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Arbitration under the Canada Labour Code: A Neglected Policy and an Incomplete Legislative Framework

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1. *Introduction*

Arbitration under the Canada Labour Code¹ is an elusive subject. There is not independent text on law in the federal jurisdiction, where grievance arbitration is a neglected policy operating within an incomplete legislative framework.

The lack of prominence of a federal body of arbitral law and practice is readily exemplified by the fact that the federal law influence is frequently ignored or overlooked. A pertinent example is a 1976 case involving British Columbia Telephone Company and the Federation of Telephone Workers of British Columbia in which an arbitration board of three prominent members of the bar proceeded pursuant to the Labour Code of British Columbia.² Such oversights are not confined to British Columbia. In Ontario arbitrators have applied provincial legislation to arbitrations involving Air Canada³ and C. N. Telecommunications.⁴

These examples do not discredit the arbitrators or point to the illogical constitutional division of authority in labour relations so much as they reflect the shadowy presence of federal legislation and the lack of editorial recognition of its existence. Editors of arbitral and judicial case reports do not recognize the eleventh labour relations jurisdiction. Cases are indexed and identified by province of origin and, unless each case and the parties are painstakingly

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1. R.S.C. 1970, c. L-1

2. *Re British Columbia Telephone Co. Ltd.* (1976), 12 L.A.C. (2d) 117 (Larson). See also *Re British Columbia Telephone Co. Ltd.* (1977), 15 L.A.C. (2d) 426 (Larson) where the same arbitration chairman sitting alone refers to the federal statute.

3. *Re Air Canada* (1978), 18 L.A.C. (2d) 187 (Kennedy)

4. *Re C.N. Telecommunications* (1976), 11 L.A.C. (2d) 152 (Rayner) in the dissenting opinion of Pethick at 157

reviewed the federal jurisdiction decisions are unidentifiable. Similarly, authors of textbooks, including Brown and Beatty whose text is keyed into the *Labour Arbitration Cases*, fail to recognize a separate body of federal arbitral law.⁵

This is not because none exists. It does and it presents some of its own problems.⁶ These problems stem from the provisions of the Code, the differing routes to and the attitude on judicial review in various provinces, the existence of the Federal Court, the linguistic and geographic factors operating in the federal sphere and the lack of focus for marshalling a consensus on issues in the federal sphere.

Other problems generally experienced in arbitration are shared in the federal sphere. The role of arbitrators, the sources of arbitral reasoning, the role of the courts and labour board, the future of grievance arbitration, and the protection of individual rights are problems or concerns common to all eleven jurisdictions, but some of these have their own dimensions in the federal sphere, as they have under each provincial legislation.

In this paper it is submitted that this confusion merely camouflages a more serious underlying problem: namely, the legislative framework of grievance arbitration in the Canada Labour Code and its legal environment do not adequately serve the policy goals assigned to compulsory grievance arbitration. For grievance arbitration to be an effective dispute resolution substitute for work stoppages it must function in a legal environment that enhances that purpose by clearly expressing its goal and vesting arbitrators with authority to reach that goal. The effectiveness of the public purpose, fostering industrial peace, and the efficiency of the arbitration process must not be left to the relative bargaining powers of parties or the strictures of arbitration rules developed for other settings.

This paper seeks to illustrate the failings of the federal legislation

5. Brown & Beatty, *Canadian Labour Arbitration* (1977). It may be that editors of the *Labour Arbitration Cases* chose to cite the location of the hearing rather than the legal jurisdiction because of the difficulty in determining jurisdiction in trucking and other enterprises and that text authors followed this lead. The result, however, was no separate identity for federal cases. Since the first presentation of this paper the practice has changed. In volume 21 of *Labour Arbitration Cases* (Second Series) the editors identify cases decided under federal arbitral law. However researchers must be cautious of editorial error. See *Re Bell Canada and Communication Workers of Canada* (1979), 21 L.A.C. (2d) 154 cited as "Ontario" at 154 and "Ontario" at 154 and "Ont." at iii

6. One example is the question of extra-territorial operation of collective agreements e.g. *Re Canadian Broadcasting Corporation* (1974), 8 L.A.C. (2d) 67 (Stewart).

by discussing (1) the policy background to grievance arbitration, (2) its institutional relationship to the Canada Labour Relations Board and the Courts, (3) the processes of arbitration and (4) the method of enforcement of awards. In each section there is reference to failings in the present legal framework. Before concluding, the impact the newly enacted duty of fair representation may have on arbitration is discussed.

Because the British Columbia legislature has recognized the importance of grievance arbitration more than any other jurisdiction in Canada and has created the most refined statutory framework, that legislation is used as a reference point when discussing inadequacies and reforms in the federal jurisdiction.

II. *The Policy Background*

The policy of compulsory grievance arbitration as a substitute for work stoppages, accepted in all Canadian jurisdictions except Saskatchewan,⁷ was first given expression by the federal government. In 1940, the Government issued a declaration of principles "for the avoidance of labour unrest and for the regulation of labour conditions during the War." Among these was the principle "That every collective agreement should provide machinery for the settlement of disputes arising out of the agreement, and for its renewal or revision, and that both parties should scrupulously observe the terms and conditions of any agreement into which they have entered."⁸ This principle received expression in P.C. 1003 and persists today as section 155(1) of the Code:

155. (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged violation.

Until 1973 federal legislation was skeletal in its treatment of grievance arbitration: a collective agreement must contain a provision for final settlement; in its absence the Canada Labour Relations Board could provide one; no party could lawfully strike during the term of a collective agreement; and a right was reserved to

7. The Trade Union Act, 1972, S.S. 1972 c. 137

8. P. C. 2685

an employee to present individual grievances to his employer at any time.⁹

In 1973 these provisions were fleshed out with questions of judicial review and enforcement of awards, authority of arbitrators and referral of questions to the Canada Labour Relations Board being addressed.¹⁰ There was an expansion and refinement of these provisions in 1978,¹¹ but their basic nature is unaltered.

Grievance arbitration is viewed as an essentially private process with little legislative direction on the mandate of the arbitrator or his remedial authority. The legislation begins with the principle that compulsory arbitration is the substitute for midcontract work stoppages because this is in furtherance of the public policy objective of industrial peace, but then it stops short. At this point the principle of voluntarism takes over and the legislator steps out of the picture with the guiding force becoming judicially developed principles of the arbitrator's jurisdiction and his role as a reader of the collective agreement.

The Canada Labour Code does not expressly recognize that if grievance arbitration is a substitute for industrial unrest during the life of collective agreements then the arbitrator must be armed with tools and authority to ensure the objective of his role. The Code does not free the arbitrator from the rules of commercial arbitration or the restraining effect of some judicial decisions. To the extent the legal framework of the arbitration process has achieved the policy objectives, it has been the result of enlightened judicial reasoning¹²

9. *The Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, ss. 124-126, 128 and 132

10. S.C. 1972, c. 18, ss. 155-159 and 160 (5)

11. S.C. 1977-78, c. 27, ss. 52-57

12. An example of enlightened judicial reasoning is the approach of the Ontario High Court of Justice (Divisional Court) in *Re Communications Union Canada and Bell Canada* (1976), 77 CLLC 14, 108 where the court said:

Nothing can be more calculated to exacerbate relations between employers and employees, than to be told that their differences plainly designed to be finally settled by arbitration as the statute requires, cannot be examined because of a defect in form.

(at 14, 812)

Rather it is the duty of the Board to construe the agreement in the light of its statutory context, namely as an instrument for settling all disputes between the parties or between employees and the employer.

(at 14, 814)

In this case the Court was reviewing conflicting arbitration awards under the same agreement in *Bell Canada* 12 L.A.C. (2d) 177 (Shime) and (1976) 13 L.A.C. (2d)

or creative arbitral reasoning.¹³ An apt example is a recent case of the Supreme Court of Canada that arose in Ontario under provincial legislation, but has application under the federation Code.

In *Bradburn et al v. Wentworth Arms Hotel Limited et al*¹⁴ the issue was the legality of a strike. The answer required interpretation of conflicting clauses in the collective agreement and certain sections of The Ontario Labour Relations Act. A majority of the Board of Arbitration and majorities of the Division Court and Court of Appeal held the strike was illegal. The Supreme Court of Canada unanimously reversed these decisions. The facts were straightforward. The union struck after notice to bargain, conciliation and the statutory period of delay. The catch was the collective agreement contained a clause stating the agreement was to remain “in effect until a new agreement has been negotiated and signed.”

The Supreme Court of Canada held that the statutory grant of authority to arbitrators to decide “any question as to whether a matter is arbitrable” gave the Board authority to decide if it had jurisdiction. It then addressed the question of interpretation. Mr. Justice Estey writing the principal opinion recognized the realities that operate in the selection of collective agreement language:

As is customary in the collective agreements which by axiom find their root in compromise reached usually after active negotiations, the terminology is not that which might be found in a carefully constructed private contract or public statute produced in the quiet of the draftsman’s office.¹⁵

He then discussed the role of the courts, and therefore also of arbitrators, in interpreting agreements. The refreshing aspect of his approach is the paramount and governing place he gives to the overall policy of the collective bargaining legislation:

186 (Dunn). This decision has had an impact on arbitral reasoning. See *Re Canadian Pacific Ltd. (Telecommunications Department)* (1978), 19 L.A.C. (2d) 31 (Beck).

13. See *Re British Columbia Telephone Company* (1978), 19 L.A.C. (2d) 98 (Gall) reviewed in *Re British Columbia Telephone Company and Telecommunications Workers Union* (1978), 93 D.L.R. (3d) 603 (B.C.S.C.) and *Canadian Pacific Limited — Northland Service*, unreported, January 29, 1979 (Larson). See also note 52, *infra*.

14. (1978), 79 CLLC 14,189 reversing (1976), 76 CLLC 14,035 (Ont. C.A.) which affirmed (1975), 75 CLLC 14,268 (Ont. Div. Ct.) which upheld the arbitration decision in *Wentworth Arms Hotel*, unreported, February 25, 1974. The arbitrator followed the decision of the Ontario Labour Relations Board in *Wentworth Arms Hotel Limited*, [1971] OLRB June Rep. 308.

15. *Id.* at 15, 140

A court therefore should not be quick to place a meaning on a term of a collective agreement which would put that clause in conflict with the general philosophy of labour relations as established under the applicable statute. Such should be the case only where the contract by its clearest intent and provisions dictates otherwise. I do not find such to be the case here.¹⁶

The disposition of this proceeding calls into play all the interpretive tools available to a court in construing both a contract and a statute. The conclusions reached by the various majorities below depend of course upon the approach taken in the interpretation of the contract and the statute and their relationship. The minority of the Arbitration Board, T. E. Armstrong for example, concluded:

I do not believe that it was the intention of the Legislature to permit a collective agreement to be fashioned which would perpetually foreclose the right to strike and lockout. Accordingly, I believe that any tenable interpretation of the contract language which will preserve the statutory right to strike in the post-conciliation period, is to be preferred to an interpretation which will negate that right.

Lacourcier, J.A. , in dissenting in the Court below, stated:

In assessing the significance of this Article 13.02 one must not only follow ordinary canons of construction, but do so in the framework of The Labour Relations Act as a whole as well as modern labour law and practice. The conflicting interests must be weighed realistically and fairly, having regard to the social policy behind The Labour Relations Act as progressively administered by the Labour Relations Board and interpreted by the courts.

It is a prevailing assumption in the area of labour conflicts that a union can legally strike, and that a company can resort to lock-out, when conciliation procedures have been exhausted and statutory restraints followed. It is in that context that the article relied upon by the employers must be interpreted. In that respect, I prefer the view stated by T.E. Armstrong, Q.C., in his dissent from the majority award. With these views, I concur with great respect.¹⁷

16. *Id.* at 15, 139-40

17. *Id.* at 15,141-2. An example of a case where an arbitration board ignored the statutory mandate of grievance arbitration is *Office and Professional Employees International Union, Local 342 v Bakery and Confectionery Workers' International Union of America, Local 389*, [1979] 6 W.W.R. 140 (Man. Q.B.). The

Chief Justice Laskin in a concurring opinion focuses on the question of judicial review and finds that the failure to give due regard to the policy of the statute in interpreting the collective agreement involves a mixture of jurisdictional error and error of law. His view is that the construction given the language defied common sense and gave an interpretation which the words could not reasonably bear in a case where statutory considerations were dominant.¹⁸

The thrust of this decision is that it implicitly recognizes the role of arbitrators set out in section 92(3) of the Labour Code of British Columbia¹⁹ as instruments for applying “principles consistent with the industrial relations policy” of the Act.

(3) An arbitration board shall, in furtherance of the intent and purpose expressed in subsection (2), have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties thereto under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute.

Returning to the federal Code and its policy, the statute lacks the express statement of policy contained in section 92(2) of the British Columbia Code, which reads:

92(2) It is the intent and purpose of this Part that its provisions constitute a method and procedure for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.

The federal Code does not address the fundamental question of dismissal and discipline as the British Columbia Code does in section 93(1).

93(1) Every collective agreement shall contain a provision governing the dismissal or discipline of an employee bound by the agreement and that provision, or another provision, shall require that the employer have a just and reasonable cause for the dismissal or discipline of an employee; but nothing in this section shall prohibit the parties to a collective agreement from including

Board accepted the argument raised by a trade union which was the employer party to the collective agreement that the union party could not grieve any matter!

18. *Id.* at 15, 142ff

19. S.B.C. 1973 (Second Session), c. 122

therein a different provision for employment of certain employees on a probationary basis.

Although, as we will see, it does partially address this question in the unorganized sector.²⁰

Recognizing this fundamental failing of federal legislation to express clearly the purpose of grievance arbitration, let us proceed to examine the expression of the federal government's thirty-nine year policy in the provisions of the Canada Labour Code.

The basic legal framework is familiar. Section 154 makes a collective agreement binding on the bargaining agent, which includes voluntarily recognized bargaining agents²¹, the employer and every employee. Resolution of differences over the "interpretation, application, administration or alleged violation" of the agreement is to be by "arbitration or otherwise" and work stoppages are prohibited during the life of an agreement.²²

Although differences may be resolved by "arbitration or otherwise", arbitration is the preferred method under the Code. In the absence of a mechanism, the Code mandates that differences be submitted to an arbitrator selected by the parties or appointed by the Minister.²³ Where the parties or their nominees fail to appoint an

20. *Infra*, text accompanying Part VI

21. See definition of "bargaining agent in s. 107(1):

107. (1) In this Part, 'bargaining agent' means

(a) a trade union that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and the certification of which has not been revoked, or

(b) any other trade union that has entered into a collective agreement on behalf of the employees in a bargaining unit

(i) the term of which has not expired or

(ii) in respect of which the trade union has, by notice given pursuant to subsection 147(1), required the employer to commence collective bargaining;

22. Section 155(1)

155. (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged violation.

23. Section 155(2)

155. (2) Where any difference arises between parties to a collective agreement and

(a) the collective agreement does not contain a provision for final settlement of the differences as required by subsection (1), or

arbitrator or chairman of a board, the Minister may do so on the request of a party or its nominee.²⁴ Only the employer and bargaining agent are parties to the collective agreement and any difference relating to its interpretation, application, administration or alleged violation.²⁵

III. *Arbitration, the Canada Labour Relations Board and the Courts*

The arbitration process and the arbitrator operate in a legal

(b) the collective agreement contains a provision for final settlement of the difference by an arbitration board and either party fails to name its nominee to the board in accordance with the collective agreement,

the difference shall, notwithstanding any provision of the collective agreement, be submitted by the parties for final settlement

(c) to an arbitrator selected by the parties, or

(d) where the parties are unable to agree on the selection of an arbitrator and either party makes a written request to the Minister to appoint an arbitrator, to an arbitrator appointed by the Minister after such inquiry, if any, as the Minister considers necessary.

24. Section 155(3) and (4)

155. (3) Where a collective agreement provides for final settlement, without stoppage of work, of differences described in subsection (1) by an arbitrator or arbitration board and the parties or their nominees are unable to agree on the selection of an arbitrator or a chairman of the arbitration board, as the case may be, either party or its nominee may, notwithstanding anything in the collective agreement, make a written request to the Minister to appoint an arbitrator or a chairman of the arbitration board, as the case may be, and upon receipt of such inquiry, if any, as he considers necessary, appoint the arbitrator or chairman of the arbitration board, as the case may be.

(4) Any person appointed or selected pursuant to subsection (2) or (3) as an arbitrator or arbitration board chairman shall be deemed, for all purposes of this Part, to have been appointed pursuant to the collective agreement between the parties.

25. See the definition of "party" in s. 107(1):

107. (1) In this Part,

"parties" means

(a) in relation to the entering into, renewing or revising of a collective agreement and in relation to a dispute, the employer and the bargaining agent that acts on behalf of his employees,

(b) in relation to a difference relating to the interpretation, application, administration or alleged violation of a collective agreement, the employer and the bargaining agent, and

(c) in relation to a complaint to the Board under this Part, the complainant and any person or organization against whom or which the complaint is made;

environment where there are points of contact with labour relations boards and the Courts. The modern effort has been to make those points of contact as friction free as possible. In the federal sphere the task is compounded by the presence of the Federal Court of Canada as well as the superior courts of the provinces and the territories. The present state is that the situation has received only cursory legislative attention.

In this part, procedural and substantive points of contact between arbitrators and the Canada Labour Relations Board will be examined. These will then be placed in the third dimension of judicial review to show the multiplicity of concurrent and competing proceedings that can result. Then the simple process of judicial review of arbitration awards will be examined in its unique setting of eleven legal jurisdictions where problems arbitration seeks to resolve and the authority of the arbitrator are geographically more far reaching than that of the reviewing court.

An arbitrator or arbitration board has the authority set out in section 157 of the Code, which is to determine procedure, subject to being required to “give full opportunities to the parties to the proceedings to present evidence and make submissions”.²⁶ This qualification is relevant to the question of judicial review, and places review on questions of procedure in the courts, in contrast to British Columbia, where, for sound labour relations reasons, it is before the Labour Relations Board.²⁷

In the course of proceeding the arbitrator may utilize the powers

26. Section 157(a).

157. An arbitrator or arbitration board

(a) shall determine his or its own procedure, but shall give full opportunity to the parties to the proceeding to present evidence and make submissions to him or it;

On the question of whether an arbitrator can exclude the public see *Re Air Canada* (1977), 14 L.A.C. (2d) 309 (Brown).

27. See *Simon Fraser University*, [1976] 2 Can. LRBR 54 (BCLRB); *Board of School Trustees of School District No. 68 (Nanaimo)*, [1977] 1 Can LRBR 39 (BCLRB); and *Gearmatic Co., a Division of Paccar of Canada Limited*, [1978] 1 Can. LRBR 502 (BCLRB) at 515. Based on labour relations considerations and the expertise of tribunals review is divided between the Courts and the labour relations board. Sections 108 and 109 of the British Columbia Code, *supra*, note 19 read:

108. (1) On the application of a party affected by the decision or award of an arbitration board, the board may set aside an award of the arbitration board, or remit the matters referred back to the arbitration board, or stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board on the ground

of the Canada Labour Relations Board under section 188(a), (b) and (c) of the Code. These paragraphs state as follows:

118. The Board has, in relation to any proceedings before it, power

(a)

to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Board deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;

(b)

to administer oaths and affirmations;

(c)

to receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion the Board sees fit, whether admissible in a court of law or not;

This is the first point of contact between the Board and the arbitration process. These powers are frequently exercised by the Board and regularized to some extent in the Board's regulations. Their extent and content are matters of much concern to the Board, which is the primary institution exercising them, but because they are also exercised by arbitrators they are open to interpretation by

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- (a) that a party to the arbitration has been or is likely to be denied a fair hearing, or
 - (b) that the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act, or any other Act dealing with labour relations.

(2) An application to the board under subsection (1) must be made in accordance with the regulations.

109. (1) On the application of a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award of the arbitration board where the basis of the decision or award is a matter or issue of the general law not included in section 108(1).

(2) The rules governing appeals to the Court of Appeal from a decision of the Supreme Court Apply to proceedings under subsection (1).

(3) Except as provided in this Part, the decision or award of an arbitration board under this Act is final and conclusive and is not open to question or review in any court on any grounds whatsoever, and no proceedings by or before an arbitration board shall be restrained by injunction, prohibition, or any other process or proceeding in any court or be removable by certiorari or otherwise into any court.

them. In one case, a sole arbitrator unequivocally interpreted his authority under section 118(a) as not including power to produce documents prior to a hearing. In so doing he was purporting to interpret the power of the Canada Labour Relations Board.²⁸ Although prehearing procedures may be neither the norm nor desirable in arbitration proceedings, they are in the Board's proceedings and the Board's view of the scope of the section may differ from that of the arbitrator. That is neither here nor there for the purpose of this discussion. What is of note is that an arbitrator's procedural powers were not designed with arbitration in mind and they are very basic. Unlike their counterparts under British Columbia legislation,²⁹ arbitrators in the federal jurisdiction are not expressly given the power to enter premises and view work procedures, an important power in some cases, or the power to abridge or enlarge time limits, or the power to delegate tasks to persons acting for the arbitrator.

Another important feature of this dual grant of authority in the same section of the Code will be seen when the forums for judicial review of arbitral and Board decisions are examined.³⁰

The enforcement of sanctions for failure to comply with section 118(a) before arbitrators is another point of contact between the Board and arbitrators. Every person who fails to comply with section 118(a) "is guilty of an offence and liable on summary conviction to a fine not exceeding four hundred dollars".³¹ Consent

28. *Re Canadian Broadcasting Corporation* (1978), 18 L.A.C. (2d) 357 (Adams), at 361-2

29. Labour Code of British Columbia, *supra*, note 19, ss. 101(b) and (c). See also Saskatchewan Trade Union Act, *supra*, fn. 7, s. 25 (2) (d) and (e) and Ontario Labour Relations Act, R.S.O. 1970, c. 232, s. 37 (7) (d) and (e).

30. One case where the superior court of a province addresses Canada Labour Relations Board authority under s. 118 while reviewing an arbitral award is *Re British Columbia Telephone Company and Telecommunications Workers Union*, *supra*, note 13.

31. Section 192

192 Every person who

(a) being required to attend to give evidence pursuant to paragraph 118(a), fails, without valid excuse, to attend accordingly,

(b) being commanded to produce, pursuant, to paragraph 118 (a), any document, book or paper in his possession or under his control, pursuant to paragraph 118 (a), fails to produce the document, book or paper.

(c) refuses to be sworn or to affirm, as the case may be, after being required to do so pursuant to paragraph 118(a), or

to prosecute must be obtained from the Board.³² Under sections 184(3)(a) (iii) to (vi) and (e) and 185(i) recourse for discrimination by unions or employers against a person because he participated in arbitration proceedings is before the Canada Labour Relations Board.³³

Under the Canada Labour Code arbitrators do have the power to

(d) refuses to answer any proper question put to him, pursuant to paragraph 118(a), by the Board, a conciliation Board, a conciliation officer, an arbitrator or an arbitration board,

is guilty of an offence and liable on summary conviction to a fine not exceeding four hundred dollars.

32. Section 194

194. Except with the consent in writing of the Board, no prosecution shall be instituted in respect of an offence under this Part.

33. Section 184

184 (3) No employer and no person acting on behalf of an employer shall (a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person . . .

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that he may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part. . . .

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that he may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part; . . .

Section 185

185. No trade union and no person acting on behalf of a trade union shall

(i) discriminate against a person in regard to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a pecuniary or other penalty on a person because he

(i) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(ii) has made or is about to make a disclosure that he may be required to make in a proceeding under this Part, or

(iii) has made an application or filed a complaint under this Part.

determine whether any question is arbitrable.³⁴ Issues of arbitrability can be as elusive as questions of jurisdiction. They include such fundamental issues as the existence of a collective agreement and the identification of the parties and the employees bound by the agreement. It is at this point that the contact between arbitrators, the Board and the courts begins to overlap.

The Board is granted the authority under section 118(p) "to decide for all purposes" of Part V of the Code "any question that may arise" in any proceeding before it whether

- (i) a person is an employer or employee,
- (ii) a person performs management functions or is employed in a confidential capacity in matters relating to industrial relations, . . .
- (vi) a collective agreement has been entered into,
- (vii) any person or organization is a party to or bound by a collective agreement, and
- (viii) a collective agreement is in operation.

That jurisdiction is not exclusive for all the purposes of Part V as it is in the B.C. Board under the provincial Code.³⁵ But arbitrators, the Minister or any alleged party may refer these questions to the Board and once referred, the arbitrator or the Board may suspend the arbitral proceedings. Section 158 of the Code states:

158 (1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for hearing and determination.

(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless he or it decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.³⁶

34. Section 157(c)

157. An arbitrator or arbitration board

(c) has power to determine any question as to whether a matter referred to him or it is arbitrable;

35. Labour Code of British Columbia, *Supra*, note 19, ss. 33 and 34

36. Since 1973 the Board has received only 19 references under this section. Two

The Board has taken the view that it is the primary forum for resolving these questions and a reference may be made to it after the conclusion of the arbitral proceedings. In this respect the Board would be sitting in appeal from the arbitration decision on these questions, which is similar in some respects to the B.C. Board's jurisdiction.³⁷ This avenue would have provided access to the Labour Relations Board for the problem in the *Wentworth Arms Hotel Limited* case and the Board, with primary jurisdiction in matters of illegal work stoppages,³⁸ would have had an opportunity to act with the policy of the legislation in the foreground as the Supreme Court did.

But the revealing aspect of this overlap of Board and arbitral jurisdiction is the incomplete expression of thought it contains. Why allow access to the Board at all when it is not granted the exclusive authority to decide these fundamental questions of a bargaining relationship? Is this evidence of a lack of faith in arbitrators or the Board? If the intention is to have these questions initially or ultimately decided by the Board, why permit judicial review in the superior courts of the provinces or territories which infrequently deal with matters arising under the Code? And why permit the same questions to come before superior courts of the provinces or territories on review of arbitration, before the Board under section 158 and ultimately before the Federal Court of Appeal on review of Board decisions? Why, when Board decisions are subject to limited review before the Federal Court of Appeal,³⁹ allow those same

reported arbitral decisions in which a reference was made are *Re L. R. McDonald and Sons Ltd.* (1974), 6 L.A.C. (2d) 22 (Brown) and *Re Charterways Transportation Ltd.* (1977), 14 L.A.C. (2d) 237 (Betcherman). In *Re Charterways Co. Ltd.* (1973), 4 L.A.C. (2d) 391 (Weatherill) the question of an individual's employee status was determined without any mention of section 158 or the Canada Labour Relations Board's role.

37. See *Glenda Newhook and Radio CJYQ 930 Limited*, [1979] 1 Can LRBR 233; and *Eastern Provincial Airways (1963) Limited*, [1978] 2 Can LRBR 572, and *CJMS Radio Montréal (Québec) Ltée* unreported Board decision no. 183 and *supra*, note 27 for the B.C. legislation on review of arbitral awards.

38. Sections 182-183.1 See also *McKinlay Transport Limited v. Goodman et al* (1978), 78 CLLC 14,161 (Fed. Ct. T. D.). That the Board's jurisdiction is not perceived as exclusive is evident by the lack of reference to work stoppages in s. 118 (p), by The Supreme Court of Canada's decision in *International Longshoremen's Association, Local 273 et al v. Maritime Employers' Association et al* (1978), 78 CLLC 14,171 and by the approach of arbitrators e.g. *Re Atomic Energy of Canada Ltd.* (1978), 18 L.A.C. (2d) 302 (Weatherill).

39. Section 122.

122. (1) Subject to this Part, every order or decision of the Board is final and

decisions, when applied by arbitrators after a reference under section 158, to be the subject of review in the superior courts?

This maze of forums and proceedings, which can result in references to the Board subject to review by the Federal Court of Appeal and concurrent proceedings before arbitrators which in turn are subject to review by the superior courts, all of which may be compounded by motions to stay, does not serve the purpose of grievance arbitration. That this ping pong of legal proceedings, which runs counter to the overall policy objectives, is permitted, evidences incomplete thought on, and commitment to, the importance of arbitration.

Decisions of arbitrators are reviewable by notice of motion, application for a declaration or under provincial or territorial arbitration acts before the superior court of the provinces or

shall not be questioned or reviewed in any court, except in accordance with paragraph 28(1)(a) of the Federal Court Act.

(2) Except as permitted by subsection (1), no order, decision or proceeding of the Board made or carried on under or purporting to be made or carried on under this Part shall be

(a) questioned, reviewed, prohibited or restrained, or

(b) made the subject of any proceedings in or any process of any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise,

on any ground, including the ground that the order, decision or proceeding is beyond the jurisdiction of the Board to make or carry on or that, in the course of any proceeding, the Board for any reason exceeded or lost its jurisdiction.

The extent of the Federal Court of Appeal's jurisdiction under s. 28(1)(a) is unclear. See *Rohm and Haas Canada Limited v. Anti-Dumping Tribunal* (1978), 22 N.R. 175 (Fed. C.A.), note 3 at 179. The Federal Court has no jurisdiction to interrupt Board proceedings under s. 18 of the Federal Court Act. See *C.J.M.S. Radio Mutuel v. Canada Labour Relations Board* (1978), 78 CLLC 14,163 (Fed. Ct. T.D.). For the most recent relevant decision see *McKinlay Transport Limited v. Goodman et al*, *supra*, note 38, *Uranerz Exploration and Mining Limited v. Canada Labour Relations Board et al* (1979) 79 CLLC 14,215 (Fed. C.A.), leave to appeal denied at (1979), 29 N.R. 537; *La Banque Provinciale du Canada v. Conseil canadien des relations du travail et al* (1979), 79 CLLC 14,214 and [1979] 2 F.C. 439 (C.A.); *CKCV (Québec) Limitée v. Conseil canadien des relations du travail et al*, [1979] F.C. 107 (C.A.); *Re National Association of Broadcast Employees and Technicians and Western Ontario Broadcasting Ltd.* (1979), 25 N.R. 471 (Fed. C.A.); *Seaspan International Ltd. v. Canada Labour Relations Board et al*, as yet unreported decision of Fed. C.A., Sept. 25, 1979; *L'Administration de la Voie Maritime du St-Laurent — Transport Canada v. Conseil canadien des relations du travail*, as yet unreported decision of Fed. C.A., Nov. 3, 1979; and *La Banque d'Epargne De La Cité et Du District de Montréal v. Conseil canadien des relations du travail et al*, as yet unreported decision of Fed. C.A., Nov. 19, 1979.

territories, although not by *certiorari* because of the “or otherwise” clause.⁴⁰ The Code expressly says arbitrators are not federal tribunals for purposes of the Federal Court Act.

156. (3) For the purposes of the Federal Court Act, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act.”⁴¹

40. See *Regina v. Arthurs et al ex parte Port Arthur Shipbuilding Company* (1968), 68 CLLC 14,136 (S.C.C.); *Bell Canada v. Office and Professional Employees International Union, Local 131* (1973), 73 CLLC 14,170 (S.C.C.); *General Truck Drivers Union, Local 938 et al and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 v. Bulk Carriers Limited, Egan et al* (1973), 74 CLLC 14,198 (Ont. H. Ct.) in which it is said the proper way to review an arbitration award under the Code is by notice of motion; *Re British Columbia Telephone Co. and Federation of Telephone Workers of British Columbia* (1972), 25 D.L.R. (3d) 310 (B.C.C.A.) where proceedings for review were taken under the Arbitration Act R.S.B.C. 1960, c. 14; *Re General Longshore Workers of the Port of Saint John, N.B., Local 273 I.L.A. and Maritime Employers Association* (1975), 65 D.L.R. (3d) 166 (N.B.S.C. — App. Div.) where review was allowed by procedure under the provincial arbitration act, but its requirement that an oath of office be sworn did not apply; *Re Canadian Broadcasting Corporation and Association of Radio and Television Employees of Canada (CUPE — CLC)* (1972), 26 D.L.R. (3d) 124 (Man. C.A.) where the Court allows judicial review by way of motion. (The Appeal Court reversed the Court of Queen’s Bench decision at (1971), 71 CLLC 14,112 and was affirmed by the Supreme Court of Canada at (1973), 73 CLLC 14,189); *Canadian Airline Employees Association v. Eastern Provincial Airways (1963) Limited* (1977), 42 A.P.R. 358 (Nfld. S.C. — T.D.) where judicial review was allowed-reversed for other reasons at (1979), 20 Nfld. & P.E.I. R. 522 (Nfld. S.C. — C.A.); *Re Transair Ltd. and Canadian Airline Flight Attendants’ Association, Local Union No. 13 et al* (1978), 86 D.L.R. (3d) 85 (Man. Q.B.) when an application for an order of prohibition was entertained but dismissed; and *Nordair Limited v. Trudelle et al* (1976), 77 CLLC 14,092 (Que. S.C.) where review was allowed on a writ of evocation without any reference to the Code. There is some indication that the words “or otherwise” may lose their procedural magic with the mandatory and automatic nature of the recently amended section 155, *supra*, notes 22-24. See *Volvo Canada Ltd. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), Local 720* (1979), 79 CLLC 14,210 (S.C.C.) at 15,246-7 *per* Laskin, C.J.C. and *Douglas Aircraft Company of Canada Ltd. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1967, et al* (1979), 79 CLLC 14,221 (S.C.C.) at 15,312-18 *per* Estey, J.

41. In *Canadian Pacific Ltd. v. United Transportation Union* (1978), 85 D.L.R. (3d) 665 (Fed. C.A.) the Court decided the mandatory arbitration provisions of s. 155 of the Code constitute a special assignment of jurisdiction for the purposes of s. 23 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.) and ousted the Court’s jurisdiction to entertain an action seeking a declaration that certain terms were part of a collective agreement. Section 23 of the Federal Court Act states:

s. 23. The Trial Division has concurrent original jurisdiction as well between subject and subject as otherwise, in all cases in which a claim for relief is

It also contains a standard privative clause.⁴² But that clause has received the same short treatment by the courts as most privative clauses have. Perhaps the best example of judicial attitude to this privative clause intended to foreclose judicial review of arbitral decisions is a Nova Scotia case where the trial judge said the following:

A long line of cases establishes that privative clauses are not to be interpreted literally. Courts have ever been sensitive to any attempt to limit their inherent supervisory jurisdiction over inferior tribunals. Precedent has established guidelines within which the actions of such tribunals are still open to review despite the wording of the so-called privative clauses.⁴³

If you conclude that this "legislative scheme" casts shadows on the finality of arbitral decisions, then you are correct. It becomes more complex when you consider that judicial attitudes, procedures for review and standards of review can and do differ among the provinces and territories. The result is that there is no coherent standard in the federal sector. This might be thought acceptable because each arbitration, being essentially a private process, has a localized character, but this is not the case in the federal sector. In one recent C.B.C. arbitration case, counsel from Winnipeg and Montreal argued before an arbitrator in Toronto on a dispute over who would read the national news.⁴⁴ In another case involving C.N.R. the Ontario Court of Appeal was addressing an issue that

made or a remedy is sought under an Act of the Parliament of Canada or otherwise in relation to any matter coming within any following class of subjects, namely bills of exchange and promisory notes where the Crown is a party to the proceedings, aeronautics, and works and undertakings connecting a province with any other province or extending beyond the limits of a province, except to the extent that jurisdiction has been otherwise specially assigned.

42. Section 156(1) and (2).

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

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

43. *Re Maritime Employers' Association and International Longshoremen's Association, Local 269, Port of Halifax* (1975), 35 A.P.R. 486 (N.S.S.C. — Trial Div.) at 490.

44. *Canadian Broadcasting Corporation*, unreported, February 7, 1979 (Adams)

resulted from a difference over rights of employees in Alberta and the Yukon.⁴⁵ One wonders how the Alberta and Yukon employees felt about their interests being finally resolved by Ontario courts.

IV. *The Arbitration Process*

Decisions of arbitration boards are those of the majority or the chairman if the majority cannot agree⁴⁶ and costs and fees of arbitration are to be borne equally by the parties.⁴⁷ These are common Canadian provisions. A unique provision in the Code is that final decisions of arbitrators must be made within sixty days after their appointment, unless the parties otherwise agree or the collective agreement otherwise provides or it is not practicable due to circumstances beyond the arbitrator's control.⁴⁸ The fact that a

45. *Re Canadian National Railway Co. and Canadian Telecommunications Union Division No. 43 of the United Telegraph Workers et al* (1975), 63 D.L.R. (3d) 385; (1975), 10 O.R. 2d 389 (Ont. C.A.) reversing a decision quashing an arbitration award.

46. Section 157.1

157.1 Where a difference described in subsection 155(1) is submitted to an arbitration board, the decision of a majority of those comprising the board is the decision of the board, but if a majority of those comprising the board cannot agree on a decision, the decision of the chairman of the board is the decision of the board.

See also *Re Canadian Press Broadcast News Ltd.* (1977), 17 L.A.C. (2d) 7 (Kennedy).

47. Section 157.2

157.2 Where a difference described in subsection 155(1) is submitted by the parties to an arbitrator or arbitration board, the costs, fees and expenses with respect to the arbitration proceedings shall, unless the collective agreement otherwise provides or the parties otherwise agree, be borne as follows:

(a) each party shall bear its own costs and shall pay the fees and expenses of any member of the arbitration board who is nominated by it; and

(b) the fees and expenses of an arbitrator or chairman of an arbitration board, whether the arbitrator or chairman is selected by the parties or their nominees or appointed by the Minister under this Part, shall be borne equally by the parties.

48. Section 157.3

157.3 (1) Every order or decision of an arbitrator or arbitration board shall be made or given within sixty days after

(a) in the case of an arbitrator, his appointment as arbitrator, and

(b) in the case of an arbitration board, the appointment of the chairman thereof,

unless the collective agreement otherwise provides or the parties otherwise agree or unless, owing to circumstances beyond the control of the arbitrator or

breach of the time period does not affect the arbitrator's jurisdiction or the validity of any decision or order reflects the merely moral suasive intent. There is no statistical base to determine if this provision has alleviated any problems of delay and the only sanction appears to be the influence delays may have on the selection of arbitrators for ministerial appointment.

All arbitration awards and orders must be filed with the Minister within fifteen days after they are made.⁴⁹ Through a new arbitration branch of the Ministry of Labour all decisions are summarized in both languages in the Federal Arbitration Award Digest which is available free of charge.⁵⁰

The remedial authority of arbitrators under the Code is a neglected issue.⁵¹ Arbitrators have authority to substitute penalties

arbitration board, it is not practicable to make or give the order of decision within those sixty days.

(2) For the purpose of subsection (1), any day that is included in a period for which the arbitration proceedings are suspended pursuant to subsection 158(2) shall not be counted as one of the sixty days referred to in that subsection.

(3) The failure of an arbitrator or arbitration board to make or give any order or decision within the sixty days referred to in subsection (1) does not affect the jurisdiction of the arbitrator or arbitration board to continue with and complete the arbitration proceedings and any order or decision made or given by the arbitrator or arbitration board after the expiration of those sixty days is not for that reason invalid.

A different approach is taken to the problem of delay in Ontario this year in The Labour Relations Amendment Act, 1979, S.O. 1979, c. 32. Delay is a problem addressed at length by Judge Arthur Kelly in his *Report of the Industrial Inquiry Commissioner Concerning Grievance Arbitration Under the Labour Relations Act And The Hospital Labour Disputes Arbitration Act*, (Ontario Ministry of Labour, 1978).

49. Section 156.1 reads:

156.1 A copy of every order or decision of an arbitrator or arbitration board shall be filed by the arbitrator or the chairman of the arbitration board with the Minister and shall be available to the public in circumstances prescribed by the Governor in Council.

Regulation II made under this section states "A copy of every order or decision referred to in section 156.1 of the Act shall be filed within fifteen days after the order or decision has been given or made." Canadian Industrial Relations Regulations, amendment (SOR/78-873).

50. Available upon written request from Arbitration Services, Federal Mediation and Conciliation Services, Labour Canada, Ottawa, Ontario, K1A 0J2. The Digest consists of a one page summary of each award filed. Also available is the Arbitration Services Reporter which is a monthly issue listing all awards filed the previous month and states the names of the parties, the names of the arbitrators, a "brief" statement of the issue in dispute and result and a reference number to be used if the full award is later requested.

51. The law on an arbitrator's remedial authority is clear. In *Port Arthur*

for discharge or discipline “for cause” where “the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration”.⁵² This provision does not go as far as some provincial legislation but it at least addresses the question. Section 203 of the Code says that “No proceeding under this Part is invalid by reason only of a defect in form or a technical irregularity”. There is scant reference to this section in arbitral awards and little exercise of authority under it to avoid overly technical proceedings in arbitration.

The Code contains only one other provision on arbitral authority. Access to arbitration is preserved beyond the termination of an agreement until the prerequisites to a lawful work stoppage have been met and an arbitrator may hear matters related to a difference arising during this period.⁵³

Shipbuilding Company v. Arthurs, [1969] S.C.R. 85 the Court said an arbitrator’s powers must be determined from the provisions of the collective agreement. This was affirmed in the Supreme Court of Canada’s decision in *General Truck Drivers, Union Local 938 et al v. Hoar Transport Co. Ltd.*, [1969] S.C.R. 634. In *Re Polymer Corporation et al*, [1962] S.C.R. 338 the Court upheld an arbitral award of damages based on a jurisdiction implied from the terms of the collective agreement. The principle is that the authority derives from the agreement not the statute. This was reaffirmed in *Canadian Broadcasting Corporation, supra*, note 40, where the Board ordered a remedy fashioned to redress the wrong. The Court found “the Board had no power to order any remedy which was not contemplated, either expressly or impliedly, by the agreement itself” (p. 170). This approach prevails under the federal Code where arbitrators do not have the role assigned arbitrators under s. 98 of the B.C. Code, *infra*, note 60.

52. Section 157 (d).

157. An arbitrator or arbitration board

(d) where

(i) he or it determines that an employee has been discharged or disciplined by an employer for cause, and

(ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration,

has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

See also *Re Air Canada* (1978), 18 L.A.C. (2d) 400 (Swan) and *Re British Columbia Telephone Company and Telecommunication Workers Union* (1978), 93 D.L.R. (3d) 603 (B.C.S.C.).

53. Section 160(4) and (5).

160. (4) Notwithstanding anything contained in a collective agreement, the provision required to be contained therein by subsection 155(1) shall remain in force after the termination of the collective agreement and until the requirements of paragraphs 180(1) (a) to (d) have been met.

What is missing in the legislative provisions on the arbitral process is any clear message to arbitrators to act in a manner different from that dictated by a technical reading of the collective agreement. A case involving *Eldorado Nuclear Limited* illustrates this point. The employer disciplined five employees for alleged irregularities in the return of drill bits. The union grieved and written replies and meetings were held. The union then named its nominee and the employer named its. They were unable to agree upon a chairman and one was appointed by the Minister of Labour. At the hearing the employer argued the matter was not arbitrable because the union's written grievance at stage two did not set out the section or sections of the agreement alleged to have been violated and it was not signed by the grievors. The Board reserved on the question and heard the merits. A majority then found the employer had not established proper cause for discipline, but upheld the employer's objection on arbitrability and dismissed the grievance. The Saskatchewan Court of Queen's Bench upset the award finding the employer having "suffered no prejudice" and "was fully aware or should have been fully aware of the position of the applicant by the time the matter reached the arbitration stage".⁵⁴ The Saskatchewan Court of Appeal reversed this decision relying on the privative clause of the Code and recognizing the unfettered jurisdiction of the Board to decide questions of arbitrability.⁵⁵

The judicial decisions need not be commented on. But how can it be on these facts that the aims of the social response designed to alleviate industrial unrest were served to anyone's benefit when

(5) Where a difference arises between the parties to a collective agreement relating to a provision contained in the collective agreement during the period from the date of its termination to the date the requirements of paragraphs 180(1)(a) to (d) have been met,

(a) an arbitrator or arbitration board may hear and determine the difference; and

(b) sections 155 to 159 apply to the hearing and determination.

See also *Greyhound Lines of Canada Ltd., et al v. Gerard C. Hawco et al* (1979), 79 CLLC 14,193 (Alta. S.C.T.D.); and *Re Bell Canada Ltd.* (1978), 17 L.A.C. (2d) 119 (Picher). In the latter case there is a good discussion on section 180(1) (a) to (d) and the interaction of s. 148(b) with s. 160(4).

54. *United Steelworkers of America, Local 913 v. Eldorado Nuclear Limited*, Sask. Q.B., action no. 619 at 8; [1975] W. W. D. 128. Contrast the approach of the arbitrator in *Re Canadian Pacific Ltd. (Telecommunications Department)*, *supra*, note 12.

55. *Eldorado Nuclear Limited v. United Steelworkers of America, Local 913* Sask. C.A., July 13, 1976; [1976] W. W. D. 152

discipline without cause stands because of a narrow reading and highly technical application of the role of arbitration by a majority whose chairman is a ministerial selection? Examples such as this illustrate the purpose of grievance arbitration is being forgotten. The legislation is not fulfilling its purpose when it allows that purpose to be forgotten and does not direct those who are technicality-minded to overcome the restraints they see binding upon them.

The Code does not clearly authorize arbitrators to relieve against time limits in collective agreements,⁵⁶ exercise a jurisdiction of legal rectification,⁵⁷ or address the question of conflicts between collective agreements and legislation⁵⁸ or any of the several other issues experience has shown can act as stumbling or complete blocks to effective operation of grievance arbitration. If arbitration is to advance the interests of industrial peace and be perceived as an effective and meaningful process for resolving the many and often complex problems that arise during collective agreement administration, arbitrators must be able to bring to their task the power to find the real issue in dispute and give a final decision that respects the true bargain. They must not be hampered by the manner in which the question is phrased or contract law rules of interpretation or arbitration practice developed for entirely different

56. See *General Truck Drivers, Union Local 938 et al v. Hoar Transport Co. Ltd.*, *supra*, note 51. Its effect under the Code is demonstrated in *Re Dominion Consolidated Truck Lines Ltd. and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 141* (1975), 9 O.R. (2d) 195 (Ont. Div. Ct.). In this case the Court disagreed with the arbitrator's finding that the time limits were directory and not mandatory. See also *MacDonald v. Air Canada* (1973), 74 CLLC 14,205 (Ont. Div. Ct.) and *Re Smith Transport Company Ltd. and Teamsters Union, Local 938* (1978), 20 L.A.C. (2d) (Brunner). There have been legislative responses to this question in some provinces (e.g. s. 37 (5a) of the Ontario Labour Relations Act and s. 98(e) of the British Columbia Labour Code). For the application of acquiescence to relieve against time limits see *Re British Columbia Steamship Company (1975) Ltd.* (1978), 18 L.A.C. (2d) 367 (Ladner).

57. See *Canadian Pacific Limited — Northland Service*, *supra*, note 13 where the arbitrator determined he had jurisdiction under the Canada Labour Code to rectify a collective agreement. A similar result was reached in *The Maritime Employers' Association*, unreported, July 6, 1978 (Green). For a discussion of the general law and B.C. approach see *Vernon Fruit Union*, [1977] 1 Can LRBR 21 (BCLRB). See also *Re Canadian National Railway* (1978), 17 L.A.C. (2d) 142 (Adams). In *Re Charterways Transportation Ltd.* (1976), 12 L.A.C. (2d) 85 (Betcherman) estoppel prevented reliance upon an error in the agreement.

58. This issue may be resolved by the Supreme Court of Canada's decision in *McLeod v. Egan*, [1975] 1 S.C.R. 517, but a statutory provision like s. 98(g) of the British Columbia Labour Code is a more accessible way of informing union leaders, management personnel and arbitrators, *infra*, note 60.

circumstances.⁵⁹ They must, as the B.C. Code says, have “all the authority necessary to provide a final and conclusive settlement of a dispute arising under the provisions of a collective agreement”.⁶⁰ By vesting them with this authority the Canada Labour Code would assist its policy objective by, again borrowing from the B.C. Code, “promoting conditions favourable to the orderly and constructive settlement of disputes”.⁶¹

59. In granting judicial review in *Canadian Airline Employees Association v. Eastern Provincial Airways (1963) Limited*, *supra*, note 40, the Trial Court said: “It is imperative that parties, who submit a question to arbitration, should receive an award which resolves that precise question in accord with the agreement between them” (at 361). Compare the approach in *Lornex Mining Corporation Limited*, [1977] 1 Can LRBR 377 (BCLRB).

60. Labour Code of British Columbia, *supra*, note 19, s. 98 which states:

98. For the purposes set out in section 92, an arbitration board has all the authority necessary to provide a final and conclusive settlement of a dispute arising under the provisions of a collective agreement, and, without limiting the generality of the foregoing, has authority

- (a) to make an order fixing and determining the monetary value of any injury or loss suffered by an employer, trade-union or any other person as a result of a contravention of a collective agreement, and directing an employer, trade-union, or other person to pay to an employer, trade-union or other person all or part of the amount of the monetary value of the injury or loss as fixed and determined by the board.
- (b) to make an order directing an employer to reinstate an employee dismissed under circumstances constituting a contravention of a collective agreement,
- (c) to make an order directing an employer or trade-union to rescind and rectify any disciplinary action taken in respect of an employee that was imposed under circumstances constituting a contravention of a collective agreement,
- (d) to determine that a dismissal or discipline is excessive in all the circumstances of the case and substitute such other measure as appears just and equitable,
- (e) to relieve, on such terms as may be just and reasonable, against any breaches of time limits or other procedural requirements set out in the collective agreement,
- (f) to dismiss or reject an application or grievance, or refuse to settle a difference, where, in the opinion of the arbitration board, there has been unreasonable delay by the person bringing the application or grievance, or requesting the settlement, and the delay has operated to the prejudice or detriment of the other party to the difference, and
- (g) to interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement notwithstanding that its provisions conflict with the terms of the collective agreement.

61. *Id.*, s. 27(1) (c)

V. *Enforcement of Awards*

Once made, an arbitration award is enforceable by filing in the Federal Court of Canada. Section 159 states:

159. (1) Any person or organization affected by an order or decision of an arbitrator or arbitration board may, after fourteen days from the date on which the order or decision is made, or the date provided in it for compliance, whichever is the later date, file in the Federal Court of Canada a copy of the order or decision, exclusive of the reason therefor.

(2) On filing in the Federal Court of Canada under subsection (1), an order or decision of an arbitrator or arbitration board shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order or decision were a judgment obtained in the Court.

The first point to note is that there are different courts for judicial enforcement and judicial review. One is the Federal Court. The other is the superior court of the province or territory. That in itself presents easily foreseeable procedural problems illustrated in one case where the Federal Court registered a decision of an arbitrator but stayed proceeding for enforcement of the decision because judicial review of the decision was pending before a provincial superior court.⁶² A single forum for review and enforcement would be a more positive approach.

But the real procedural problems are in obtaining enforcement in the Federal Court. Prior to recent amendments the Code stated that failure to comply was a condition precedent to registration of the decision for enforcement.⁶³ Non-compliance was a triable issue before the Court.⁶⁴ Non-compliance is of course an issue on

62. *Teamsters Union, Local 106, Robert Duguay and Florian Brunet v. Motorways Quebec Limitée et al*, [1978] 2 F.C. 351 (T.D.)

63. Section 159 before amended read:

159. (1) Where any person or organization has failed to comply with any order or decision of an arbitrator or arbitration board, any person or organization affected by the order or decision may, after fourteen days from the date on which the order or decision is made, or the date provided in it for compliance, whichever is the later date, file in the Federal Court of Canada a copy of the order or decision, exclusive of the reasons therefor.

(2) On filing in the Federal Court of Canada under subsection (1), an order or decision of an arbitrator or arbitration board shall be registered, in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order or decision were a judgment obtained in the Court.

64. *International Brotherhood of Electrical Workers, Local Union, No. 529 v. Central Broadcasting Company Ltd.*, [1977] 2 F.C. 78 (T.D.); *The Public Service*

enforcement and not properly one for the registration stage. This was recognized shortly before the amendments by the Federal Court of Appeal.⁶⁵

Before the Federal Court will enforce an order it must be "precise, unconditional and unambiguous."⁶⁶ The Court requires a high standard in the language of orders, and parties and arbitrators must be cautious and aware of the consequences of the doctrine of *functus officio* intervening to preclude revision of the order.⁶⁷ Enforcement in the Federal Court is by way of sequestration, garnishment, execution and committal because the arbitral order once registered is to be treated as an order of the Court.

VI. *Duty of Fair Representation*

A discussion of arbitration in 1979 is incomplete without reference to the duty of fair representation. The duty in the Code, unlike those in the provinces is stated positively. A union and every representative of the union must "represent, fairly and without discrimination, all employees in the bargaining unit".⁶⁸ Because

Alliance of Canada Local 660 et al v. The Canadian Broadcasting Corporation et al, [1976] 2 F.C. 151 (T.D.); *International Association of Longshoremen, Local 375 v. Association of Maritime Employers* (1974), 52 D.L.R. (3d) 293 (Fed. Ct. — T.D.)

65. *Mario Paradis v. Verreault Navigation Inc. et al*, [1978] 2 F.C. 147 (Fed. C.A.) reversing *Regis Tardif v. Verreault Navigation Inc.*, [1978] 1 F.C. 815 (T.D.); and (1978), 78 CLLC 14,144. These cases deal with orders of the Canada Labour Relations Board and not arbitrations but the reasoning is equally applicable.

66. *International Brotherhood of Electrical workers, Local Union, No. 529 v. Central Broadcasting Company Ltd.*, *supra*, fn. 64 at 100. See also *Regis Tardif v. Verreault Navigation Inc*, *supra* note 65.

67. In reference to orders of the Canada Labour Relations Board the Court in *International Brotherhood of Electrical Workers, Local Union No. 529 v. Central Broadcasting Company Limited*, *supra*, fn. 64 said ". . . orders of the Board must be cast in the precise language as are orders of the judges of this Court and must be so framed as to be capable of enforcement by the normal process of this Court." (p. 82 per Cattanaach, J.). It cannot be expected that the Federal Court of Canada or other courts will take the same approach as the B.C. Board did in *Gearmatic Co.*, *supra*, fn. 27. To avoid loss of jurisdiction arbitrators may say in their award: "Should there be any doubts or differences about the intent, interpretation or application of this award, this Board retains jurisdiction to deal with the matter." This sentence rendered a Board not *functus officio* in *The British Columbia Telephone Company v. Telecommunication Workers Union*, *supra* note 13 (B.C.S.C.)

68. Section 136.1

136.1 Where a trade union is the bargaining agent for a bargaining unit, the trade union and every representative of the trade union shall represent, fairly and without discrimination, all employees in the bargaining unit.

the duty is stated positively and specifically applies to union representatives its content may be broader than that under provincial legislation. The Board has not yet had to address the question.⁶⁹ But these factors are causing some uneasiness in union circles and may add pressure to have matters proceed to arbitration.

The presence of this provision in the Code and the Board's expanded remedial authority raise the question of whether the Board will, in exercising its remedial authority, defer to arbitration or act as an arbitrator itself. There is a general legislative policy preference for Board deferral to arbitration in section 188(2) of the Code.

188 (2) The Board may refuse to hear and determine any complaint made pursuant to section 187 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

But at least in one area there is a competing policy consideration. In section 61.5 of the Code non-unionized employees with one year continuous employment may, upon the exercise of Ministerial discretion, have his dismissal adjudicated if he thinks it was unjust. As stated, there is no requirement in the Code that collective agreements provide for dismissal only for just or reasonable cause. It can be argued that unionized employees should have equal access to final adjudication and the Board should act as the final arbitrator at least on dismissal cases alleging a breach of the duty of fair representation.

At the same time there is evidence that some courts still misunderstand the rights and role of an exclusive bargaining agent. In one case involving an agreement entered into under the federal Code, employees disputed the employer's interpretation of the seniority provisions. Mr. Justice Callon of the Ontario High Court of Justice recognized it as settled law that one of the preconditions to an action on a collective agreement was that it not involve an interpretation of the agreement. However, he said compulsory arbitration proceedings did not oust the Court's jurisdiction and that exhaustion of internal remedies satisfied the precondition to an action. In that case he held that although the union, acting in good

69. For Board decisions on s. 136.1 see *Hasan Ergen*, [1979] 1 Can LRBR 571; *Vincent Maffei* (1979), 79 CLLC 16,202; *George Lochner*, as yet unreported Board decision no. 219; *John J. Huggins*, as yet unreported Board decision no. 224; and *Andrew Startek*, as yet unreported Board decision no. 227.

faith, had the right to refuse to proceed to arbitration it could not "bar the individual thereafter from proceeding to the Court".⁷⁰ He held the Court had jurisdiction to determine the matters raised in the action for an order requiring the employer "to rectify certain employee seniority lists". Leave to appeal was granted by the Divisional Court of Ontario and the decision was reversed.⁷¹ The important point is that the sketchy provisions of the Code on grievance arbitration were not complete enough to emphasize the policy that this was not judicial territory. A more complete and explicit legal framework could have discouraged the action or at least avoided the necessity for the matter to proceed to appeal.

VII. Conclusion

This review of the arbitral framework in the federal jurisdiction demonstrates the lack of a cohesive and comprehensive structure. The problems of delay, cost and employee access to the process are common to those in provincial jurisdictions. The current debate on the role of the labour relations board in arbitration is also relevant in the federal sphere.⁷² Problems associated with the role, sources of reasoning and remedial authority of arbitrators are common. Issues of judicial review and enforcement of awards are compounded by mixed judicial and administrative forums and by the opportunity for forum shopping through selection of the locus of arbitral hearings and decision making. The interpretive problems associated with bilingual collective agreements, which like federal legislation or regulations often say different things in each language or are unintelligible in one, need only be mentioned.⁷³ For the labour relations community, identification and access to awards and judicial decisions under the Code is a serious problem. Resolution

70. *Bergeron et al v. Kingsway Transport Ltd.* (1978), 83 D.L.R. (3d) 574

71. *Bergeron et al v. Kingsway Transport Ltd.* (1978), 87 D.L.R. (3d) 601 and the decision of the Court in *Bergeron et al v. Kingsway Transport Limited*, unreported, February 7, 1979, (Ont. Div. Ct.). See also *Caines v. Cape Breton Development Corporation* (1973), 77 CLLC 14,065 (N.S.S.C.—T.D.).

72. For a statement of the Ontario situation see Donald D. Carter, "Grievance Arbitration — The Present Role Of The Labour Relations Board", Address to Conference On The Grievance Arbitration Process, Toronto, March 1, 1979. For the situation in British Columbia see Address by Donald R. Munroe to Seminar On Current Problems in Labour Arbitration, University of B.C. May 12, 1978.

73. *CKCH Radio Limited v. Canada Labour Relations Board*, [1976] 1 F.C. 3 (C.A.) where the Court found a provision of a collective agreement imposed by the Board under s. 155 of an earlier version of the Code to be "unintelligible". See also *Re Royal Canadian Mint* (1975), 11 L.A.C. (2d) 63 (Abbott).

of these problems is hampered by the absence of any cohesive labour relations community with a specific interest in federal legislation through which or from which pressure for legislative change can come.

This is not to say that the state of the law or effectiveness of arbitration in the eleventh jurisdiction is any less advanced than in the other ten. Parties in the federal jurisdiction have been imaginative in devising grievance and arbitration procedures that suit their needs⁷⁴ and the volume of discontent in the federal jurisdiction is no louder than elsewhere.

The recent amendments to the Code show that the federal government, after decades of neglect of a policy favouring arbitration as an alternative to midcontract work stoppages, has become concerned with refurbishing its legislative housing so that it is respectable among its provincial neighbours. What it has failed to do is recognize fully the important role of arbitration in furthering the basic legislative policy of fostering industrial peace. It calls upon arbitrators to act without a clearly expressed mandate, does not arm them with sufficient authority to achieve the objectives for which their function is designed and subjects their decisions to a maze of review that can baffle even the tailored labour lawyer. The incomplete and imbalanced legislative framework of the federal jurisdiction needs serious review and refurbishing.

The social phenomenon of collective bargaining and its attendant social unrest spawned legislative responses to contain the unrest and substitute orderly, efficient and accessible processes for resolution of differences. To ensure that the process remains effective and respects its policy roots, it must be streamlined so it can react quickly to and be able to reach around narrowing confines placed on it by overly technical and cumbersome procedures and interpretive constraints that frustrate its ability to act as a meaningful substitute for midcontract work stoppages. In so doing it will also lessen the degree of frustration that mounts before exchanges at the bargaining table.

What the federal Code needs above all is a renewed commitment to the important place grievance arbitration plays in the overall legislative policy of promoting industrial peace.⁷⁵ Policy advisors

74. See Federal Mediation and Conciliation Service, Labour Canada, *Industry and Expedited Arbitration: Alternatives to Traditional Methods*, (1977).

75. This was called for by C. Brian Williams, "Observations on Canada's Compulsory Grievance Arbitration System" (1977), 77 Lab. Gaz. 62.

and Parliament have to return to the basics and recognize, as the Supreme Court has, the fundamentally different character of collective agreements in the range of legal documents requiring interpretation. At present the skeletal provisions of the Code offer little assistance to parties and inexperienced labour arbitrators in ascertaining their role and scope of authority. The policy is not fulfilled when it relies upon the ability of parties and arbitrators to use an unindexed jurisprudential roadmap to find the rules that govern the legal perimeters of the process.

The Preamble to Part V of the Code sets out its intent to develop “good industrial relations”, “constructive settlement of disputes” and “constructive collective bargaining practices”. The Preamble is often overlooked by arbitrators as an interpretive reference point for their role and authority. Its grandeur is not reflected in the legislative provisions on grievance arbitration which do not go far enough to fulfill the policy behind them. This can be remedied by having the Code clearly state the purpose of grievance arbitration and the legislative mandate of arbitrators. It should set out the remedial role of arbitrators and eliminate duplicity of forums on questions arising under the Code. It should expressly state the remedial authority of arbitrators and vest them with specific authority to do the task they are called upon to perform. It should unify and clarify the grounds for review and vest what limited review authority is considered advisable in a forum whose primary focus is the administration of federal labour relations legislation and policy. A bargain or policy to submit differences to final decision making by arbitration should not operate with an unwritten exception allowing further review when one party is unhappy with the decision of the arbitrator he participated in selecting. Finally, with arbitral jurisprudence gaining the growing dominance it is in collective agreement negotiation and administration, there should be easy access to a federal body of law that is grounded in the policy and provisions of its legislation. These things can only be achieved by discontinuing neglect of the policy fashioned by the federal government which has such an important place in our collective bargaining system.