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# THE REMEDIAL AUTHORITY OF THE LABOUR ARBITRATOR: REVISED JUDICIAL VERSION

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*Vancouver*

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A crucial problem is surfacing in contemporary labour arbitration in Canada. The crisis is occasioned by the almost exponential growth in judicial review of arbitration decisions in recent years. One finds a recurring theme in many of the cases in which the courts actually quash the decisions of arbitration boards. These cases required the exercise of remedial powers by the boards. Once an arbitrator sees a violation of one of the terms and obligations of the collective agreement he must decide what, if anything, to do about it. In recent years our judges, especially those from Ontario, have tended to have a very different view of this problem than the one which appears to prevail within the arbitration profession itself. Analysis of the opposing positions leads us directly to some of the fundamental and enduring dilemmas of the arbitration process. What is the nature and extent of an arbitrator's authority and what is the proper scope of judicial supervision of its exercise?

## I. *Polymer.*

There are two alternative models of the labour arbitration which are relevant to this issue.<sup>1</sup> Let me sketch each in turn and trace out their implications. On the one view, a collective agreement is a contract. The parties have reached an agreement, each making certain commitments to the other, and then expressed their overall bargain in writing. Disputes about the administration of this agreement are channelled into the arbitration process. The stand-

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<sup>1</sup> Here I draw on two of my earlier writings which have developed the analyses in greater detail and for a much broader range of issues; Weiler, *The Role of the Labour Arbitrator: Alternative Versions* (1969), 19 U. of T. L.J. 16; *Labour Arbitration and Industrial Change* (1970). The reader who is interested in the general literature relevant to this problem area will find references to the important pieces there.

ard arbitration clause in collective agreements enjoins arbitrators to interpret and apply the agreement and prohibits their supplementing, deleting, or amending the agreed-to terms. Within this perspective the arbitrator's function is, quite simply, to be the official *reader* of the agreement to discover what obligations the parties have assumed under it. He must perform that function but that is all he may do.

Not only is this a logically coherent position, but it also has an important practical value. The arbitrator is supposed to respect the integrity of the bargain which unions and management have arrived at. This presumption is an essential corollary of a system of free collective bargaining. Each negotiating party is empowered to act on the basis of its own perception of its essential interests and to pursue them to the extent that its bargaining power makes feasible. The resultant compromise which the two sides arrive at is not to be altered by an arbitrator acting on the basis of his own views of what is just and equitable. Accordingly arbitrators are not entitled to add to or subtract from the benefits secured by one or the other side in the agreement. We are all familiar with the distaste felt by both union and management negotiators for compulsory interest-dispute arbitration of the terms of an agreement. This distrust is aggravated, and justifiably so, when an *ad hoc* grievance arbitrator covertly imposes new terms or limitations of substance, favouring one side or the other, by reference to such vague phrases as "the climate of collective bargaining".<sup>2</sup>

With this model of labour arbitration in mind, we can understand the union argument in *Polymer Corp.*,<sup>3</sup> still the most crucial event in the development of arbitral powers in Canadian labour law. In that case, the union had been found in violation of its obligation not to conduct or permit a strike during the term of the collective agreement. The company in its grievance also sought damages for lost revenues during the duration of the strike but the union challenged the arbitrator's authority to grant them. The agreement contained an explicit prohibition of strikes but was completely silent on the power of an arbitrator to award damages for violation of this term or, indeed, of any other provision of the agreement. Union counsel's argument was quite simple and straightforward. The sole source of an arbitrator's authority is the voluntary acceptance of contractual commitments by both sides, as ex-

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<sup>2</sup> This is the famous phrase of the then Professor Laskin as the arbitrator in *Peterboro Lock Mfg.* (1953), 4 L.A.C. 1499, at p. 1502. I have critically assessed this position in Ch. 1 of the book, cited in footnote 1 above.

<sup>3</sup> (1959), 10 L.A.C. 51 (Laskin). This decision and its background was thoroughly canvassed in Palmer, *The Remedial Authority of Labour Arbitrators*, [1940] *Current Law & Social Problems* 125.

pressed in their agreement. Absent such a mutual intention, there is no power in an arbitrator to add a remedial term to the agreement and then act upon it.

In one of the most powerful opinions in the history of Canadian labour arbitration, Professor Bora Laskin, as he then was, took up the challenge and sketched an alternative model of the arbitrator's function and authority. The key to his approach is his rejection of the absolute, all-embracing reign of the contractual foundation of labour arbitration. It simply is not true that the parties opted for arbitration of grievances as a matter of voluntary choice. Instead, the relevant labour legislation, reflecting a comprehensive collective bargaining policy, directed the parties to use grievance arbitration as a means of securing final and binding settlement of their disputes in the administration of the agreement. This legislative policy was in sharp contrast to the attitude of common law judges<sup>4</sup> who had rejected the enforceability of the collective agreement in the ordinary courts and told the parties to use their weapon of self-help—be it strike or lockout—to secure their rights under the original bargain. The new collective bargaining policy of the statute seeks to prohibit such economic warfare during the term of an agreement. To this end it directed the parties to provide for a peaceful method of securing an authoritative settlement which, in effect, meant grievance arbitration.<sup>5</sup>

Within this framework, the key question is not what the parties intended in adopting an arbitration clause in their agreement. This conception,

. . . ignores the fundamental fact that the mutual acceptance of arbitration by the parties is not a matter of undertaking of obligations toward each other but a remission of their disputes to final and binding adjudication by an external tribunal. The central question is hence not one of construing the limits of rights and obligations *inter se* but rather of determining what is involved in arbitration. This determination must take account of the role that arbitration is designed to play in collective agreement administration.<sup>6</sup>

Accordingly, to determine the scope of an arbitrator's authority,

<sup>4</sup> *Young v. C.N.R.*, [1931] A.C. 83 (P.C.).

<sup>5</sup> In Ontario, s. 37(1) of the Labour Relations Act, R.S.O., 1970, c. 232, as am., reads: "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."

Under the federal statute in question in *Polymer*, as well as certain provincial labour relations statutes, the corresponding portions provide for settlement "by arbitration or otherwise". As a practical matter, this legal distinction is unimportant. The parties are required to adopt some method: the only viable option is grievance arbitration, they adopt this, and use the same procedures and personnel for this purpose.

<sup>6</sup> *Supra*, footnote 3, at p. 58.

we must have recourse to the legislative policy in favour of peaceful adjudication of contract grievances. What is "the full range of the tribunal's adjudicative powers which are *immanent* in such adjudication"?"<sup>7</sup> Professor Laskin's response was forthright:<sup>8</sup>

That the adjudication was intended to be remedial as well as declaratory could hardly be doubted. Expeditious settlement of grievances without undue formality and without excessive cost was no less a key to successful collective bargaining in day to day administration than the successful negotiations in the first place. Favourable settlement where an employee was aggrieved meant not a formal abstract declaration of his rights but affirmative relief to give him his due according to the rights and obligations of the collective agreement. . . . To have proposed to union negotiators that collective agreements, so long ignored in law and left to "lawless" enforcement by strikes and picketing, should continue to be merely empty vehicles for propounding declarations of right when the right to strike was taken away, would be to mock the policy of compulsory collective bargaining legislation. . . .

What was true in the case of aggrieved employees or aggrieved unions could be no less true in the case of aggrieved employers.

To the same effect, he stated:<sup>9</sup>

The pivotal issue is simply whether the exercise of arbitral authority encompasses the effectuation of the right and the enforcement of the obligations which are submitted for both original and final adjudication. One would ordinarily think . . . that if there is any area of adjudication where abstract pronouncements, devoid of direction for redress of violations, would be unwelcome it would be in labour arbitration.

Put this way, the proper response seemed clear to Professor Laskin—and to me as well. But it is important to spell out in explicit detail the reasons why this is so, and the factors which differentiate the arbitral assertion of remedial powers from the kinds of creativity which I termed illegitimate earlier. When union and management sit down to negotiate an agreement, they are almost totally concerned with what I would call the substantive benefits obtained and costs assumed by each. What types of fringe payments will employees receive? What forms of eligibility requirements must they satisfy? What restrictions do employers and employees place on their freedom of action? In these negotiations, the tacit assumption is that, normally, the obligations will be adhered to and the rights secured and what is at issue is how much are they worth and what will they cost. Arbitral intervention to revise this bargain in selected areas is, I believe, improper, and to be excluded by the standard limitations on arbitral power.

Sometimes, of course, this expectation that the terms will be adhered to in the primary activities of the private parties is not

<sup>7</sup> *Ibid.*, at p. 60.

<sup>8</sup> *Ibid.*, at p. 56.

<sup>9</sup> *Ibid.*

fulfilled. Breaches will occur, either because of *bona fide* disagreements about what the agreement requires or a simple refusal to perform the obligations a party has assumed. The statutes require a peaceful method of settling these disputes and the parties insert a grievance procedure culminating in binding arbitration. Neither the statutes nor the collective agreement contains more than a bare-bones description of what is entailed by grievance arbitration. The accidents of a particular bargaining relationship may produce special rules directed at a couple of issues in the process. In my experience it is *never* the case that a comprehensive outline is included, sufficient to allow arbitration to be carried on in simple reliance on the expressed intentions of the parties. Union and management assume that there is such a process, that it has a well-defined shape, and that the arbitrators who are selected will have enough sense to understand and conform to what is "immanent in such adjudication", to the "import conveyed by such an agreed resort to final and binding arbitration". But only arbitrators can make precise the nature of these standards and powers.

I may be just belabouring the obvious, but let me mention some of the recurring questions in the arbitration process about which the vast majority of collective agreements are *invariably* silent. Let us start with the arbitration procedure. Who is to go first in leading evidence, what is the proper allocation of the burden of proof, what is the correct sequence for examining witnesses, when do third parties have a right to intervene, and so on? These are not straw men; such questions have triggered controversy and arbitral opinions in over twenty years in the reports. Next, let us consider the decision-making process. What canons of contract interpretation are to be used, what is the proper role of extrinsic evidence, judicial or arbitral precedent, *res judicata* and so on? These also are matters which are important, often debated, reflected in arbitration decisions, but never dealt with in any detail in collective agreements. The parties have much more pressing matters to resolve in their often tense negotiations. Yet we must realize that the arbitration process will be a "non-starter" without answers to each of these questions.

If they stuck rigidly to the first model of labour arbitration, arbitrators would have to say that we just read the agreement, when we do we find nothing there about who is to go first, we cannot add such a term, in the absence of immediate agreement the arbitration hearing cannot start, and so everyone just has to go home. That may reflect a literal reading of the agreement, but it mocks the provision which an arbitrator can read in the statute, that there is supposed to be final and binding settlement of these issues in arbitration. As a result, arbitrators have had to develop

from the very beginning a common law jurisprudence of the system of arbitration itself. As a consensus has emerged in the course of reported decisions, this becomes the framework within which experienced negotiators write the arbitration clause into their collective bargaining agreements.

The same response is appropriate for the third problem-area, the one which arises when the arbitrator has discovered a breach of the agreement. What is he to do about it? Perhaps it is not absurd on the face of it to respond that he should do nothing. The arbitration has gotten under way, the evidence has been heard, findings of fact have been made, and the relevant portions of the agreement have been interpreted. But surely Professor Laskin was correct in saying that if arbitrators took the self-limiting stance of merely producing abstract declarations of right, this would deprive the process of its significance as a crucial element in labour relations policy, the vehicle for peaceful settlement of disputes under a collective agreement. If one party has refused to give the other the benefit of his bargain under the agreement, will he always, or even usually, meekly offer to make redress after the arbitrator has told him what the agreement means? If he does not, is the aggrieved party to acquiesce in that situation, or will he not likely take measures of self-help, and start down the path of escalating labour unrest?

I suggest, then, that in the remedial area, as well as in matters of procedure or arbitral reasoning, both the statute and the collective agreement require creative arbitral elaboration of what is involved in final and binding arbitration. The simple reason is that there is no alternative source of such standards which are necessary for the fulfilment of the arbitrator's mandate. The "reader" conception of labour arbitration is just not an adequate response to these problems.

There are two further factors justifying the development of a body of arbitral jurisprudence in the remedial area, both of which were mentioned by Professor Laskin. One is that there was a ready source of analogies on which arbitrators could rely in fashioning their standards. The common law courts for a long time had adjudicated disputes arising out of commercial contracts and had developed an extensive body of legal doctrines. Not all of these were readily transferable to the context of arbitration of a collective agreement but most of them were, at least with suitable refinements. The award of damages for harm caused by violations of a contract was a classic example. The point is that neither the parties nor arbitrators were left in the air as to what rules to adopt. There was an established source of legal materials to shape and channel the creative task.

Second, and I believe even more important, is the reciprocity of adjudicative remedies. The power to award damages would be available to aggrieved claimants from either side. Here the grievor was the company but in another case Professor Laskin had awarded damages to an employee.<sup>10</sup> Hence we need not be concerned about the fatal defect in arbitral policy-making with respect to the substantive terms of the agreement. In the latter situation, if an arbitrator implies a new provision to work what he sees as justice for one side, he necessarily tilts the balance in the bargain against the other. To use the jargon of game theory, we have a zero-sum game; what one side wins the other, perforce, must lose. I do not believe this is a serious problem at the remedial level. There arbitrators have a much more neutral and impersonal task, working out the implications of a system of fair and effective adjudication, which will be available to either side when the substantive or primary rules generate disputes.

These are the factors which justified the *Polymer* award in favour of an implied power to award damages. The union took the award to court and was unsuccessful at all three levels.<sup>11</sup> Not one of these opinions really does justice to the problem, and clearly perceives the issue of whether the arbitrator's jurisdiction "to award damages must be found in the language by the parties as an expression of their intention"<sup>12</sup> or whether it is a supplementary power inferred from the legislative policy in favour of final and binding settlement of disputes through arbitration. Both lower courts assume that the proper question is the former, but then find the answer in the latter source:<sup>13</sup>

We are confirmed in our view and in that interpretation of the agreement by a consideration of the *compulsory* atmosphere, if I may put it that way, in which pursuant to statute . . . , the parties are required to bargain in good faith and in concluding a collective agreement to include therein a provision for the final settlement without stoppage of work of all differences between the parties concerning the meaning of the agreement or violations thereof.

Of course, since there was not one iota of evidence in the written agreement that the parties intended such a jurisdiction for the arbitrator, the only source of an affirmative answer had to be the statute. It is unfortunate that the judges did not explicitly accept the legitimacy of the legal platform on which in fact they relied. It is also unfortunate, though perhaps not unexpected, that the

<sup>10</sup> In *Amalgamated Electric* (1950), 2 L.A.C. 597 (Laskin).

<sup>11</sup> The case was reported as *Imbleau v. Laskin et al.* (1961), 26 D.L.R. (2d) 609 (Ont. H.C.); (1961), 28 D.L.R. (2d) 81 (Ont. C.A.); [1962] S.C.R. 338.

<sup>12</sup> Mr. Justice McRuer, in the High Court, at p. 614.

<sup>13</sup> Mr. Justice Aylesworth for the Ontario Court of Appeal, at p. 82, emphasis mine.



Supreme Court of Canada simply agreed with the lower courts without further reasoning.

## II. *Port Arthur Shipbuilding.*

What are the implications of the *Polymer* decision? Read most narrowly, it stands for the proposition that arbitrators can award damages for union breaches of the no-strike clause. Of course, it is impossible to avoid the corollary that arbitrators have the power to award damages against any party for losses occasioned by his breach of any term of the agreement.<sup>14</sup> The thesis of this article, though, is that the case has a much wider significance. The principle or rationale which logically underlies either of these statements of the immediate holding is that a labour arbitrator is more than just a *reader* of the language of the agreement. He must be considered an *adjudicator*, with all of the unforeseeable implications that status may hold. What are the ramifications of *Polymer* for the many other related situations, and how have subsequent arbitrators and judges deferred to its rationale?

Suppose, for example, the company takes a view of the collective agreement which puts it in breach of its obligations. The union lodges a grievance, takes the company to arbitration and secures a favourable interpretation and damage award. The company pays that award but adamantly refuses to alter its course and continues in default notwithstanding the arbitration award. So the union goes back to arbitration and obtains the same ruling and another award for accumulated damages. Can the union also secure a mandatory "order prospectively requiring payment of future arrears"? The virtue of this award would be that the union would be able to obtain its immediate enforcement in courts in cases of future breaches without the added delay and expense of further arbitration on the merits (which is aggravated by the inability of arbitrators to award costs against losing parties). In a carefully reasoned opinion, the arbitrator in *Polax Tailoring*<sup>15</sup> held that this form of *quia timet* order of specific performance was within the

<sup>14</sup> In *Toronto Star Ltd.* (1971), 71 C.L.L.C. 14,092 (Ont. H.C.), Mr. Justice Osler took this one step further by holding that there was an implied power to award damages for breach even of an implied obligation under the agreement. His opinion nicely focused on the rationale of *Polymer* to the effect that the arbitral remedial power "is not a matter of the undertaking of obligations towards each other but a remission of their disputes to final and binding adjudication by an external tribunal". It is unfortunate that he has not considered fully the implications of that rationale in his further involvement in this area; see at footnotes 36 and 50 *infra*.

<sup>15</sup> (1972), 24 L.A.C. 201 (Arthurs). This decision was recently upheld by the Ontario Divisional Court *sub nom. Samuel Cooper v. International Ladies Garment Workers Union* (1973), 35 D.L.R. (3d) 301.

implied powers envisaged by the *Polymer* decision.<sup>16</sup>

Professor Arthurs constructed his argument out of a series of judicial decisions, some in labour relations but others involving ordinary contracts, in which this kind of power was exercised. On the basis of these analogies he felt entitled to make his unusual order, notwithstanding the absence of an explicit jurisdiction to do so under the collective agreement. Strangely, though, arbitrators have consistently assumed that they have an implied power to make another kind of order, one which is unknown to the common law.<sup>17</sup> If an employee is discharged without just cause, and in breach of the agreement, the arbitrator does not simply award damages for lost earnings. He also orders the reinstatement of the employee, notwithstanding that this involves the specific enforcement of a contract of personal service. The legitimacy of this arbitral remedy (which is also available for violation of seniority clauses and so on) is not questioned in judicial review, notwithstanding that courts will not order reinstatement themselves if the employee lodges his claim in court.<sup>18</sup>

The third asserted, arbitral power commonly exercised in discharge cases, one which did run afoul of the courts, was exercised in the case of *Port Arthur Shipbuilding*.<sup>19</sup> Here the arbitration board was faced with three long-service employees who had been discharged for absenting themselves from work for several days to take temporary employment elsewhere. For my purposes, I need not go into the details of the situation. Suffice it to say that the majority of the arbitration board, after considering the circumstances of the offence and the background of the offenders, held that the employees' conduct was not "proper cause" for the serious

<sup>16</sup> In a recent arbitration decision, *Canadian Johns-Manville* (1971), 22 L.A.C. 396 (Weiler), I drew somewhat the same inference about the arbitrator's remedial powers. The employee-grievor had been wrongfully denied his turn to work Saturday overtime at premium rates and asked for damages for the lost wages. If this were the only possible remedy, he would be entitled to it. However, as the company pointed out, this would result in a windfall to the employee. He would receive the pay now after having had the Saturday free; meanwhile the company would have to pay two employees to obtain one day's work. I agreed with the company that there was an alternative, the award of an extra overtime turn on the company roster (in place of the employee who had already worked). If an arbitrator has power to award money damages for a lost work opportunity, then, *a fortiori*, he should have the power to make a compensatory award in kind (assuming this is feasible). Neither power is explicitly conferred by overtime clauses, or any other contractual provisions; they are implications of the arbitrator's implicit authority to fashion appropriate remedies for breaches of the agreement.

<sup>17</sup> See Clawson, Comment (1948), 26 Can. Bar Rev. 998.

<sup>18</sup> Compare, e.g., *Zeller's (Western) Ltd. v. Retail Wholesale & Dept. Store Union* (1972), 31 D.L.R. (3d) 742 (Sask. C.A.) with *Woods v. Miramichi Hospital* (1968), 68 C.L.L.C. 14,104 (N.B.C.A.).

<sup>19</sup> (1966), 17 L.A.C. 109 (Arthurs); (1967) 60 D.L.R. (2d) 214 (Ont. H.C.); (1967), 62 D.L.R. (2d) 342 (Ont. C.A.); [1969] S.C.R. 85.

offence of discharge and ordered the employees reinstated. Because the board felt that the employees were guilty of misconduct worthy of some discipline it substituted suspension of between ten and fifteen weeks for the several employees.

There are two distinct legal propositions implicit in this conclusion, both of which were tested in judicial review of the decision. In interpreting the scope of "proper cause for discharge", was an arbitrator entitled to hold that employee misconduct warranting some discipline was not serious enough to justify the ultimate penalty of discharge (whether because of the nature of the offence, extenuating circumstances in its occurrence, or mitigating circumstances in the records of an employee)? Personally I find it hard to fathom how any argument can be advanced against such a conclusion.<sup>20</sup> Assuming an affirmative answer to this first question, a second, *remedial* issue arises. Is an arbitrator entitled to substitute what he believes to be the proper, lesser discipline or is he required to reinstate the employee outright with full compensation for his lost wages?

In the final analysis, the board's decision was quashed. Perhaps the most charitable interpretation of the opinions reaching that result, including that of the Supreme Court of Canada, is that they disagreed with the arbitrator on the facts of the immediate case (though how this amounted to an error of law is still dubious). Certainly these opinions appear totally to confuse these two logically distinct questions. The assumption seemed to be that because the arbitrator could not exercise the management's power to impose a suspension, he could not find the discharge improper and order reinstatement. The second conclusion simply does not follow from the first.

The only two opinions which appreciated the distinction between these two issues were those of Justices Laskin and Wells of the Ontario Court of Appeal which upheld the arbitration board. Moreover, as both judges realized, the real beneficiary of this implied remedial power would be the employer, not the employee or union. Only Mr. Justice Wells felt compelled to address the question of whether the arbitrator had that power. He started from the rationale of *Polymer*:<sup>21</sup>

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<sup>20</sup> I shall refrain from discussing this issue of the scope of an arbitrator's power to review the substance of management's discharge decisions. My views are set out in detail in my arbitration decision, *S.K.D. Mfg.* (1969), 20 L.A.C. 231 (Weiler) and in my book *Supreme Court of Canada* (1973), Ch. 5. Suffice it to say that in Ontario the decision was neutralized by legislation. In other provinces, the lower courts are limiting its impact: see *King Size Photo Service* (1970), 70 C.L.L.C. 14,042 (Sask. Q.B.); *Coulson Prescott Logging*, [1972] 4 W.W.R. 51 (B.C.C.A.).

<sup>21</sup> *Supra*, footnote 19, at p. 354.

A right to decide what was referred and if unfavourable to the action taken, what consequential relief should follow to the parties, seems to me to be necessary to produce a final and binding settlement.

After agreeing that the arbitrator had the power to look at all of the circumstances of the employees' offence, "and particularly long years of service, apparently without black marks against them", to find that discharge was not justified, he continued:<sup>22</sup>

To have simply restored these men to their employment, however, would have been a gross injustice to the employer. So, within the terms of the collective agreement, the majority of the arbitrators tried to determine what the proper remedy and discipline was. In doing so they were attempting to bring the matter to a final conclusion and to deal with it once and for all. That unquestionably is one of the purposes for which they were appointed and for which they were acting.

What was the possible result of the alternative conclusion of no arbitral power to substitute an appropriate penalty:<sup>23</sup>

Then, proceeding under whatever action the employer chose, it could have continued the dispute indefinitely, there would be one decision in respect of the facts submitted which was final and binding. Such a condition in my opinion is clearly not within the contemplation of the collective agreement and in my opinion the majority of the board had the implied power to do what they did.

Mr. Justice Schroeder, dissenting in the Ontario Court of Appeal, and Mr. Justice Judson, for the unanimous Supreme Court of Canada, disagreed. Their holding that the arbitrator had no such implied remedial power was relatively clear; it was the logic of their further conclusion, reversing the arbitrator's judgment that discharge was improper, which remains obscure, at least to me. Schroeder J.'s general stance about implication of terms was expressed in these words:<sup>24</sup>

These observations, differently expressed, admonish Judges that they have no right to make contracts for the parties; that their province is to interpret contracts and not on any arbitrary principle or by presumption to nullify the clear intention of the parties as expressed in words deliberately chosen by them to govern their employer-employee relationship and set out in a formal contract which is more frequently than not the consummation of protracted and arduous bargaining on both sides.

His conclusion about the arbitrator's asserted remedial power was:<sup>25</sup>

The choice of penalty is thereby committed to management and to it alone. Had the parties intended that a board hearing a grievance submission should be entitled to substitute suspension for dismissal, that

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<sup>22</sup> *Ibid.*, at p. 359.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, at p. 347.

<sup>25</sup> *Ibid.*

intent should have been clearly expressed in appropriate language. In the absence of such a provision there was no authority in the board to pursue that course.

This analysis, which was adopted by Judson J. without any further contribution of note, is not an adequate response to the issue. The clear implication of *Polymer* is that the scope of remedial authority in arbitration is not to be assessed by reference only to the written intention of the parties; equally important is the statutory context of a labour relations policy in favour of final and binding settlement of disputes through arbitration. I do not mean to suggest that the implications of this policy were crystal-clear and that this arbitral power should necessarily have been upheld. There are differences between awarding damages and substituting new penalties. Besides the fact that the courts are more accustomed to the former, there is the further fact that management is given the power to make the original penalty decision. Perhaps this means that arbitrators should not encroach on this prerogative when management has been found to have over-reacted. When one begins to look at the matter realistically under this approach, the arguments of Mr. Justice Wells would have to be dealt with (and I do not think they could be countered). Not only did Mr. Justice Judson fail to respond to the Mr. Justice Well's opinion, he did not even mention *Polymer*, the crucial precedent in the whole area.

The Supreme Court in its opinion concluded with a passage which has had substantial impact:<sup>26</sup>

An arbitration board of this 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 those are usually defined in some detail. It has no inherent power to amend, modify or ignore the collective agreement. But this is exactly what the board did in this case and it was clearly in error in so doing and its award should be quashed.

The absolutist tone of this language is diametrically opposed to the rationale of *Polymer*, a decision of many of the same judges only seven years before. The arbitrator is restricted to reading the language of the agreement; he has no further authority derived from his statutory mandate of adjudication. Yet, if this is so, why can he order reinstatement and award damages in cases of unjustified discharge, where these powers also are not conferred by the collective agreement? The Supreme Court of Canada did not suggest an answer for us. Yet the language of the court might have been—indeed, should have been—of no consequence to Canadian law. The Ontario legislature (under whose jurisdiction the *Port*

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<sup>26</sup> *Ibid.*, at pp. 95-96.

*Arthur Shipbuilding* case had arisen) stepped in shortly afterwards to repair the damage. It explicitly conferred on arbitrators the power to grant whatever remedies they believe "just and equitable",<sup>27</sup> when they find discipline to be unjustified. True this legislation dealt only with the immediate problem of substituting new penalties. But the real point is that the legislature had authoritatively disagreed with the view taken by the Supreme Court about the proper scope of arbitral authority. If a higher court had reversed that judicial decision, later courts would feel obliged to look to the underlying reasons advanced for the conclusion, and follow their implications in analogous cases.<sup>28</sup> Surely a legislature, with its supposed legal predominance, should have the same deference paid to the policies or principles which underlie its statutory prescriptions. Unfortunately, it is exactly the opposite approach which is conventional within our legal order. If a legislature disagrees with a judicial holding and feels constrained to alter the law by statute, this is merely added evidence that the underlying judicial rationale was the true common law approach all along:<sup>29</sup>

Judicial reversals avowedly based upon the social inexpediency of the earlier conclusion stifle its germinating powers but the same sober judgment of a representative assembly merely adds virulence to the poison of judicial unwisdom. Indeed, at times, the process portrays a fantasy more than fit for a new Erewhon.

### III. *The Current Legal Morass.*

#### (a) *Rectification.*

*Port Arthur Shipbuilding* has indeed had a virulent effect on the further elaboration of the remedial law of labour arbitration. As a first example, let us consider this fact-situation. An article in a collective agreement provides for statutory holiday pay and sets up explicit qualifications for employee entitlement to this fringe benefit. In the previous agreement, one such qualification read:

*Article 13.07:* To be eligible for pay for a statutory holiday . . .

- (D) any employee absent due to *illness or accident* must have been at work some time within the three month period previous to the holiday period.

<sup>27</sup> Section 37(8) of the Ontario Labour Relations Act, *supra*, footnote 5. The scope of that discretion was respected by the Ontario Divisional Court even in the fairly extreme case of *Gould Manufacturing of Canada* (1973), 73 C.L.L.C. 14,161.

<sup>28</sup> In fact, that is what Canadian judges have felt constrained to do by the Supreme Court's own decision in *Port Arthur Shipbuilding* reversing the Ontario Court of Appeal.

<sup>29</sup> Landis, *Statutes and the Sources of Law* (1965), 2 Harvard J. of Legis. 7, at pp. 23-24.

In negotiations, the parties agreed to revise the wording of the italicized phrase and the signed memorandum of agreement noted this change (under the heading "Delete and substitute") to *personal sickness or accident*. When the agreement was typed up and signed by the parties, this was the way the section emerged:

*Article 13.07:* To be eligible for pay for a statutory holiday . . .  
(D) personal sickness or accident.

On its face, as the union suggested, this seems to create an unconditional entitlement to holiday pay for any employee suffering from sickness or accident, no matter how long he was absent. But from this history, as well as from surrounding circumstances, it was easy for the board to conclude that the parties had intended no such result at all. As a result of errors in the transcription process, the new italicized phrase had not been substituted for the corresponding language within the older clause; instead it had been typed in as the sum total of the wording of that clause, so as to suggest an entirely different legal result. The question was whether an arbitrator could do anything about the error in transcription when it was discovered some months later.

There was a well-established doctrine of contract law which permitted courts to rectify these mistakes in transcribing firm mutual agreements and this doctrine had been applied in several arbitration decisions. As the then Professor Laskin said:<sup>30</sup> "The Board sees no reason why an equity of reformation or rectification does not arise, as is usual in similar situations in the case of individual contracts of a commercial nature." In the instant case, *Philips Electronic Industries*,<sup>31</sup> the board felt entitled to apply the same equitable doctrine, relying on both judicial and arbitral precedents. To the union argument that the board was overstepping its limited jurisdiction, this was the reply:<sup>32</sup>

It is well for this board to reiterate that what it has done has not been to alter, modify or amend the collective agreement between the parties but simply to rectify an obvious omission so that the agreement reads as it was negotiated and agreed upon by the parties.

Unfortunately, in a recent judicial decision, *Metropolitan Police Association*,<sup>33</sup> the use of this doctrine in arbitration was

<sup>30</sup> In *W. Harris & Co.* (1953) unreported.

<sup>31</sup> (1964), 15 L.A.C. 455 (Reville).

<sup>32</sup> *Ibid.*, at p. 462.

<sup>33</sup> (1972), 72 C.L.L.C. 14,125 (Ont. C.A.). I should disclose immediately that I was the author of the arbitration award which was quashed in that case. The real issue in the case, both at arbitration and upon judicial review, was the correct interpretation of the collective agreement, and I do not intend to comment on the merits of that problem here. The issue of rectification was a subsidiary factor in my award. I followed without discussion a long-established practice of arbitrators using that doctrine, and

abruptly aborted. The Ontario Court of Appeal held that "consensual arbitrators" had no power to rectify a written document in the face of the express limitations in the standard arbitration clause. Quoting *Port Arthur Shipbuilding*, the court said:<sup>34</sup>

If the collective agreement did not represent the true bargain between the parties, the party asserting this to be so could bring an action for rectification but . . . the arbitrator "had no inherent power to amend, modify, or ignore the collective agreement".

No further analysis was considered necessary to support the judgment that the arbitrator owes this absolute fealty to the typed copy of the collective agreement, rather than the original bargain as negotiated and incorporated in the signed memorandum of agreement.

(b) *Estoppel*.

A similar judicial attitude has surfaced regarding the use by arbitrators of another equitable doctrine, that of estoppel. Suppose a union business agent represents to a contractor that the double-time requirement in an overtime clause in a master agreement does not apply to him on certain jobs. As a result the contractor signs the agreement, goes ahead and bids on the jobs without making provision for double-time, and then schedules some overtime work. Now the employees lodge grievances claiming the extra premium pay and, on the face of it, appear to have a persuasive case under the wording of the overtime clause. Can the company rely on the doctrine of equitable estoppel to defeat this claim? Numerous arbitrators have said they can and a British Columbia High Court judge agreed on these facts in *Ben Ginter Construction*.<sup>35</sup> He felt that "application of the doctrine does not involve modification of the agreement", and quotes Lord Denning to the effect that instead it bars the one party from asserting his legal rights in a way which is inconsistent with representations made to the other party, and relied on by the latter to his detriment. The implication of that legal policy seems quite clear in the above situation.

Unfortunately the passage from *Port Arthur Shipbuilding* reared its ugly head again in a recent decision of the Ontario Divisional Court, *Sarnia General Hospital*.<sup>36</sup> Here the arbitrator had

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the court's holding as to that issue was really a reversal of the arbitral practice. Accordingly, I do feel free to include this crucial appellate court decision in my review of the legal area. I should add as well that I was also the arbitrator in the *Union Carbide* and *Hoar Transport* cases, referred to in footnotes 56 and 58 respectively, and again I shall just mention the judicial holdings in these two cases without dwelling on their merits.

<sup>34</sup> *Ibid.*, at p. 519.

<sup>35</sup> (1967), 67 C.L.L.C. 14,032 (B.C.S.C.).

<sup>36</sup> (1973), 73 C.L.L.C. 14,157 (Ont. Div. Ct).



found the language of an agreement unambiguous and refused to look at extrinsic evidence to modify his conclusions. In response to the employer's attempt to have the court require the arbitrator to consider this evidence, on the grounds *inter alia*, of equitable estoppel, here is what the court said:<sup>37</sup>

As to estoppel by conduct, it is rarely if ever that such principles can arise in proceedings such as these being reviewed. A Board such as this one . . . has no "inherent power to amend, modify, or ignore the collective agreement". The Board is there to interpret the collective agreement, not to ignore it or go around it.

Believing, correctly, that this issue was closely analogous to the doctrine of rectification dealt with by *Metropolitan Police Association*, the court instructed arbitrators not to use either device to prevent a party "from maintaining that the agreement meant what its plain words said it meant".

(c) *Illegality*.<sup>38</sup>

Suppose the parties have negotiated a clause which turns out to be illegal under governing legislation. Can the arbitrator deem the provision void and unenforceable, and prevent a party relying on "what its plain words said it meant"? Can the arbitrator go further and affirmatively enforce an alternative obligation imposed by the statute on the parties' relationship? Two Ontario High Court judges have responded negatively to these two questions. In *International Chemical Workers Union v. Krever*,<sup>39</sup> an arbitration board accepted a company's defence to a grievance that adherence to the collective agreement would put it in breach of a federal safety statute. This decision was reversed by a judge who said, *inter alia*:<sup>40</sup>

In my view the Board is strictly limited to interpreting the written contract and this it has not seen fit to do. . . . The matter should be remitted to the Board for determination of the narrow issue between the parties strictly in accordance with the terms of the Agreement.

In the next case, *R.C.A. Victor Ltd.*,<sup>41</sup> it was the union which sought to broaden the arbitrator's jurisdiction to encompass the statute while the company wanted him confined to the contract. The collective agreement provided for limited major medical insurance at the expense of the company. When the province enacted

<sup>37</sup> *Ibid.*, at p. 14,721.

<sup>38</sup> Here I just summarize a more detailed discussion in an earlier comment of mine, *The Arbitrator, the Collective Agreement and the Law*, (1972), 10 Osgoode Hall L.J. 141. The *Etobicoke* case, *infra*, footnote 44, occurred subsequent to this comment and is canvassed more thoroughly here.

<sup>39</sup> (1968), 68 C.L.L.C. 14,086 (Ont. H.C.).

<sup>40</sup> *Ibid.*, at p. 380.

<sup>41</sup> (1971), 71 C.L.L.C. 14,099 (Ont. H.C.).

a comprehensive, compulsory medical insurance plan, O.H.S.I.P., this provision was rendered null and void. Another section of the statute provided for continuance of the employer's obligations to pay premiums for medical insurance and transference of this obligation to premiums for the public scheme. The union lodged a grievance claiming that the company should pay the premiums for O.H.S.I.P.<sup>42</sup> The court held that an arbitrator had no power to uphold such a grievance based on a statute, rather than the agreement. After quoting from *Port Arthur Shipbuilding* he said:<sup>43</sup>

A board of arbitration derives its authority from and is limited by the terms of the collective agreement. Its jurisdiction is solely to determine questions arising with respect to the application, administration, or alleged violation of the collective agreement. The Board was limited in its consideration of the grievance to the question as to whether or not the collective agreement, as opposed to the statute, imposed an obligation on the part of the company to pay all the additional O.H.S.I.P. premiums. . . . The majority award is therefore beyond the jurisdiction of the board by reason of the fact it has based its decision on an interpretation of the statute rather than on the collective agreement.

In a more recent decision of the Ontario courts in this area, *Board of Education of Etobicoke v. C.U.P.E.*,<sup>44</sup> the law was taken, unaccountably, in a somewhat different direction. A collective agreement established a sick pay credit scheme which provided, *inter alia*, that on retirement for age or ill health an employee would receive a cash payment for his unused credit up to a maximum of six months pay. After administering this scheme for several years, the employer discovered a provision in the School Administration Act which apparently made this payment illegal. Section 44(1) of that Act allowed a Board, by resolution, "to establish a system of sick leave credit gratuities for employees . . . provided that on termination of employment an employee is entitled to sick credit for no more than an amount equal to his salary . . . for one-half of the days standing to his credit, and in any event not in excess of the amount of one-half year's earnings". When the school board discontinued the payments required by the agreement, grievances were lodged and went to arbitration.

The majority of the board of arbitration posed the key question raised by the case: "Do statutory provisions which apparently prohibit conduct which is otherwise permissible under the collective agreement override the terms of the collective agreement?"<sup>45</sup> After referring to both *Krever* and *R.C.A. Victor*, quoting the language from the latter excerpted above, the majority concluded that once

<sup>42</sup> Which, I might add, offered broader coverage but at a higher cost; this factor was relevant only to a second issue in the case.

<sup>43</sup> *Supra*, footnote 41, at pp. 424-25.

<sup>44</sup> (1973), 73 C.L.L.C. 14,164 (Ont. Div. Ct.).

<sup>45</sup> (1972), 24 L.A.C. 255, at p. 259.

an arbitrator finds a "clear violation" of the agreement, that "exhausts his jurisdiction", and "enforcement of a statute must be left with those charged with the administration of that statute". The school board was found to be in violation of the agreement, directed to comply with it, and ordered to pay the sick pay cash credit for which its language provided. In a very important decision, but with a thoroughly inadequate opinion, the majority of the Divisional Court quashed this award.

I do not quarrel with the court's conclusion that an arbitration award can be quashed if it is based on a provision of a collective agreement made illegal by the statute. What is unsatisfactory is the number of vital issues which were left dangling, unanswered, on the way to that conclusion. The most obvious such issue was whether the provision in the contract really was illegal. The statute *permitted* a school board to set up a system of sick pay *gratuities* with cash payments on *termination* of employment. Did this *prohibit* the school board negotiating a sick leave credit plan with a union which, as part of the total remuneration of the employees, *obligated* the board to pay a different and larger cash credit on *retirement*? I should think this raised a nice question of statutory interpretation, at the very least, and Mr. Justice Osler in dissent, after a careful analysis of the statute and the problem, concluded that the provision in the agreement was not illegal. Without deigning to address itself to the issue, the majority opinion asserted, without more, that the Act "expressly prohibited what the parties agreed to in article 16(1)(e) of the collective agreement".

But let us assume that the agreement really was illegal and proceed to the issue which is germane to this article. What will the court have the arbitrator do in such a situation? Strangely enough, the opinion does not really tell us, or at least not in terms which are clear to me. We do know for sure that the court will quash an arbitration award which is based on what the judges think is an illegal contract, because that is exactly what they did. But we are never really told that arbitrators themselves should also look at the statutes and refuse to make awards based on provisions in the agreement which they think are illegal.

Mr. Justice Parker does quote from an opinion of Lord Denning, reviewing a commercial arbitrator:<sup>46</sup>

There is not one law for arbitrators and another for the court. There is one law for all. If a contract is illegal, then arbitrators must decline to award upon it, just as the court would do.

That seems clear enough. Unfortunately its adoption would leave the general proposition (if not the narrow holdings) in *Krever* and

<sup>46</sup> *Supra*, footnote 44, at p. 14,757.

*R.C.A. Victor* in a rather shaky state. Yet the Divisional Court found no conflict at all, on the grounds that here there was "an issue of illegality", rather than an arbitral attempt to base its decision "on an interpretation of the statute rather than the collective agreement". This distinction simply will not wash, at least as far as *Krever* is concerned, because, there, the arbitrator did refuse to enforce a provision of the agreement where he thought it would require illegal conduct from the employer, and Mr. Justice Stark reversed for that reason.<sup>47</sup> More important, this supposed distinction was in fact considered by the arbitration board in the *Etobicoke* case. It said that the application of the statute to its situation required the interpretation of some difficult statutory terms, and this task it had no jurisdiction to undertake (because of *Krever* and *R.C.A. Victor*). Hence it would confine itself to the agreement and leave enforcement of the statute to those charged with that function (including especially the courts). In its refusal to disavow the opinions in *Krever* and *R.C.A. Victor*, did the Division Court mean to agree with that view, and simply hold that judges can set aside arbitration awards for illegality?<sup>48</sup> But then what of the language of Lord Denning?

I do not mean to deny the existence of a viable intermediate position. If the statute appears clearly to make a term in a collective agreement illegal, the arbitrator should decline to enforce the latter. On the other hand, if there are ambiguous and disputed

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<sup>47</sup>I should add that the ultimate holding in that case could be justified on the alternative ground that no such illegal conduct really was required by the agreement. But the language in the *Krever* opinion goes much farther than that and this court did not explicitly draw any such distinction.

<sup>48</sup>That appears to be what happened in another Ontario decision, *Bendix-Automotive of Canada* (1971), 71 C.L.L.C. 14,089 (Ont. H.C.), a case which was not cited by this court. Here again, the problem was the interaction of O.H.S.I.P. and the collective agreement. The agreement required the employer to provide full medical insurance under the Windsor Medical Services Plan, which covered 100% of the doctor's fees. When the Health Services Insurance Act, R.S.O., 1970, c. 200, was enacted, it provided for payment of only 90% of these same doctor's fees, in the pious hope that the doctors would accept this as full payment since the government was insuring them against unpaid bills. When this happy result did not materialize, the employees grieved and the arbitrator held the employer obligated to pay for the difference (under a complicated formula from which the judge differed, but in a direction more generous to the employees). The company was in the process of setting up machinery to do so when it was notified by the Ontario government that this would put it in breach of section 25(1) of the Health Services Insurance Act which forbade any more private medical insurance. When the company sought to quash the award on certiorari for an error of law, the Ontario High Court judge found that the arbitrator's interpretation of the agreement (with which he basically agreed) was in contravention of section 25 of the Act and null and void. As a result he quashed the award on the basis of the Act. No mention is made of *R.C.A. Victor* and *Krever* which quashed the arbitrator's awards for the legal error of looking at the statute.

provisions in the statute, the arbitrator should decline to resolve them and should give the benefit of the doubt to the collective agreement under which he was appointed. The losing party can take the case to court if it wishes a determination of the statutory problem and can get the award quashed if, on the court's interpretation of the statute, the contractual provision turns out to be illegal. This seems to me to be a sensible approach and one I have advocated in an earlier article.<sup>49</sup> But if it is what the court majority had in mind in *Etobicoke*, one would wish they had said so, and since this proposal was clearly adumbrated in Mr. Justice Osler's dissent, there can be no excuse for the omission.<sup>50</sup>

Equally troublesome is the treatment of *R.C.A. Victor*. Clearly there is a real distinction in that case. There the arbitrator not only refused to enforce the illegal obligation to provide private medical insurance but also undertook to order the company to pay the premiums for the new, substituted, statutory plan (O.H.S.I.P.). In *Etobicoke*, the employer simply asked the arbitrator *not* to enforce the "illegal" cash payments under the sick pay plan. But the question remains, why should this distinction make a legal difference? Exactly that argument was made to the arbitration board and its response carries some force. The collective agreement tells him *not* to alter the agreement and *R.C.A. Victor* tells him *not* to enforce the statute. But if he excises a provision from the contract, surely he alters the agreement. If he does so because of the statute, surely he enforces the statute. Agreed, he does not do so to quite the same extent as if he also goes on to direct compliance with a statutory term which has been substituted. The point is that once his purely contractual jurisdiction has been breached to some extent, what are the good legal and functional reasons for drawing the line at negative enforcement of the statute?

Nor is this just an academic debating point. It goes to the heart of the practical problem in both *R.C.A. Victor* and *Etobicoke*. The parties have agreed to one kind of fringe benefit, whether medical insurance or sick pay. The statute has ordained that the scheme is illegal, void, and thus unenforceable in arbitration. But the same statute has permitted, or even required a different scheme as a replacement. The trouble is that the statute has omit-

<sup>49</sup> *Op. cit.*, footnote 38.

<sup>50</sup> But I am puzzled as well by the restrictive attitude of Mr. Justice Osler to the scope of the arbitrator's jurisdiction, both here and in the *Sarnia General Hospital* case, *supra*, footnote 36. As one judge who had had extensive experience with labour arbitration from the inside, I would have expected a somewhat more pragmatic and sensitive treatment of the problem. In particular, I would like to see him consider the implications of his stance in the *Toronto Star Ltd.* case, *supra*, footnote 14, and defend his choice of the spot at which he draws the line around the arbitrator's jurisdiction.

ted to provide its own vehicle for enforcing its positive directions. Denied the usual forum of arbitration, left with no readily available alternative in court, are employees to be left with no enforceable rights to part of their remuneration? Are employers to be left with the windfall saving in their employment costs? I readily admit that these questions are easier to ask than they are to answer, but the beginning of wisdom in judging, as in any enquiry, is asking the right questions. As is shown by *Etobicoke* and almost all its forbears, we have not yet reached that beginning in the judicial appraisal of the remedial authority of arbitrators.

(d) *Laches*.

A final example of the assertion of a remedial power by an arbitrator, which has also reached the Ontario courts but received a less decisive response, involves the denial of a grievance on the ground of unreasonable delay in pursuing the claim. In *Ottawa Newspaper Guild & Bower v. The Ottawa Citizen*,<sup>51</sup> Bower had been discharged and lodged a grievance. After the grievance procedure had been exhausted, the union waited 143 days before notifying the company of its intention of going to arbitration. The arbitrator upheld the company's preliminary objection on the basis of the equitable doctrine of laches. The union took the decision to court and Mr. Justice Gale quashed this award. There were several reasons for his conclusion, but for our purposes this is the key passage in the opinion:<sup>52</sup>

Instead of examining the collective bargaining agreement to see whether the parties intended to bar employees, or others affected, from remedy if responsible for unreasonable delay, and, if so, then of considering whether there had been unreasonable delay in the circumstances of this case as disclosed by the evidence, the Board seems to have confined itself to applying the equitable doctrine of laches as such. Surely this was the wrong approach.

In a subsequent British Columbia decision, *The Saanich Firefighters Union*,<sup>53</sup> the *Ottawa Citizen* case was distinguished—beyond recognition, I believe. The arbitrator had used the doctrine of laches, to bar a grievance which the union had dropped on June 27th, 1970, and then only under pressure from the grievor, reinstated on April 28th, 1971. This decision was upheld on the ground that the arbitrator had not made the error of saying he had lost jurisdiction. Instead, he had merely exercised his power to deny a grievance for unreasonable delay in asserting it. Would such a ruling be upheld in Ontario now? Given Chief Justice Gale's injunction to look at the intention of the parties expressed

<sup>51</sup> (1966), 66 C.L.L.C. 14,108 (Ont. H.C.).

<sup>52</sup> *Ibid.*, at p. 338.

<sup>53</sup> (1971), 71 C.L.L.C. 14,110 (B.C.H.C.).

in their agreement rather than a general policy of the law, given the silence of the agreement regarding any time limits in instituting arbitration, and given the progeny of *Port Arthur Shipbuilding*, one wonders. Yet the most recent decision of the Divisional Court in this area suggests that arbitrators may have such power. In *Dominion Glass Company Ltd.*,<sup>54</sup> the union grieved about a changed job function some two months after the latter occurred. The agreement established a time limit of five days for individual grievances but imposed no such explicit limit on union policy grievances such as this one. The arbitrator read other language in the grievance provision as imposing the one set of time limits on the other form of grievance. This decision was quashed by the Divisional Court as an unjustified construction and we need not dwell on those reasons here. In a tantalizing aside, Mr. Justice Lacourcière left the door open for some exercise of arbitral remedial powers to deal with delay:<sup>55</sup>

In my opinion, where the article dealing with a policy grievance is silent as to the time limit within which such grievance may be brought, the only appropriate limitation is that it be brought within a reasonable time, as was done here. This seems to be in accordance with the practice of experienced labour arbitrators. See Award. . . . as an illustration of this commendable practice.

Although only a dictum, and without any reference to the course of related judicial authorities, this is an encouraging sign.

Let us turn now to a somewhat different situation of delay in the face of explicit time limits, a situation which has also generated important judicial forays into the arbitration process. A collective agreement provides that a party has ten days to give the other notice in writing of its intention to proceed to arbitration following the exhaustion of the grievance procedure. In a seniority case, the employee's claim is not settled and the union must decide whether to go to the trouble and expense of arbitration. Consultations among members of the grievance committee are delayed somewhat by a temporary transfer of the union president, but eventually the decision is affirmative and the company personnel manager is so informed. However, the written notice to the company with the name of the union's nominee is not mailed until

<sup>54</sup> (1973), 73 C.L.L.C. 14,162 (Ont. Div. Ct). Some time after I finished this article, the decision of the Divisional Court was reversed in turn by the Ontario Court of Appeal on the ground that the arbitrator's interpretation of the agreement was a reasonably possible one though perhaps not correct, on balance. Accordingly the language of the Divisional Court majority has very little authoritative force and indeed it was largely *obiter dictum* in any event. I discuss the case because it is a vehicle for raising two important and recurring issues and because it is gratifying to see some faint hint of a more deferential judicial attitude towards the experience and reasoning of labour arbitrators.

<sup>55</sup> *Ibid.*, at p. 14,740.

the tenth and received until the eleventh day after the final grievance meeting. If compliance with the time limits is made a "condition" of arbitration, or if non-compliance explicitly renders the grievance "null and void" or "deemed to be withdrawn", does the arbitrator have the power to hear the merits of this case? Because the contract has provided its own explicit remedy for the breach of the time limits, there can be no question of any *implied* remedial power to relieve against this bargain freely made. That power could only be conferred by statute. In the case of *Union Carbide of Canada*,<sup>56</sup> the Supreme Court of Canada rejected the only two legislative candidates in the Ontario Labour Relations Act. Given that conclusion the arbitrator's duty is clear. Any implied "common law" authority he might have is designed to *supplement* the operation of the collective agreement, not to *contradict* it. As is true of just about every legal proposition, there is an apparent exception to this one also. Arbitrators commonly relieve against the operation of such time limits when the beneficiary allows the grievance to proceed for a time without asserting them, and this use of "waiver" has been judicially upheld in the Ontario High Court.<sup>57</sup>

In my experience, while time limits are the rule in collective agreements, this explicit provision of the consequences of a breach of time limit is the exception. Accordingly, suppose the parties have laid down the standards to be followed, but have remained silent about the effect of delay on the validity of a grievance: if the union does delay at some stage in the grievance procedure, what is the arbitrator to do about it?

Taking a strict view of the arbitrator's jurisdiction, the logical answer is that he should do nothing. He is called on to read the agreement and decide whether there was a valid grievance. If in view of the facts and the proper interpretation of the contract terms, the claim obtains on the merits, the arbitrator must so hold. The union may have delayed in processing the grievance and the arbitrator might even "declare" that this has occurred. But how can he use this subsequent breach by the union as a ground for denying a valid individual grievance if the agreement does not tell him to do so. The logical corollary of *Port Arthur Shipbuilding* and *Union Carbide* is that he has no "inherent jurisdiction" to do so.

The consensus in recent arbitration decisions is that arbitrators must not automatically deny grievances on the merits because of procedural defects. This result is expressed in terms of a

<sup>56</sup> [1968] S.C.R. 966; see *supra*, footnote 33.

<sup>57</sup> *Cf. R. v. Lane; ex parte Green* (1966), 66 C.L.L.C. 14,137 (Ont. H.C.); also *Automatic Screw Machine Products* (1971), 71 C.L.L.C. 14,080 (Ont. H.C.).



distinction between "mandatory" and "directory" time limits. These are not the happiest terms of legal art insofar as they suggest that the time limits are not intended to be *binding*. The point of the distinction is in the proper remedy for a breach. If the agreement lays down its own remedy—for instance, that the grievance is deemed to be withdrawn, as in *Hoar Transport Company Ltd.*,<sup>58</sup>—arbitrators must comply with it. But if the parties merely stated that certain time limits "shall be followed", and left blank the consequences if they are not, the arbitrator must use some judgment in fashioning the appropriate remedy. Happily this arbitral consensus also found favour with the Divisional Court in *Dominion Glass Company*:<sup>59</sup>

In any event, even if the time limit of 5 days at Step No. 1 had been found to be applicable, it was, in my opinion, a directory requirement only, stating a procedure but not providing a penalty. . . . In such circumstances, a Board should not refuse to consider the merits of a grievance, particularly where the slight delay cannot in any way prejudice the company in the preparation or presentation of its defence. Thus the Board would not be deprived of jurisdiction.

This willingness of Mr. Justice Lacourcière to look to the common sense of an arbitrator's jurisdiction, and to learn from the arbitration reports something of the alternatives, is as admirable in a judge as it is unusual. One can only hope that it will be emulated in the future.<sup>60</sup>

<sup>58</sup> [1969] S.C.R. 634; see *supra*, footnote 33.

<sup>59</sup> *Supra*, footnote 54, at p. 14,741. I should add that while I agree with Mr. Justice Lacourcière's statement of the general legal principle, I am dubious about his application of it to the facts of this case. One part of the grievance clause stated that a time limit "shall be complied with". The arbitrator said this seemed to be "mandatory" in the grammatical sense but that misses the point. It should not be taken as "mandatory" in the technical legal sense of making the grievance a nullity simply because there is a breach of the directive. However, the collective agreement also provided that: "No matter may be submitted to arbitration which has not been properly carried through the grievance procedure." This does clearly satisfy the definition of a "mandatory" time limit, as a term of legal art. The parties have provided themselves for the remedial consequences of a defect in procedure and in the absence of statutory authority arbitrators must respect their bargain. I understand that the union conceded this point in the argument in front of the Ontario Court of Appeal and the latter's decision focused on the real nub of that case, the issue of construction of the specific language of that agreement.

<sup>60</sup> For that reason it is worth-while elaborating somewhat on the context and the reasons for this arbitration doctrine. First of all, the consequence of characterizing a time limit as "directory" is that non-compliance will bar grievances if, and only if, the delay was unreasonable (and, as we saw, Lacourcière J. accepted that as well). This is the sense of the doctrine of laches, but with the difference that the parties have crystallized their own views of what time limits are appropriate. But the arbitrator must still look at the underlying circumstances to appraise the reasons for the breach and to assess the prejudicial effect, if any, on the other side. In fact, I once suggested that the arbitrator might even assess the consequences of delay in monetary terms and compensate the other party on this basis. The point

#### IV. Our Future Legal Options.

How shall we appraise this trend in recent Canadian judicial decisions? No consistent theme really appears. Sometimes an expansive conception of the arbitrator's authority is accepted. The dominant trend, though, at least since *Port Arthur Shipbuilding*, is the denial of the power to use such remedies as rectification, estoppel or laches in adjudicating grievances. The argument is that arbitrators have no *inherent* jurisdiction, unlike the *superior* courts, to apply legal doctrines which are not part of the written agreement of the parties. They must simply read that agreement and follow it wherever it leads, whatever be the incongruity, perhaps even the illegality, of the result.

One hesitates to dignify the propositions advanced in these several judicial opinions by the label "reasons". On the surface the courts seem driven by the tyranny of the concept "inherent jurisdiction" but there was nothing inevitable about any one of these conclusions. In each of these cases, the law had to be settled about the precise scope of arbitration jurisdiction. At first instance, the arbitrators had concluded they had the authority to use a legal doctrine, and in so doing followed a long-established tradition in the arbitration reports. Eventually the issue was presented to the courts by a disgruntled party to the arbitration, and we would receive a decisive answer about what the law was to be. But the approach of the respective judges is completely question-begging. It resembles nothing so much as the magician who has carefully stowed a rabbit away in his hat, and then looks surprised for the audience when he reaches in his hand and pulls it out.

I do not mean to suggest that any one of these decision-makers, be he arbitrator or judge, is left with a total discretion to do whatever he wants. We can find ample *legal* materials, emanating from

is that this is a much more reasonable remedy than the draconian result of barring a valid grievance altogether, and thus possibly denying an employee who had been unjustly discharged by the company any redress at all because of the laxity of the union.

Not only is this general approach to the remedial problem a more reasonable one, but it is also the only way to preserve some reciprocity in the impact of time limits. Suppose it were the legal rule that a union breach of a time limit automatically invalidated a grievance? Is there also to be a rule that a company breach would bar the employee's grievance? Obviously not, because this would offend against the principle that a person should not profit from his own wrongs. But then should the company automatically *lose* a grievance if it is in breach of a time limit (*e.g.*, in responding at some stage in the grievance procedure)? That would preserve some degree of fairness in the operation of the procedures, by encouraging management to comply with them, but surely at the cost of disposing of grievances on a wholly irrelevant basis. But then is it not just as senseless to say that an employee should automatically lose his claim because some union steward was a few days late at some stage in the grievance process? An arbitrator should not take the latter step unless he is prepared to take the former, and there is very little one can say in favour of either.

several authoritative sources, which set the parameters for the ultimate conclusion. The collective agreement has set out a definition of the scope of the arbitrator's authority, and the integrity of this provision must be respected. But arbitration has been mandated by statute for the purpose of securing final and peaceful settlement of grievances, and this legislative policy is at least as authoritative as the mutual intentions of the contracting parties. Some accommodation between the two must be worked out. The watershed in this endeavour was crossed in *Polymer* when the statute was appealed to in order to justify the key remedial power of awarding damages. As I said earlier, this decision stands ineluctably for the proposition that labour arbitrators can have implied powers which the parties have not explicitly conferred. That case has not been judicially repudiated; in fact it has been extended in important respects. As long as it stands, it is not legally defensible for a court to deny automatically to labour arbitration the further remedial powers which may be asserted.

It is true that the Supreme Court of Canada, without even mentioning its own precedent in *Polymer*, tried to place some limits on the arbitral fashioning of new remedies in the *Port Arthur Shipbuilding* case. Whatever one may say of the court's concentration on the limited *contractual* jurisdiction of the arbitrator, the fact is clear that its view was repudiated by the Ontario legislature shortly afterwards.<sup>61</sup> I read section 37(8)<sup>62</sup> as a further stamp of legislative approval of a wider role for arbitrators in administering collective agreements and the desirability of supplementary remedial powers for that purpose.

This is the crucial legal background within which these later assertions of arbitral authority should have been (and still should

<sup>61</sup> Although the Supreme Court focused on the other facet of the arbitration process when it was required to justify the legality of its own intervention. Certiorari is a remedy available only against "statutory" tribunals, not private, contractual arbitration. In the Supreme Court of Canada in *Port Arthur Shipbuilding*, the company's appeal was challenged on this very ground. After quoting the then section 34(1) of the Ontario Labour Relations Act, *supra*, footnote 5, Mr. Justice Judson said: "The wording is clear and unambiguous. The parties to a collective agreement must arbitrate their dispute. There is no alternative course of action open to them. The legislation compels recourse to an arbitration board and that board is therefore a statutory creation and hence subject to review in the courts by *certiorari*." *Supra*, footnote 19, at p. 94. It is bad enough that Mr. Justice Judson did not even refer to the argument he made to the contrary some ten years before, in settling the law on this crucial issue (see (1956) 1 D.L.R. (2d) 775 (Ont. H.C.)). It is even worse that he now chooses to rely on the *statutory* character of grievance arbitration to get the judicial foot in the door and then concentrates solely on the *contractual* character of that process to find a legal error in the arbitrator's award. Again I do not argue that such a distinction, however improbable, is logically impossible. We were not offered, for examination, any reasons by which the two positions could be reconciled.

<sup>62</sup> *Supra*, footnote 5.

be) appraised. In no case will the later answers be automatic from that vantage point. The earlier precedents furnish analogies and suggest a basic principle for the area. They still require practical judgments about the appropriateness of the remedial powers in each new type-situation. One can see that approach in many, though not all, analyses of the problem by arbitrators; but it is conspicuous by its absence in most of the recent interventions by the judges.

The question in each of these cases was the same: do arbitrators have the authority to apply supplementary legal doctrines in adjudicating grievances brought under the express terms of a collective agreement? Logically, there are three alternative answers: either the doctrine is totally inapplicable to collective agreements, or the arbitrator is perfectly entitled to use it, or the doctrine can be applied to the situation in court but the arbitrator must stick to reading the agreement. I shall not dwell on the first option and try to appraise the worth of such concepts as laches, estoppel, rectification and so on in labour relations. Admittedly not every traditional judicial remedy is compatible with the peculiar environment of collective agreements. For example, if one party is deemed to repudiate a contract through a fundamental breach of his own obligations, the other may elect to rescind the agreement for the future. In the case of the statutory requirement of minimum terms for collective agreements, and the general legislative policy favouring a stable period under the agreement, that doctrine should not be applied, whether in arbitration or the courts.<sup>63</sup> I do not believe this conclusion is warranted for the legal remedies under examination here, at least when they are tailored to fit the realities of collective bargaining. Be that as it may, this alternative was not the gist of any of the decisions I have considered, which were concerned simply with the question of whether the *arbitrator* had the jurisdiction to use them. Assuming that they are applicable to collective agreements (as certainly is the case with the notion of "illegality") we are faced with options two and three. Put thus baldly, I find it hard to think of a decent argument in favour of number three, the one our courts appear to favour.<sup>64</sup>

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<sup>63</sup> And was so stated by Mr. Justice McRuer in *Polymer, supra*, footnote 11, at p. 615; see also *Gould Manufacturing of Canada, supra*, footnote 27, for further implications of that proposition.

<sup>64</sup> Perhaps I should elaborate somewhat on that last statement. The favour found by the courts in the third option is more negative than positive. The trend in the cases is to deny arbitrators the power to administer these legal remedies. But no one of the cases suggests that the legal doctrines are inapplicable to collective agreements on their merits. If they are to be implied, then logically the only forum in which this can be done is the court. That was the explicit suggestion of the Ontario Court of Appeal

I realize that the pattern of decisions is somewhat uneven, and the language in some opinions is not completely negative. But suppose we consider one possible consistent theme, a series of holdings each one of which has been subscribed to by one Ontario judge or another. Arbitrators must ignore mistakes in transcribing the results of negotiations, disregard detrimental reliance on the representations of one side, and then turn a blind eye on prejudicial delay in processing grievances. Once he upholds a claim in the face of these factors, he may even have to steel himself to order a result which may be illegal for its target to carry out. I submit that if arbitrators are to do a fair and efficient job of *adjudicating* disputes under collective agreements, they simply cannot have their powers gradually whittled away like that. Not one of these restrictions is as serious as would have been the denial of the power to award damages in *Polymer*; still, the cumulative impact of the sequence of decisions since *Port Arthur Shipbuilding* is serious and troubling.

Are these patent injustices avoided by the suggestion that the injured party can seek relief from the arbitrator's award in courts? On the face of it, this would seem an inefficient duplication of proceedings. It detracts from the speedy, inexpensive, and informal remedy originally foreseen by the legislature for labour grievances. Whenever one of these collateral issues arises, it *must* go to the courts for a decision. Doctrinally this alternative is very dubious in the face of another Ontario statute, the Rights of Labour Act.<sup>65</sup> Pragmatically it will be difficult to achieve, especially when the remedy turns on complex and controverted facts which must be established for the first time through the procedure of judicial review. Such a truncated conception of labour arbitration can only render the process much less serviceable to the parties and the public.

The problems with the third option are clear. Is there anything wrong with the second alternative, one which allows arbitrators to apply these supplementary legal remedies at the first instance, to secure a "final and binding settlement of the dispute"? Almost all labour arbitrators are legally trained and, in any event, the task of using concepts such as estoppel is no more demanding than the interpretation of contract language (pursuant to *legal* principles such as the parole evidence rule)? Perhaps our judges are worried about the possibility that arbitrators may go badly awry in an unfamiliar area. This may be a self-serving state-

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in *Metropolitan Police Association* regarding "rectification". It may be implicit in the failure of the Divisional Court to grasp the nerve of the legal problem in *Etobicoke*. I can think of no reason why the same logic, or illogic, is not equally valid with respect to estoppel, laches, and so on.

<sup>65</sup> R.S.O., 1970, c. 416.

ment, but, on the record of over twenty years of arbitral jurisprudence, I do not believe that fear is well founded. In any event, the concern is irrelevant. The party who disagrees with the decision can always go to court and obtain judicial review of any alleged errors of law in the award, and the scope of such review is certainly expansive.<sup>66</sup> It might just be that, in a substantial proportion of cases, the arbitrator's decision will be clearly correct and accepted as such by the parties without any need for an extra layer of decision. I think if one examined each of the different remedies I have talked about *realistically*, one could find nothing in their application which is inconsistent with either free collective bargaining or a proper adjudicative role for arbitration.<sup>67</sup>

It may be that the institution of private, *ad hoc* arbitration is no longer needed. Certainly the courts have overcome their earlier reluctance and shown a desire to plunge into the world of collective agreement.<sup>68</sup> For the moment, though, the legislature's earlier selection of arbitration remains law and fidelity to this judgment requires a legal framework conducive to *successful* grievance arbitration. And this is what is threatened by the thread we see running through the recent decisions. Our judges seem uncomfortable with the use of any materials for decision beyond the bare surface language of the collective agreement.<sup>69</sup> Perhaps

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<sup>66</sup> It is not pertinent to the main theme of this article, but one cannot but be struck by the extensive supervision of arbitrators now undertaken in courts and the willingness of judges to substitute their own wishes as to the merits. Nor is there any consistency at all in the approach taken to the task of interpreting the collective agreement. Two recent decisions are instructive in this regard: *Niagara Wire and Weaving* (1969), 69 C.L.L.C. 14,228 (Ont. H.C.), where the judge imposed a rigid and remorseless logic on the arbitrator and *Northern Electric* (1973), 73 C.L.L.C. 14,154 (Ont. Div. Ct), where the judge used a free-wheeling style to relieve the company of its obligations in a situation where he obviously believed it to be equitable. If there is a consistent thread to be found in the pattern of such judicial reversals of arbitration awards, I would like someone to enlighten me as to what it is.

<sup>67</sup> I would qualify that judgment somewhat with respect to the more nettlesome issue of "illegality". I have canvassed the different factors involved in the issue in much more detail in the article cited *supra*, footnote 38.

<sup>68</sup> See *Hamilton Street Railway Co. v. Northcott*, [1967] S.C.R. 3; Adell, Comment, (1967), 45 Can. Bar Rev. 354.

<sup>69</sup> The prime example of this attitude is the decision of the Ontario Court of Appeal in *R. v. Barber et al. ex parte Warehousemen's Union and Steinberg's Ltd.*, [1968] 2 O.R. 245. Here the court held that resort to extrinsic evidence of past practice in the administration of a term in a collective agreement amounted to an error of law in the interpretation of the meaning of that term: "Where a writing is unambiguous such evidence, although received, cannot be used to construe it. It is true that at least in some respects a collective agreement is different from an ordinary commercial contract. But the principle that requires the intention of parties to be derived from their plain written words rather than from extrinsic evidence is one applicable to all writings clearly defining rights between parties. In acting on the oral evidence which is admitted, I think the

that is why they want arbitrators to ignore evidence of the negotiations of the parties—even as reflected in a signed memorandum of agreement—later conduct or representations which may have induced action by the other party, or prejudicial delay in the assertion of these claims. Judges may prefer this blinkered, artificial and legalistic approach to labour relations for themselves, but it is precisely that attitude which led the legislatures to entrust the administration of collective agreements to arbitration, rather than the ordinary courts. Now the courts are intervening to fasten their own approach on arbitrators, to override decades of industrial jurisprudence with uninformed and casual asides, and to remove the various instruments necessary for fair and efficient adjudication in any legal environment.

Save for *Metropolitan Police Association*, not one of these deplorable conclusions is a firm and binding decision of an appellate court. The law is in a state of flux and could yet be settled in accordance with a very different conception of the arbitrator's function and remedial authority. The point of this article is to suggest an alternative approach: the optimists among us can always be hopeful of a more sensible and restrained attitude on the part of our judges—and I have pointed out examples where it has occurred. Frankly, I am not sanguine. But then, like our Prime Minister, I can be philosophical. "And whether or not it is clear to you, no doubt the universe is unfolding as it should".<sup>70</sup>

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majority of the board acted illegally . . . ." At pp. 252-253. It would not be profitable here to speculate on possible rationales for the judicial imposition of this legal doctrine on the arbitrator's *interpretation* of the collective agreement co-existing with judicial denial of an arbitrator's resort to equally established legal doctrines in the *administration* and *adjudication* of rights under that same agreement. Within the pragmatic framework I have sketched in this article for analyzing such problems, each doctrine must ultimately be appraised separately (though with some common thread of argument). More important for my purposes here is the evidence of the latent judicial attitude which surfaced near the end of the opinion, Mr. Justice Jessup quoted the arbitrator's view that, because collective agreements are contracts of parties who live together in a continuing relationship, a board of arbitration should take care to investigate and assess the underlying factors which surround a dispute about the meaning of the agreement: "To tell a party that that contract is clear without so investigating seems likely to undermine the party's confidence in the arbitration process." Jessup J.A. summarily rejected this view: "With respect I think that it is of at least equal importance that confidence be maintained in the integrity of collective agreements the words of which are plain. There are few agreements the language of which is read and relied on by so many and the choice of which, including the omission and inclusion of particular words, is the result of more and more protracted negotiations." *Ibid.*, at p. 254. In the final analysis, the conflict between these two approaches can only be sorted out in terms of what it means to say that the meaning of words is "plain", "clear", or "unambiguous", and this entails critical assumptions about the nature of interpretation of legal language. But then that is the subject of another article.

<sup>70</sup> *Desiderata in Poems of Max Ehrmann* (1948).