

Arbitration Under The British Columbia Labour Code

Joseph M. Weiler*

I. Introduction

Certain American members of the National Academy of Arbitrators seem concerned about an impending decline in the status of the arbitration process.¹ Professor David Feller, the distinguished lawyer and law professor who argued the Steelworkers Trilogy² in the United States Supreme Court, argued recently before the Academy that the virtual immunity from judicial review that arbitration awards have enjoyed is ending.³ He suggested that the *Collyer* decision,⁴ along with increasing legislative regulation of employment conditions, must be productive of increased judicial review of arbitral decisions.⁵

Canadian arbitration awards have never enjoyed the degree of immunity from review afforded those in the United States. Rather, our judiciary has continually probed into the arbitral realm — with dubious results.⁶ However, the British Columbia Legislature, having investigated both the procedural and the substantive aspects

* Associate Professor, Faculty of Law, University of British Columbia, and labour arbitrator.

¹ See Feller, "The Coming End of Arbitration's Golden Age" in Dennis & Somers (eds.), *Proceedings of the Twenty-Ninth Annual Meeting, National Academy of Arbitrators* (1976), 97 [hereinafter *Golden Age*]; Feller, *Arbitration: The Days of its Glory are Numbered* (1977-78) 2 *Industrial Relations L. J.* 97 [hereinafter *Glory*]. Some American scholars argue that arbitrators should not be concerned about appellate review in cases of statutory interpretation (as opposed to the interpretation of contractual language): see, e.g., St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny* (1976-77) 75 *Mich. L. Rev.* 1137.

² *United Steelworkers of America v. American Mfg Co.* 363 U.S. 564 (1960); *United Steelworkers of America v. Warren & Gulf Navigation Co.* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363 U.S. 593 (1960).

³ Feller, *Glory*, *supra*, note 1, 106-10.

⁴ *Collyer Insulated Wire* 192 N.L.R.B. 837 (1971).

⁵ Feller, *Golden Age*, *supra*, note 1, 108-9.

⁶ See generally Adams, *Grievance Arbitration and Judicial Review in North America* (1971) 9 *Osgoode Hall L. J.* 443; Tacon, *The Effect of Judicial Review on Grievance Arbitration* (1976) 14 *Osgoode Hall L. J.* 661; P. Weiler, *The 'Slippery Slope' of Judicial Intervention* (1971) 9 *Osgoode Hall L. J.* 1; P. Weiler, *The Remedial Authority of the Labour Arbitrator: Revised Judicial Version* (1974) 52 *Can. Bar Rev.* 29.

of grievance arbitration, has radically altered the review mechanism in creating a partnership between the Labour Relations Board and the Court of Appeal.⁷ Early indications point to a comfortable working relationship between these two adjudicative bodies. The experiment is of great interest to other jurisdictions concerned with the administration of collective agreements.

This paper will comprise a description of the statutory framework and of the legislative history surrounding arbitration in the British Columbia *Labour Code*; an analysis of the four year British Columbia experience under this scheme, focusing particularly on the roles that the judiciary and the Labour Relations Board have played in developing the status and character of grievance arbitration; and a summation, from an arbitrator's point of view, of the effect of this scheme on the conduct of arbitration hearings and on the development of the common law of the collective agreement.

II. The statutory framework for grievance arbitration in the Labour Code

The British Columbia *Labour Code*, unlike those of other North American jurisdictions, provides a comprehensive statutory scheme under which disputes over the meaning and application of collective agreements are to be resolved. As in other Canadian jurisdictions, the *Labour Code* prohibits strikes and lockouts during the term of a collective agreement,⁸ and requires that every collective agreement contain a provision for final and conclusive settlement of disputes without stoppage of work.⁹ While arbitration is not mandatory, since the parties may agree on other methods to peacefully resolve their differences, the *Labour Code* recognizes that arbitration is the preferred mechanism.¹⁰

The basic premise of Part VI of the *Labour Code* is contained in section 92(2):¹¹

⁷ *Labour Code of British Columbia Act*, S.B.C. 1973 (2d Sess.), c. 122, Pt. VI, ss. 92-111, as am. by S.B.C. 1974, c. 87, s. 22(h); S.B.C. 1975, c. 33, ss. 23-28; S.B.C. 1976, c. 26, s. 8 [hereinafter *Labour Code*].

⁸ *Ibid.*, s. 79.

⁹ *Ibid.*, s. 93(2) as am. by S.B.C. 1975, c. 33, s. 23.

¹⁰ *Ibid.*: "Every collective agreement shall contain a provision for final and conclusive settlement without stoppage of work, *by arbitration or such other method as may be agreed to by the parties*, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or any alleged violation of the agreement, *including any question as to whether any matter is arbitrable*" [emphasis added].

¹¹ As am. by S.B.C. 1975, c. 33, s. 23.

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.

From this starting point, the *Labour Code* proceeds to enunciate the manner in which the arbitrator is to perform his function of administering the collective agreement. The arbitrator is to "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".¹² In performing his task, the arbitrator "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".¹³

These provisions direct the arbitrator to the statutory basis of the law of the collective agreement rather than to the common law of contracts or the law of commercial arbitration. The arbitrator in British Columbia is emancipated from the difficult task of interpreting a collective agreement according to the often conflicting dictates of modern arbitral jurisprudence or the traditional common law doctrines derived from the context of the master-servant relationship. The Labour Relations Board has noted:

Collective agreements deal with the entire range of employment terms and working conditions often in large, diverse bargaining units. The agreement lays down standards which will govern that industrial establishment for lengthy periods — one, two, even three years. The negotiators are often under heavy pressure to reach agreements at the eleventh hour to avoid a work stoppage, and their focus of attention is primarily on the economic content of the proposed settlement, not the precise contract language in which it will be expressed. Finally, the collective agreement though the product of negotiations over many years, must remain a relatively concise and intelligible document to the members of the bargaining unit and the lower echelon of management whose actions are governed by it.¹⁴

Because of these circumstances, disputes which reach arbitration generally involve situations which the parties may have neither clearly anticipated nor specifically covered in their contract. For such issues, the parties expect a special attitude from their arbitrator. The *Labour Code* recognizes and affirms these expectations by directing the arbitrator, in interpreting a collective agreement, to apply principles consistent with sound industrial relations policy.

¹² *Ibid.*, s. 92(3), as am. by S.B.C. 1975, c. 33, s. 23.

¹³ *Ibid.*

¹⁴ *Simon Fraser Univ. & Ass'n of Univ. & College Employees, Local 2* [1976] 2 Can. L.R.B.R. 54, 59 (B.C.L.R.B.).

The industrial relations setting requires an arbitrator to examine the function of the disputed contract benefit according to his perception of the typical expectations of an experienced negotiator.¹⁶

Another novel feature of the British Columbia *Labour Code* is the significant role given to the Minister of Labour in monitoring and assisting in the mechanics of grievance arbitration. The Minister may make administrative arrangements for the conduct of arbitrations,¹⁶ may make provision for the training and education of labour arbitrators as well as for research and publication of information concerning labour relations,¹⁷ and may provide for the maintenance of a register of arbitrators and labour arbitration chairmen.¹⁸ These provisions are consistent with the legislative preference for arbitration as the primary vehicle of grievance resolution.¹⁹ In addition, provision is made for ministerial intervention in cases of ineffectual arbitration,²⁰ of failure to appoint or constitute an arbitration board,²¹ and of contract disputes requiring the appointment of a special officer.²²

The *Labour Code* also specifically deals with the payment of the fees and costs of arbitration,²³ the problem of unreasonable delay in the rendering of awards,²⁴ and the powers of a board to receive evidence under oath²⁵ and to issue a summons.²⁶ In the absence of a majority, the decision of the Chairman is the binding decision of the board.²⁷ The award must be filed at the Parliament Building within ten days,²⁸ and it is enforceable as a Supreme Court judgment when filed in the Court Registry.²⁹ The significance of these

¹⁶ P. Weiler, "The Code, The Collective Agreement, and The Arbitration Process: As Seen from The Labour Board" in Hickling (ed.), *Grievance Arbitration: A Review of Current Issues* (1977), 7, 8.

¹⁶ *Labour Code*, s. 111(a).

¹⁷ *Ibid.*, s. 111(b).

¹⁸ *Ibid.*, s. 111(c).

¹⁹ For a further example of this preference, see *ibid.*, s. 112, which provides that the government shall bear one third of certain of the costs of arbitration in prescribed circumstances.

²⁰ *Ibid.*, s. 94, as am. by S.B.C. 1975, c. 33, s. 24.

²¹ *Ibid.*, s. 95.

²² *Ibid.*, s. 97, as am. by S.B.C. 1975, c. 33, s. 26.

²³ *Ibid.*, s. 99.

²⁴ *Ibid.*, s. 100.

²⁵ *Ibid.*, s. 101.

²⁶ *Ibid.*, s. 102, as am. by S.B.C. 1976, c. 26, s. 8.

²⁷ *Ibid.*, s. 103.

²⁸ *Ibid.*, s. 105.

²⁹ *Ibid.*, s. 110.

rather commonplace sections lies in their inclusion in a comprehensive labour relations statute.

The most interesting features of the *Labour Code* are, first, the statutory recognition of the arbitrator's authority;³⁰ second, the power granted to the Labour Relations Board to act as an arbitration board;³¹ and finally, the review authority given to the Labour Relations Board³² and the Court of Appeal.³³

A. *The arbitrator's authority*

One major issue in the evolving law of the collective agreement has been the courts' antipathy to arbitrators' endeavours to exercise remedial authority. Arbitrators' attempts to remedy collective agreement breaches have been continually quashed by reviewing courts.³⁴ The judiciary, differing radically from the profession in its view of the proper role of an arbitrator, has often reduced the arbitrator to little more than an "official reader of the agreement".³⁵ The *Labour Code* sets out the following comprehensive statement of an arbitrator's authority:

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* [.]³⁶

Section 98 is clearly designed to overcome the truncated notion of grievance arbitration contemplated by the Supreme Court of Canada in *Port Arthur Shipbuilding*³⁷ and its progeny;³⁸ in addition,

³⁰ *Ibid.*, s. 98, as am. by S.B.C. 1974, c. 87, s. 22(h), and S.B.C. 1975, c. 33, s. 27.

³¹ *Ibid.*, s. 96, as am. by S.B.C. 1975, c. 33, s. 25.

³² *Ibid.*, s. 108, as am. by S.B.C. 1975, c. 33, s. 28.

³³ *Ibid.*, s. 109, as am. by S.B.C. 1975, c. 33, s. 28.

³⁴ See, e.g., *Union Carbide of Canada Ltd v. Weiler* [1968] S.C.R. 966; *Port Arthur Shipbuilding Co. v. Arthurs* [1969] S.C.R. 85; *General Truck Drivers Union, Local 938 v. Hoar Transport Co.* [1969] S.C.R. 634.

³⁵ The nature of this problem is clearly described in P. Weiler, *The Remedial Authority of the Labour Arbitrator: Revised Judicial Version*, *supra*, note 6, 30.

³⁶ *Labour Code*, s. 98, as am. by S.B.C. 1975, c. 33, s. 27 [emphasis added]. The remedial authority granted to arbitrators by s. 98(a)-(g) is not exhaustive, as was made clear in *Vernon Fruit Union & B.C. Interior Fruit & Vegetable Workers' Union, Local 1572 & Okanagan Federated Shippers' Ass'n* [1977] 1 Can. L.R.B.R. 21 (B.C.L.R.B.). The Board decided that s. 98 gave the arbitrator the power to order rectification of the document in which the collective agreement was expressed, although the power of rectification is not specifically mentioned in s. 98.

³⁷ *Supra*, note 34.

³⁸ The legal impact of *Port Arthur Shipbuilding* is considered in *S.K.D. Mfg Ltd* (1969) 20 Lab. Arb. Cas. 231. This case also lists the relevant arbitration decisions.

many of the specific powers given to arbitrators by section 98 constitute a "legislative reversal" of judicial decisions which quashed arbitral awards. An arbitrator may now award monetary damages,³⁹ direct that an employee be reinstated,⁴⁰ substitute measures if he finds the imposed discipline to be excessive,⁴¹ relieve against time limits,⁴² dismiss or reject a grievance if the party's delay has operated to the other party's prejudice,⁴³ and interpret and apply any statute intended to regulate the employment relationship, notwithstanding that its provisions conflict with the terms of the collective agreement.⁴⁴

In specifically granting this broad authority to the arbitrator, the Legislature has ensured that an arbitrator will be more than a mere creature of the collective agreement. Insofar as he may exercise his remedial authority irrespective of the particular contract under which he is appointed, he has evolved from "the official reader of the collective agreement" to the adjudicator of the contract dispute.

B. *The role of the Labour Relations Board in the administration of the collective agreement*

A more radical reform is effected by the *Labour Code's* grant to the Labour Relations Board of authority to monitor the administration of collective agreements. Consistent with the *Labour Code's* overall centralizing thrust, by which the Board is given authority to administer the entire body of labour law, the Board is empowered to enter the arena of grievance resolution in any of three ways. First, the Board's jurisdiction to administer the law of strikes and picketing⁴⁵ involves it in mid-contract wildcat strikes over grievances. The *Labour Code* envisages the Board as acting as informal

³⁹ *Labour Code*, s. 98(a) (as am. by S.B.C. 1975, c. 33, s. 27), ratifying the decision in *Re Oil, Chemical & Atomic Workers & Polymer Corp.* (1959) 10 Lab. Arb. Cas. 51.

⁴⁰ *Ibid.*, s. 98(b), as am. by S.B.C. 1975, c. 33, s. 27.

⁴¹ *Ibid.*, s. 98(d), as am. by S.B.C. 1975, c. 33, s. 27. Cf. the position in the *Port Arthur Shipbuilding* case, *supra*, note 34.

⁴² *Ibid.*, s. 98(e), as am. by S.B.C. 1975, c. 33, s. 27. Cf. the position in *Union Carbide of Canada Ltd v. Weiler*, *supra*, note 34; *General Truck Drivers Union, Local 938 v. Hoar Transport Co.*, *supra*, note 34.

⁴³ *Ibid.*, s. 98(f), as am. by S.B.C. 1975, c. 33, s. 27. For a discussion of the doubtful authority of arbitrators to apply the equitable doctrine of laches, see P. Weiler, *supra*, note 6, 49-50.

⁴⁴ *Ibid.*, s. 98(g), as am. by S.B.C. 1975, c. 33, s. 27. The precarious status of this authority is dealt with in P. Weiler, *The Arbitrator, The Collective Agreement And The Law* (1972) 10 Osgoode Hall L. J. 141.

⁴⁵ *Ibid.*, s. 31(1)(b)(ii), as am. by S.B.C. 1975, c. 33, s. 8.

mediator in such circumstances, in order to effect a voluntary accommodation whenever possible.⁴⁶ This arrangement constitutes a major improvement over the use of cease and desist orders in the handling of such illegal work stoppages.

Secondly, the Board may become involved in grievance resolution under its original jurisdiction over typical contract grievances.⁴⁷ Prior to the appointment of an arbitration board, a party to a collective agreement has the right to apply to the Labour Relations Board and request the appointment of an industrial relations officer (I.R.O.) to assist in settling the dispute.⁴⁸ If the officer is unable to achieve a voluntary settlement, he makes a detailed report to the Board of the circumstances of the grievance and the positions of the parties, and recommends an appropriate disposition of the matter. The Board has discretion to decide the grievance on the merits or to refer the matter back to the parties to be dealt with under the arbitration procedures in the collective agreement.⁴⁹ Experience has shown that I.R.O.'s have successfully achieved a voluntary settlement in roughly two thirds of the disputes to which they were appointed.⁵⁰ The Board's disposition of the unresolved disputes has varied according to the nature of the dispute. Whenever the issue involves a difference of interpretation — capable of constituting an important precedent — of the meaning and effect of a contractual clause, Board practice is to remit the matter to the arbitration procedure contemplated by the collective agreement, as this type of case requires a hearing, testimony under cross-examination, legal argument and carefully crafted reasons for decision.⁵¹ If, however, the dispute involves only a question of fact and the contract language is clear, the Board will cause a thorough investigation to be made and on its basis will issue an authoritative ruling without reasons.⁵² While this procedure may seem contrary to the rules of natural justice, parties to a collective agreement may contract out of the application of section 96 to their situation.⁵³ More-

⁴⁶ *Ibid.*, s. 27, as am. by S.B.C. 1975, c. 33, s. 8; S.B.C. 1977, c. 72, s. 5.

⁴⁷ *Ibid.*, s. 96, as am. by S.B.C. 1975, c. 33, s. 25.

⁴⁸ *Ibid.*

⁴⁹ See generally P. Weiler, *Statement of Policy: Section 96 of the Labour Code* [1976] 1 Can. L.R.B.R. 17.

⁵⁰ P. Weiler, "The Role of the Labour Board as an Alternative to Arbitration" in Dennis & Somers (eds.), *Proceedings of the Thirtieth Annual Meeting, National Academy of Arbitrators* (1977), 72, 80.

⁵¹ *Ibid.*, 82.

⁵² *Ibid.*

⁵³ *Labour Code*, s. 96(2), as am. by S.B.C. 1975, c. 33, s. 25.

over, if they are unhappy with the particular ruling they may apply to have the case reconsidered by the Board, ordinarily by way of a full scale hearing before a different panel.⁵⁴

Thirdly, the Board may become involved in the arbitration process through its primary responsibility, under section 108 of the *Labour Code*, to review arbitration awards. The Legislature has relieved the courts of most of their traditional authority to review arbitral decisions and has transferred this jurisdiction to the Labour Relations Board. The remainder of this paper will be devoted to an examination of this statutory experiment.

III. Review of grievance arbitration under the Labour Code

A. Legislative history

1. The situation prior to 1974

Prior to the enactment of the original *Labour Code* in January 1974, the power to review the awards of British Columbia arbitration boards belonged exclusively to the superior courts.⁵⁵ Arbitration was not mandatory under the old *Labour Relations Act*,⁵⁶ and the parties were free to devise other methods of peaceful dispute resolution. Arbitration boards were thus classed for legal purposes as consensual or private bodies.⁵⁷ Awards could be vacated on the basis of bias, fraud, absence of natural justice, excess of jurisdiction, or error of law on the face of the record.⁵⁸ In theory, error of law on the face of the record could not encompass the specific issue referred to the arbitration tribunal.⁵⁹ Collateral questions of law, however, proved to be fruitful objects for judicial scrutiny.

The uneasy distinction between the "specific" as opposed to the "collateral" issues of law created considerable confusion and, depending upon the review court's phrasing of the "specific" issue, often resulted in a broad scope of review. "Collateral" issues in many cases included interpretations of the relevant collective agree-

⁵⁴ *Ibid.*, s. 36.

⁵⁵ *Arbitration Act*, R.S.B.C. 1960, c. 14, s. 14(2).

⁵⁶ R.S.B.C. 1960, c. 205, s. 22 as am.

⁵⁷ *Howe Sound Co. v. International Union of Mine, Mill & Smelter Workers (Canada)*, Local 663 (1962) 62 C.L.L.C. 15,407A (S.C.C.).

⁵⁸ *International Woodworkers of America, Local 1-71 v. Weldwood of Canada Ltd* (1970) 70 C.L.L.C. 14,033 (B.C.C.A.).

⁵⁹ *A.B.C. Sheet Metal & Plumbing Ltd & United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 170* (1962) 62 C.L.L.C. 15,394 (B.C.C.A.).

ments;⁶⁰ as one arbitrator noted, these judicial exercises constituted "a spurious attempt to rationalize a full appeal on the merits".⁶¹ A court would also review an arbitral award on the basis of jurisdictional error if it satisfied itself that the arbitrator's interpretation of the collective agreement was clearly wrong or one that the words would not reasonably bear.⁶² As noted by one commentator, this criterion "had very few constraints" and those that existed "were not of an objective variety".⁶³ If a court felt strongly that an arbitrator was wrong, reviewing was warranted — an arbitrator "could be wrong but not clearly wrong. To be clearly wrong was to lack jurisdiction".⁶⁴

2. The timid response

The Legislature, in the initial version of the *Labour Code*,⁶⁵ did not take significant measures to preclude judicial review. Rather than ousting review altogether, the *Labour Code* sought to regularize it and define its limits more succinctly.⁶⁶ The *Arbitration Act*,⁶⁷ with certain modifications,⁶⁸ was made applicable to grievance arbitration and a stated case procedure was inserted to expedite the determination of legal questions.⁶⁹ The Court of Appeal was given "exclusive jurisdiction in all arbitration cases",⁷⁰ in the hope that some degree of predictability and consistency would emerge. Moreover, it was anticipated that requiring a party to seek judicial review in the Court of Appeal would involve a subtle but real disincentive, as such an appeal was thought to involve a more ponderous procedure than simple notice of motion (the then-current route to review in the superior courts).⁷¹ The substantive grounds for review continued

⁶⁰ For an analysis of the leading cases, see generally Adams, *supra*, note 6, 493-95.

⁶¹ *Ibid.*, 495.

⁶² *A.B.C. Sheet Metal & Plumbing Ltd*, *supra*, note 59.

⁶³ Adams, *supra*, note 6, 497.

⁶⁴ *Ibid.*

⁶⁵ S.B.C. 1973 (2d Sess.), c. 122.

⁶⁶ See generally Arthurs, "The Dullest Bill": *Reflections on The Labour Code of British Columbia* (1974) 9 U.B.C. L. Rev. 280, 293-301.

⁶⁷ R.S.B.C. 1960, c. 14.

⁶⁸ *Labour Code of British Columbia Act*, S.B.C. 1973 (2d Sess.), c. 122, s. 106.

⁶⁹ *Ibid.*, s. 107.

⁷⁰ *Ibid.*, s. 108.

⁷¹ The applicant would be faced with additional paperwork and expense in filing notice and grounds for appeal and in preparing factums. The writer's information on this point was obtained from one of the persons who drafted this part of the *Labour Code*.

to be relatively open ended: misbehaviour of the arbitrator, error of law affecting jurisdiction, and denial of natural justice.⁷²

When the first application for judicial review was sought under the new provisions, counsel were informed by the Chief Justice that the Court of Appeal would operate under the same procedure — simple notice of motion — as had previously been used in the Supreme Court.⁷³ This, of course, effected a complete reversal of the original expectations of the *Labour Code's* draftsmen: rather than constituting a built-in disincentive to a party seeking review, the new provisions operated as a veritable incentive, as the intermediate step of appearing before the British Columbia Supreme Court had been eliminated. Since most applications for leave to appeal to the Supreme Court of Canada would likely be rejected, a party could go directly to the Court of Appeal by an expedited, simple procedure, and obtain a conclusive ruling. Thus, contrary to plan, parties were in effect encouraged to appeal the arbitrator's decision.

The Court of Appeal then decided the *Weldwood* case.⁷⁴ This case involved the discharge of an employee for intoxication. The arbitrator found the discharge to be without proper cause and ordered reinstatement. The Court of Appeal reversed the arbitrator's decision on the ground that he had exceeded his jurisdiction in asking himself whether the grievor was intoxicated by alcohol rather than whether she was intoxicated, and that he had thus refused to assume the jurisdiction to determine whether the impairment was a proper cause in law for dismissal.⁷⁵ The Minister of Labour was so incensed by this example of the type of scrutiny in which the Court of Appeal would engage under the rubric of "error of law affecting jurisdiction" that the Ministry paid the legal costs of both counsel in the appeal to the Supreme Court of Canada.⁷⁶ Legislative reform soon followed.

⁷² *Labour Code of British Columbia Act*, S.B.C. 1973 (2d Sess.), c. 122, s. 108(1)(a)-(c). Arthurs, *supra*, note 66, 299, thought that as an attempt to inhibit the full exploration of all legal issues, such an exercise was naive.

⁷³ This information was obtained by the writer in conversations with counsel.

⁷⁴ *Re Weldwood of Canada Ltd & Int'l Woodworkers of America, Local 217* (1974) 50 D.L.R. (3d) 439 (B.C.C.A.); *rev'd (sub nom. International Woodworkers of America, Local 217 v. Weldwood of Canada Ltd)* (1976) 67 D.L.R. (3d) 544 (S.C.C.).

⁷⁵ *Ibid.*, 446-47.

⁷⁶ This information was obtained by the writer in conversations with counsel.

3. The 1975 amendments

The new scheme of arbitration review under the amended *Labour Code* does not exclude the courts from any review jurisdiction whatsoever but rather limits the review power of the Court of Appeal to those issues of "general law" not reviewable by the Labour Relations Board.⁷⁷ Judicial interference in arbitration proceedings by way of injunction, prohibition, or *certiorari* is specifically prohibited.⁷⁸

In conjunction with this limited judicial review, the amended *Labour Code* provides for review of arbitration awards by the Labour Relations Board. The Board is granted jurisdiction to set aside an award, to remit the matter back to the arbitrator, to stay the proceedings of the arbitration board, or to substitute its own decision for that of the arbitrator.⁷⁹ Grounds for review are the denial or impending denial of a fair hearing to one of the parties or an award inconsistent with the principles of the *Labour Code* or any other Act dealing with labour relations.⁸⁰

The administrative law features of this legislative experiment have yet to be canvassed by commentators and (as the amendments were passed with little or no discussion) the Government's intentions have never been clearly stated. However, the division of review authority between the Court of Appeal and the Labour Relations Board would seem to be based largely on the respective areas of expertise of these two bodies. The Court is to review the arbitrators on questions of "general law". It may be assumed that the judiciary is comfortable with such issues, composing as they do a court's daily workload. The Board is to review awards on the basis of inconsistency with principles of labour legislation, which legislation the Board is responsible for interpreting and applying.

⁷⁷ *Labour Code*, s. 109(1), as am. by S.B.C. 1975, c. 33, s. 28: "On the application of a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision of an 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)."

⁷⁸ *Ibid.*, s. 109(3), as am. by S.B.C. 1975, c. 33, s. 28: "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 proceedings in any court or be removable by *certiorari* or otherwise into court."

⁷⁹ *Ibid.*, s. 108(1), as am. by S.B.C. 1975, c. 33, s. 28.

⁸⁰ *Ibid.*, s. 108, as am. by S.B.C. 1975, c. 33, s. 28.

This division of labour according to expertise does not provide an immediate explanation of the Board's review authority on the basis of denial of fair hearing; the appellate court, rather than the Board, would be expected to have the desired familiarity with the requirements of natural justice. One may perhaps speculate that the Legislature intended "fair hearing" to mean something other than a hearing conducted according to the rules of natural justice, and considered the Board to be the appropriate tribunal to set guidelines for the maintenance of due process in grievance arbitration.

B. *The constitutional validity of arbitral review by a provincial tribunal*

The review of one administrative tribunal by another is of questionable constitutional validity. The decisions of the Labour Relations Board are sheltered from judicial review by the privative clauses in sections 31, 32, 33 and 35 of the *Labour Code*. These sections purport to preclude any possibility of appellate review, even on jurisdictional grounds. Such clauses have been the subject of considerable academic comment⁸¹ and at least one significant challenge in the courts.⁸² The argument for the invalidity of these privative clauses depends on section 96 of the *British North America Act, 1867*.⁸³ Section 96 provides for the federal appointment of judges of superior, district and county courts, and, it is argued, thus precludes a provincial legislature from setting up a tribunal with jurisdiction or powers analogous to those of these courts.⁸⁴ Lyon argues that an essential characteristic of a "section 96" court is its jurisdiction to decide questions of law.⁸⁵ Accordingly, while a provincial tribunal may rule on these questions in the course of its original jurisdiction, there is a constitutional guarantee that final

⁸¹ See Hogg, *Is Judicial Review of Administrative Action Guaranteed by the British North America Act?* (1976) 54 Can. Bar Rev. 716; Arthurs, *supra*, note 66, 329-35; Lyon, *Comment* (1971) 49 Can. Bar Rev. 365; LeDain, *Sir Lyman Duff and the Constitution* (1974) 12 Osgoode Hall L. J. 261, 325-36.

⁸² *Robinson Little v. A-G. B.C.*, case settled out of court.

⁸³ 30-31 Vict., c. 3 (U.K.).

⁸⁴ This argument led the Privy Council in *Toronto Corp. v. York Corp.* [1938] A.C. 415 to hold that the Ontario Municipal Board, being an administrative body whose members were not appointed in accordance with ss. 96, 99, and 100 of the B.N.A. Act, was not validly constituted to receive judicial authority. The argument surfaced again in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd* [1949] A.C. 134 (P.C.), but the Privy Council there found that the functions of the Board were not analogous to those of the s. 96 courts.

⁸⁵ Lyon, *supra*, note 81, 368.

decisions on such issues must be made by a "section 96" court.⁸⁶ If this is so, then the privative clauses would be *ultra vires*.

It has also been suggested that there is a constitutional defect in the *Labour Code* insofar as it gives to the Labour Relations Board the task of reviewing arbitrators. The argument holds that as the task of defining the jurisdiction of inferior tribunals has traditionally been performed by "section 96" courts, the provincial Legislature is incompetent to grant to the Labour Relations Board the jurisdiction to review arbitration boards.⁸⁷

The point has yet to be firmly settled. The leading judicial pronouncement in the general area is the decision in *Seminary of Chicoutimi v. A.-G. Quebec*.⁸⁸ The Supreme Court in that case unanimously struck down a statute which purported to confer upon provincially-appointed courts the power to quash municipal bylaws for illegality. In reaching this decision, the Court noted that

on the eve of Confederation the Superior Court still exercised ... the special jurisdiction ... to exercise a superintending and reforming power and control over Courts of inferior jurisdiction ...⁸⁹

[T]he jurisdiction conferred by the legislative provisions the constitutionality of which is now being challenged is not, in a general way, in conformity with the kind of jurisdiction exercised in 1867 by the Courts of summary jurisdiction, but conforms rather to the kind of jurisdiction exercised by the Courts described in s. 96.⁹⁰

The jurisdiction to conclusively review arbitral awards would appear to conform to the kind of jurisdiction possessed by "section 96" courts. On this reasoning, the *Labour Code* provisions granting final review powers to the Labour Relations Board may be invalid.⁹¹

⁸⁶ *Ibid.*, 368-69. Professor Lyon's thesis on the constitutional validity of privative clauses has been questioned by other scholars, particularly Professors Arthurs (see *supra*, note 66) and Hogg (see *supra*, note 81). It is not within the scope of this paper to describe the details of the debate.

⁸⁷ See Arthurs, *supra*, note 66, and Hogg, *supra*, note 81. The argument that s. 108 of the *Labour Code* is invalid has not been raised to date in any judicial proceeding, nor has it been discussed in any commentary on the *Labour Code*.

⁸⁸ (1972) 27 D.L.R. (3d) 356 (S.C.C.).

⁸⁹ *Ibid.*, 360-61.

⁹⁰ *Ibid.*, 364.

⁹¹ See also *A.-G. Quebec v. Farrah* (1978) 86 D.L.R. (3d) 161; 21 N.R. 595 (S.C.C.), the import of which appears to be that a province may not substitute its tribunal in place of a s. 96 court. The legislation in question purported to empower a provincially appointed tribunal to hear and decide any question of law on appeal from decisions of the Quebec Transport Commission. Pratte J.'s decision (Martland, Ritchie and Beetz JJ. concurring; Pigeon J. concurring with additional reasons) seems to endorse the possibility of a provincial limitation of the superintending powers (*i.e.*, the judicial

The recent decision of the Supreme Court of Canada in *Tomko v. Labour Relations Board (Nova Scotia)*,⁹² however, indicates that the remedial jurisdiction exercised by a labour relations board cannot be analyzed without reference to the context in which the remedies are being applied. From one perspective, a board's cease and desist order directed against an unlawful strike has the same purpose and effect as a court injunction. Yet the Supreme Court noted that:

What the *John East* case shows is that in the particular framework of the legislation there in question there is no invasion of s. 96 in empowering an administrative board to apply remedies which in another context are obtainable from the ordinary courts.⁹³

While drawing implications from Supreme Court decisions is a risky enterprise, one reading of *Tomko* leads to the conclusion that a new jurisdiction granted to a labour relations tribunal may be constitutionally valid provided it can be adequately justified in terms of the Board's essential responsibility to administer labour relations. As one commentator has suggested:

In other words, if the exercise of the power is necessary and incidental to the performance of a board's labour relations function, then there is no violation of section 96 of the British North America Act, regardless of whether a similar kind of power is exercised by a Superior Court.⁹⁴

review powers) of a s. 96 court so long as this does not also involve the wholesale *transfer* of those powers to a provincially-appointed body. Laskin C.J.C. delivered a separate majority opinion (Spence, Dickson, and Estey JJ. concurring). In his view, the flaw lies in the attempt to constitute the tribunal "as an appeal agency which ... is primarily concerned with questions of law": *ibid.*, 166. The fault thus seems to lie in constituting an appellate tribunal as a replacement for a s. 96 court. See also Pépin, *Chroniques régulières — Droit administratif* (1978) 38 R. du B. 818; Duplé, *Le Contrôle de la légalité: une compétence exclusive des cours supérieures* (1978) 19 C. de D. 1069.

Nowhere does the Supreme Court indicate that under no circumstances may a province validly set up a system under which one administrative tribunal reviews another. The B.C. Labour Relations Board differs from the Quebec Transport Tribunal insofar as the Board exercises primary jurisdiction in an area (strikes and picketing) intimately related to the subject matter adjudicated in grievance arbitration. Consequently, review of arbitrators in matters of interpretation of labour legislation rests in a different institutional setting from that existing in *Farrah*. However, Board review for denial of fair hearing might fall afoul of the *Farrah* holding, as it would seem that this sort of review falls into the head of "supervising and reforming powers" exercised by superior courts in 1867 and still exercised today in many jurisdictions in Canada.

⁹² (1975) 76 C.L.L.C. 14,221 (S.C.C.).

⁹³ *Ibid.*, 14,225.

⁹⁴ Carter, *The Expansion of Labour Board Remedies: A New Approach to Industrial Conflict* (1976), 15.

The argument favouring the validity of the Labour Relations Board's review jurisdiction holds that this jurisdiction is an integral part of the Board's labour relations function.⁹⁵ Review for inconsistency has an obvious labour relations component. Review for denial of fair hearing is not so easily supported, since the labour relations justification for removing this power from the courts is less apparent. In any event, the members of the British Columbia industrial relations community seem satisfied with the Legislature's judgment that the Board is the proper review institution; to date there has been no challenge to the validity of section 108.⁹⁶

IV. The review partnership

When two separate and partially competing jurisdictions exist in one state a conflict between them is sooner or later inevitable.⁹⁷

Less conflict than one might have expected has emerged under the amended *Labour Code*. Both the Court of Appeal and the Labour Relations Board have shown considerable restraint in exercising their review authority over arbitration boards. Neither body has imposed itself unduly on the private participatory institution of arbitration. Consistent with the view that arbitration is an element of industrial self-government, the judiciary and the Board have refrained from "re-arbitrating" an arbitration issue; arbitration awards are vacated only when the provisions of the *Labour Code* clearly so demand. Sections 108 and 109 have been restrictively interpreted by both bodies, and the scope of and grounds for review have remained quite narrow.

A. *The Court of Appeal*

The leading judicial decision on the purpose and scope of the Court of Appeal's review jurisdiction is *A.I.M. Steel*.⁹⁸ Chief Justice Farris there decided that the Court had no jurisdiction to review an award if it was based upon the interpretation of the particular collective agreement.⁹⁹ In reaching this conclusion, his Lordship

⁹⁵ Informal conversations with members of the B.C. Labour Relations Board leads the writer to believe that this argument would be used should a constitutional challenge to the Board's authority to review arbitrators be launched.

⁹⁶ The issue of the constitutional validity of s. 108 was raised not by the parties but by Taggart J. in *Re A.I.M. Steel Ltd & United Steelworkers of America, Local 3495*, unreported, April 9, 1976, B.C.C.A., 6.

⁹⁷ Holdsworth, *A History of English Law* 3d ed. (1922), vol. 1, 459.

⁹⁸ *Supra*, note 96, per Farris C.J.

⁹⁹ *Ibid.*, 34.

rejected the idea that interpretation of a collective agreement is a matter or issue of general law insofar as it involves the well-known canons of construction.¹⁰⁰ The learned Chief Justice pointed out that section 92(3) of the *Labour Code* specifically provides that an arbitrator is not bound by the strict legal interpretation of the issue in dispute. The Legislature could not have intended that the arbitrator's application of canons of construction be subject to review by the Court as part of the general law, since the arbitrator is "expressly instructed not to consider himself bound" by these rules.¹⁰¹ In an important *obiter*, Farris C.J. expressed the opinion that the common law of individual contracts was not included in the phrase "general law" in section 109.¹⁰² Citing *McGavin Toastmaster Ltd v. Ainscough*¹⁰³ as authority, Chief Justice Farris accepted the proposition that the common law of master and servant was no longer relevant to employer-employee relations governed by a collective agreement.¹⁰⁴

In a concurring judgment in *A.I.M. Steel*, Mr Justice Taggart rejected the view that the phrase "general law" in section 109 provides the Court with a virtually unfettered scope of review.¹⁰⁵ The appellant had argued that the phrase "general law" should be given a broad interpretation, since (unlike the situation under the earlier provisions) the Court of Appeal's review jurisdiction was no longer specifically limited to grounds of error of law affecting jurisdiction, misbehaviour, or denial of natural justice. Mr Justice Taggart refused to accept this interpretation of section 109, noting that it is "inconsistent with the tenor of the Labour Code as it stood in 1973 and is certainly inconsistent with the Code in its present form".¹⁰⁶ His Lordship was of the view that the effect of the 1975 amendments was to "further restrict the jurisdiction of this court to review arbitration awards."¹⁰⁷

In sum, the Court of Appeal rejected the view that judicial review was available under section 109 on the bases of error in interpretation of the language of the collective agreement, misapplication of the rules of construction, or any of the other grounds

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, 4.

¹⁰² *Ibid.*

¹⁰³ (1975) 54 D.L.R. (3d) 1 (S.C.C.).

¹⁰⁴ *A.I.M. Steel*, *supra*, note 96, 4.

¹⁰⁵ *Ibid.*, *per* Taggart J., 5.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 6.

in the *Arbitration Act*¹⁰⁸ under which British Columbia courts had traditionally reviewed arbitrators. Instead the Court upheld a limited interpretation of the meaning of "general law" in section 109, and emphasized that the effect of section 92(3) was to usher in a new era of industrial relations jurisprudence unhampered by legal doctrines transposed from other areas of general contract law.¹⁰⁹ The status and integrity of grievance arbitration were considerably advanced by the Court's restrained judgment in this case.

B. *The Labour Relations Board*

The language used in section 108 of the *Labour Code* is capable of a broad interpretation. The task of defining "fair hearing" and "inconsistent with the principles expressed or implied" in labour legislation was given to the Labour Relations Board with no real guidance in the *Labour Code* as to how these phrases should be interpreted. In assessing the Board's jurisprudence in this area, it is fair to say that, as has the Court of Appeal, the Board has taken a restrictive view of the scope of its review jurisdiction.

In the *Simon Fraser University* case,¹¹⁰ the Board rejected the view that the Legislature intended to create a full-fledged avenue of appeal from arbitration decisions. The Board decided that full scale review under section 108 would be inconsistent with the concept of arbitration as a relatively quick, inexpensive and informal means of resolving contested grievances.¹¹¹ Moreover, the Board's engaging in unlimited second guessing of arbitral decisions would detract from the private, self-governmental character of the arbitration process.¹¹² The Board indicated that so long as the arbitrator's decision was based on a construction of the language of the collective agreement it would not reverse this decision even if it found the particular construction to be somewhat "farfetched".¹¹³ The reason for this restraint on the Board's part is reflected in the following observation:

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns con-

¹⁰⁸ R.S.B.C. 1960, c. 14.

¹⁰⁹ *Supra*, note 96, *per* Taggart J., 5.

¹¹⁰ *Supra*, note 14.

¹¹¹ *Ibid.*, 60.

¹¹² *Ibid.*

¹¹³ *Ibid.*, 61-62.

struction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.¹¹⁴

In general, the Board appears to have taken the view that section 108, which gives the Board basic responsibility in directly interpreting the *Labour Code*, also gives it the task of ensuring that arbitrators adhere to the principles of the *Labour Code* in a coherent way. However, the Board has indicated that it will stay within this strictly limited mandate:

The Board will not assume any more supervision or [*sic*] arbitration proceedings or awards flowing therefrom than was clearly intended by s. 108 of the Code . . . [I]t is also essential that the Board avoid creating an atmosphere which will unduly inhibit the labour arbitrator. The intent and purpose of Part IV [*sic*] of the Code would be defeated if arbitrators were constantly "looking over their shoulders" at a second guessing Board.¹¹⁵

Recent experience indicates that the Board is practising what it preaches; the statutory jurisdiction to review arbitrators has been narrowly construed.¹¹⁶ For example, the Board has refused to substitute its views for an arbitrator's findings of fact; lacking access to the evidence, the witnesses, and the transcript of the arbitration proceedings, it cannot assume that its view of the facts would be more accurate than that of the arbitrator:

We do not interpret the limited supervisory role afforded to this Board under s. 108 as entitling us to find that alleged erroneous findings of fact by an arbitrator may render its award "inconsistent with the principles expressed or implied" in the *Labour Code*.¹¹⁷

The recent decision of the Board in *Andres Wines*¹¹⁸ contains the clearest statement of the limited scope of review available under section 108. In *Andres Wines*, the employer applied for review under section 108 on the basis that the arbitration board had violated "the principles expressed or implied" in the *Labour Code* by misconstruing and misapplying arbitral jurisprudence on the issue of benefit entitlement during a layoff. No provision in the *Labour Code* addresses itself to the application of contract benefits to laid-off employees. The solution to the problem facing the arbitrator

¹¹⁴ *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra*, note 2, 599; cited in the *Simon Fraser* case, *ibid.*, 62 [emphasis added].

¹¹⁵ *Lornex Mining Corp. & United Steelworkers of America, Local 7619* [1977] 1 Can. L.R.B.R. 377, 380 (B.C.L.R.B.).

¹¹⁶ See *infra*, text accompanying notes 117-122.

¹¹⁷ *Wm Scott & Co. & Can. Food! & Allied Workers Union, Local P-162* [1977] 1 Can. L.R.B.R. 1, 6-7 (B.C.L.R.B.).

¹¹⁸ *Andres Wines (B.C.) Ltd & Can. Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local 300* [1978] 2 Can. L.R.B.R. 251 (B.C.L.R.B.).

in *Andres Wines* lay in the "common law of the collective agreement" as expounded in the existing arbitral jurisprudence. This jurisprudence does not operate as a binding precedent, but rather influences through the persuasive force of its analysis.¹¹⁹ The arbitrator's task is to use arbitral jurisprudence as one of several interpretive tools in construing the language of the collective agreement in question.¹²⁰ The Board in *Andres Wines* adopted this conception¹²¹ and concluded that section 108(1) was not intended to confer any special authority on the Board to prescribe those contract principles which must be followed by arbitrators:

The Board does have a vehicle for influencing the course of arbitral jurisprudence in the Province, through its section 96 jurisdiction (as is exemplified by decisions such as *Penticton and District Retirement Service*, [1977] 2 Canadian LRBR, and *Cominco Ltd.*, B.C.L.R.B. No. 14/77). But the halting progress made with the peculiar problem raised in this case, in over twenty years of reported arbitration decisions, demonstrates how unfortunate it would be if that process could be frozen by a binding Labour Board decision rendered in the early stages.¹²²

The Board has thus taken the position that the scope of arbitral review under section 108 does not include a review for arbitrator error in the interpretation or application of arbitral jurisprudence. This position is consistent with the Board's standing on arbitrator error of fact and of collective agreement construction.

The Board has, however, made it clear that it will reverse an arbitrator when it finds that his decision is inconsistent with the principles of the specialized labour statutes referred to in section 108.¹²³ The concept of arbitration as a feature of self-government is subordinate to the Legislature's intention that the principles of its labour relations legislation be binding on the parties. The Labour Relations Board has the task of overseeing compliance with these statutes in the arbitration process. Section 108 is the vehicle by which "a coherent and consistent implementation of the Legislature's policies would . . . be achieved, whatever the forum in which employment disputes were initially aired".¹²⁴

Section 92(3), which describes the arbitrator's mandate, is heavily relied on by the Board in its review of awards for inconsis-

¹¹⁹ *Consumers Glass Co. Ltd & United Glass & Ceramic Workers of America, Local 257* [1977] 1 Can. L.R.B.R. 234, 236 (B.C.L.R.B.).

¹²⁰ See *supra*, note 118, 254.

¹²¹ *Ibid.*

¹²² *Ibid.*, 262.

¹²³ See *infra*, text accompanying notes 128-134.

¹²⁴ *Andres Wines*, *supra*, note 118, 263.

tency with statutory principles.¹²⁵ The Board has indicated that it will give an arbitrator's award a "sympathetic reading" based on the premise that

arbitrators ... were aware of the implication of the issues raised before them and did in fact reach these conclusions which are logically implied by their ultimate ruling The Board should not analyze the award from a purely external point of view ... which requires that each relevant issue clearly be adverted to and covered on the face of the award or the ultimate decision will be found invalid.¹²⁶

Thus the Board will not assume, from their absence from his report, that the arbitrator must have failed to consider certain evidence, arguments of counsel, or provisions in the collective agreement, and in so doing, must have denied the parties a fair hearing.¹²⁷ However, the Board will not hesitate to vacate an award if it is satisfied that the arbitrator did violate the *Labour Code's* directives. In the *University of British Columbia* case,¹²⁸ the arbitrator, thinking himself bound by the common law approach to parole evidence in the interpretation of written contracts, refused to consider parole evidence of negotiation history in interpreting a collective agreement. The Board decided that this perspective was not attuned to the realities of the collective bargaining process, and vacated the award. It held that the arbitrator must listen to extrinsic evidence, if it is presented as relevant to the proper interpretation of a collective agreement term, and then decide whether the evidence is helpful:

Section 92(3) of the Code directs the arbitrator to have regard to the "real substance" of the issues and the "respective merit ... under the terms of the collective agreement". The parties do not draft their formal contract as a purely literary exercise. They use this instrument to express the real-life bargain arrived at in their negotiations. When a dispute arises later on, the arbitrator will reach the true substantive merits of the parties' positions under their agreement only if his interpretation is in accord with their expectations when they reached that agreement. Accordingly, in any case in which there is a bona fide doubt about the proper meaning of the language in the agreement — and the experience of arbitrators is that such cases are quite common — arbitrators must have available to them a broad range of evidence about the meaning which was mutually intended by the negotiators. In our judgment, it is not consistent with s. 92 of the Code for arbitrators to be prevented by

¹²⁵ See, e.g., *U.B.C. & C.U.P.E., Local 116* [1977] 1 Can. L.R.B.R. 13 (B.C. L.R.B.).

¹²⁶ *Western Mines Ltd & United Steelworkers of America, Local 954* [1977] 1 Can. L.R.B.R. 52, 56 (B.C.L.R.B.).

¹²⁷ *Ibid.*

¹²⁸ *U.B.C. & C.U.P.E., supra*, note 125.

artificial legal blinkers from looking at material which in real-life is clearly relevant to an accurate reading of disputed contract language.¹²⁹

In the *Wm Scott* case,¹³⁰ the Board was called upon to describe the purpose and effect of section 98(d) of the *Labour Code* which gives an arbitrator the power to substitute a lesser penalty if he finds that excessive disciplinary action was taken. The Board held that the arbitrator has a statutory duty to probe beneath the surface of the immediate events precipitating the disciplinary action and reach a broad judgment on the merits of the particular case.¹³¹ Even serious employee misconduct, the Board decided, does not *automatically* constitute legal cause for discharge.¹³² In the second *Simon Fraser University* case,¹³³ the arbitrator decided that he was constrained by a provision of the collective agreement from substituting what he thought was an appropriate penalty in a discharge case. The award was vacated by the Board as inconsistent with the specific authority to substitute provided by section 98(e). In the Board's words:

[T]he significance of the new s. 98 of the Code is that British Columbia arbitrators now have a *remedial* authority which goes beyond what the parties have happened to confer under the arbitration clause in their contract. Labour arbitrators in B.C. now have an inherent statutory authority to adjudicate disputes within the framework of the substantive provisions of the collective agreement ...¹³⁴

[T]he intention of the legislature is clear that the arbitrator derives his remedial authority from the statute and cannot be prevented from exercising it by the terms of a particular collective agreement.¹³⁵

The Board has construed its review authority as embracing the setting of procedural guidelines. The *Labour Code* amendments have emancipated arbitrators from the rigid procedural practices used in the ordinary courts and in private commercial arbitration; section 92(3) allows for the modification of these procedural doctrines to suit the needs of modern labour arbitration. A procedure under the *Arbitration Act*¹³⁶ — the posing of abstract questions to the arbitrator which would define the scope of his jurisdiction — was

¹²⁹ *Ibid.*, 17-18.

¹³⁰ *Supra*, note 117.

¹³¹ *Ibid.*, 6.

¹³² *Ibid.*

¹³³ *Simon Fraser Univ. & Ass'n of Univ. & College Employees, Local No. 2* [1978] 1 Can. L.R.B.R. 263 (B.C.L.R.B.).

¹³⁴ *Ibid.*, 268, citing from its previous decision in *Vernon Fruit Union, supra*, note 36, 26 [emphasis in original].

¹³⁵ *Ibid.*, 269 [emphasis added].

¹³⁶ R.S.B.C. 1960, c. 14.

one practice which the Board found wanting.¹³⁷ In the first *Simon Fraser* case, the Board decided that this practice might artificially constrain the arbitrator's perception of the true substance of the grievance and thus be inconsistent with the arbitrator's mandate:¹³⁸

In practice, many parties still do attempt to frame the issues in the form of a question and present such a question, either as a joint submission or as their own version of the dispute, to the arbitrator. That is not only understandable but in many instances is of assistance to the arbitrator. It may let him know in general terms the nature of the case he is about to hear. But any such "questions" notwithstanding that they may be jointly worded, are not "submissions" as they used to be when labour arbitrations were governed by the Arbitration Act. They do not define the boundaries of the arbitrator's jurisdiction. The labour arbitrator's function is no longer simply to "answer the question" as it might be framed during discussions at the beginning of the hearing, not infrequently on the spur of the moment. Rather, in accordance with the Code he is to go to the heart of the matter as disclosed by the facts and the collective agreement. He is not simply to answer "the" question (if one has been posed); rather, he is to answer "the real" question.¹³⁹

The Board has also had considerable experience in reviewing arbitrators for contravention of section 108(1)(a) — denial of fair hearing.¹⁴⁰ Although arbitrators have been freed by the amendments from slavish adherence to common law doctrines, they may not use this freedom to contravene the requirement of a fair hearing. In *Board of School Trustees (Nanaimo)*,¹⁴¹ the Board noted that the relative immunization of arbitration awards from substantive review should be complemented by the strict interpretation of the fair hearing requirements of section 108:

A policy in favour of limited arbitral review of "issue determination" requires as its corollary the provision to the parties of a full opportunity to present their case and to meet the case of the other side. It is important for arbitration boards to recognize that their obligation to grant a full and fair hearing can be frustrated rather than advanced by a failure to critically evaluate the types of evidence it may receive under the broad provisions of section 101(a) of the Code.¹⁴²

The Board made it clear that hearsay evidence was admissible under the *Labour Code* and that the common law distrust of the material went only to the weight that should be placed on this type

¹³⁷ *Simon Fraser* [I], *supra*, note 14, 62.

¹³⁸ *Ibid.*, 63.

¹³⁹ *Lornex Mining Corp.*, *supra*, note 115, 381.

¹⁴⁰ See *Board of School Trustees (Nanaimo) & C.U.P.E., Local 606* [1977]

1 Can. L.B.R.B. 39 (B.C.L.R.B.).

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, 42-43.

of evidence.¹⁴³ At the same time, arbitrators are under an obligation to follow certain principles in using such evidence — principles formulated in order to allow the other side a fair hearing:

[A]n arbitration board cannot accept hearsay evidence over sworn direct testimony unless it has been corroborated by other evidence. As well, when an arbitration board allows hearsay evidence on a crucial issue, that evidence should be given no weight unless it is corroborated by other direct sworn testimony. In the Panel's view this approach does not offend the Legislature's broad mandate of section 93(2) of the Labour Code to "have regard to the real substance of the matters in dispute". Indeed the failure of the arbitration board in this case to observe either of those rules ensured that "the respective merit of the position of the parties" was not considered.¹⁴⁴

V. Summary

When a losing party asks the Court of Appeal or the Labour Relations Board to review an award, it is asking that the conclusiveness which is at the heart of the arbitration process be withheld, despite the fact that parties have contracted, and the Legislature has required, that awards be final and binding. The party who resists adherence to the award is therefore seeking to be relieved of its bargain. Whether the review body upholds or vacates the award, an expedient resolution of the dispute is lost. Continued resistance to theoretically conclusive awards and repeated applications for review can only decrease the esteem parties hold for their private adjudicative forum. Lacking confidence in their own mechanism for peaceful dispute resolution, parties may backslide into work stoppages. Thus, to maintain the finality of the arbitration process is of great importance.

Certain risks are inherent in a non-interventionist policy of arbitral review. Some "surprising" awards may be published; some rough justice dispensed; "[b]ut those risks were considered by the legislature as a reasonable price to pay in the effort to secure the larger benefits to be derived from the private and presently less legalistic system of grievance arbitration".¹⁴⁵ Nor are the parties left completely without recourse if they are unhappy with an arbitration award. If they find the arbitrator's interpretation of their contract to be unpalatable, they may remedy the situation by having the particular language rewritten in the upcoming contract negotiations.

¹⁴³ *Ibid.*, 44.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Lornex Mining Corp.*, *supra*, note 115, 380.

The Labour Relations Board has assumed the major share of arbitral review responsibility, the Court of Appeal's role having been reduced to reviewing arbitral interpretations of non-labour statutes. The Board's review authority is limited to cases of denial of fair hearing or rulings inconsistent with the principles of labour legislation. Collateral issue, error of law affecting jurisdiction and error of law on the face of the record no longer constitute grounds for arbitral review in British Columbia. The law of the administration of the collective agreement now rests on a firm statutory base. The *Labour Code* recognizes the essential character of the collective agreement as a system of industrial self-government. The mechanism by which the rules of this system are administered retains this self-governmental flavour. Arbitrators are freed from unnecessary common law constraints, given a broad mandate, afforded a range of remedial tools, and protected from overzealous review. This scheme has helped to enhance both the integrity and the efficiency of the arbitration process.

The Board has had considerable influence on arbitration, both by way of its interpretation of the *Labour Code* provisions under section 108 and in its capacity as an arbitration board under section 96. The Board's interpretations of the arbitration provisions of the *Labour Code* are binding on arbitrators and parties in British Columbia. The Board has also attempted to sort out difficult problems of the common law of the collective agreement when such opportunities have presented themselves. While not binding, decisions on these matters have had a considerable educative effect on British Columbia arbitrators; their compelling reasoning and legal craftsmanship provide new standards of skill which arbitrators now strive to emulate. Although the long range effects of the Legislature's attempt to provide a comprehensive labour relations code are still unknown, arbitrators and other members of the British Columbia industrial relations community are convinced of its ultimate success.
