canada also seems to have altered its conception of collective bargaining, due, at least in part, to a change of membership on that body. In *McGavin Toastmaster Ltd. v. Ainscough*,<sup>263</sup> the issue was the entitlement to severance pay of employees who engaged in an illegal strike when the company subsequently shut down the plant. Laskin, C.J.C., for the majority, held that the individual contracts of employment could no longer be said to exist given the labour relations legislation establishing a collective bargaining regime. Where a collective agreement has been negotiated pursuant to legislative enactment, it must be that collective agreement which determines the rights of the parties. It should be noted, however, that the decision was a 5-4 split; the minority favoured the doctrine of individual contracts of employment, composed of both the terms of the collective agreement and the common law. It cannot be said that the judiciary as a whole has embraced the notion that review of arbitration awards should be conducted any differently than review of other statutory tribunals.

Until such an attitudinal change does occur, it is argued that judicial review will continue to approximate an appellate examination of arbitral awards. The doctrines of exceeding and declining jurisdiction are sufficiently broad to justify judicial intervention in almost all instances in which the court disagrees with the arbitrator's result. The instances of specific amendment of the *OLRA* to deal with the difficulties created by judicial review of arbitral awards should afford strong evidence that the judiciary is not dealing with labour arbitration as the legislature intended.

It can be said, in conclusion, that the development of arbitral jurisprudence has been inhibited by judicial review, and that arbitrators have had to direct much of their energy toward fashioning devices and doctrines to restrain the intrusion of inappropriate concepts into grievance arbitration. This waste

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<sup>262</sup> (1976), 57 D.L.R. 199; 75 C.L.L.C. 14,295, *rev'g* (1974), 4 O.R. (2d) 423; 48 D.L.R. (3d) 191 (*sub. nom. Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenter's & Joiners of America*), 74 C.L.L.C. 14,244 (D.C.). The company had breached the preferential hiring and hiring hall provisions of the collective agreement by retaining non-union employees to perform bargaining unit work. The court reversed the Divisional Courts' determination that declaratory relief was the only form available and reinstated the arbitrator's award of damages, even though this involved the distribution of monies to union members unemployed during the time the work was carried out.

In *Re Samuel Cooper & Co. and International Ladies' Garment Worker's Union*, [1973] 2 O.R. 841; 35 D.L.R. (3d) 501 (D.C.), the company violated the provisions of the collective agreement regarding contracting out, union security and certain obligatory payments (*e.g.* sick benefits, retirement, severance pay and welfare funds). The arbitrator had ordered damages and had made additional directions akin to mandatory injunctions to ensure management compliance with its future obligations under the collective agreement. The court upheld the authority of the arbitrator to fashion such a remedy as part of the arbitration process; the union was not forced to pursue this remedy at law.

<sup>263</sup> (1975), 54 D.L.R. (3d) 1 (S.C.C.) *aff'g*, [1974] 3 W.W.R. 114; 45 D.L.R. (3d) 687 (B.C.C.A.) 74 C.L.L.C. 15,056 *aff'g*, [1973] 4 W.W.R. 505; 36 D.L.R. (3d) 309.

was particularly evident in the *Hoar Transport* case. Arbitral jurisprudence at the time the Court's decision was handed down was unsettled, in that arbitrators had not yet resolved the conflict between the imperatives of an arbitral system of dispute resolution and the principle of contractual freedom in the negotiation of collective agreements. Resolution of this important issue was postponed for six years, until the statutory amendment of 1975.

In any discussion of judicial review of arbitration awards, the function and role of arbitration must be emphasized. Arbitration is the means sanctioned by the legislature to resolve disputes arising under the collective agreement. The resolution of such disputes on the merits serves to increase employee acceptance of a collective bargaining regime in which the right to strike during the term of the collective agreement has been denied. Conversely, the denial of grievances on technical points or inappropriate doctrines reduces such acceptance and increases frustration. Thus, the problem posed by judicial review is not simply confined to the development of arbitral jurisprudence in one direction or another. Rather, the extent to which judicial review inhibits arbitration from fulfilling its function represents the magnitude of the threat to the system of collective bargaining.

