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GRIEVANCE ARBITRATION
AND JUDICIAL REVIEW
IN NORTH AMERICA

GEORGE W. ADAMS*

The Nature of Grievance Arbitration

Introduction

Before plunging into the analysis of any phenomenon brought about by complex human interaction it is helpful to portray an overview of the system in which it has developed.

An industrial relations system is a concept derived from the interaction of managers and their organizations, workers and their organizations and finally governmental agencies. It is an analytical subsystem of an industrial society on the same plane as an economic system can be considered a subsystem of an industrial society. Not only are they equivalent as subsystems but their analytic purposes are identical. An industrial relations system is therefore an abstraction developed in order to highlight the relationships of the participants in a work place embraced by an industrial society. The interaction of the participants results in the formulation of a complex of rules, the character and content of which, are a function of the various important contexts in which the system operates. The system might be the nation, an industry or a small firm and the contexts within which each operate are: 1) the technical context, 2) the market or budgetary contexts and, 3) the power relations and statuses of the actors. They are obviously inter-related and "are bound together by an ideology of understanding shared by all". 2

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2 Id. at 16. The entire introduction relies heavily on chapters 1-4 in this text.
Arbitration is an institution in such an industrial relations system, having been fostered by the interaction of the parties as determined by the contexts. It is important to realize that it is only one of many mechanisms existing in the North American unionized industrial relations system and it is this system or rather its many subsystems which is the subject matter of this paper. The contexts in which arbitration operates determines its capabilities to a large extent. However in a discussion solely related to this institution it is possible, indeed probable, to exaggerate its importance and capabilities. This is the pitfall I want to avoid.

Grievance arbitration is a dispute settling mechanism with a peculiar structure and capacity for accommodating particular conflicts related to the interpretation and enforcement of the collective agreement. It does not stand in isolation as the only machinery existing to entertain differences of opinion and outlook. Collective bargaining and grievance administration are dispute settling mechanisms with distinctly different capabilities and structures. It is important to grasp the essential function of each mechanism, the circumstances in which each does this function best, as well as the institutional limitations and interdependence of all such mechanisms. A functional analysis allows for an informed allocation of responsibilities as well as contributing to an understanding of particular problems in the world of arbitrators.

The contexts in which the industrial relations system functions are critical to an examination of the parameters of grievance arbitration. The technical context, if it happens to be a complex one, may spawn a multiplicity of rules and norms to solve the problems encountered. These rules may become codified in a collective agreement. These are the rules that grievance arbitration is intended to administer; yet the character and content will be initially fixed by the technological environment and subject to its change. Technical conditions as well as budgetary and market constraints determine the size of the system which in turn affects the extent and content of the rules. Complex work assignment, promotion, transfer, and compensation rules are therefore subject to these contexts. The technical context also determines the strategic importance of a job and in turn the bargaining power of the occupant.

The market context (product market) is dependent on the number of competitors, ease of entry into the market, standardization of the product, availability of substitute products and sources of supply as well as postponability of demand, to mention a few determinants. The freedom or lack of freedom created by competition will affect the content and extent of the rules in a collective agreement. The existence and content of compensation rules, and subcontracting limitations are examples of this influence.

Labour market conditions such as the ratio of labour costs to total costs underlie the concern of management with labour costs and in turn affect the rules which govern job performance.

In short, the technological and market contexts determine the size, strength and problems of the parties. To a very large extent, grievance arbitration is presented with a given environment. This perspective suggests that arbitrators can have little influence on the occurrence of conflict created
by the contexts. Solutions to such problems revolve around altering the contexts or softening their impact on the parties. Arbitration is institutionally unsuited to perform either task. Negotiation and governmental manpower programs are more effective devices.  

Similarly the power relations of the actors and their status' in the industrial society will determine the existence and content of various rules. These rules will have a real impact on the parties' abilities to deal with problems. Governmental perception of the industrial sector has resulted in legislation which controls and facilitates the interaction of workers and management. North American government has legitimized and promoted collective bargaining through legislation that has had a beneficial impact on employee bargaining power in many sectors of the economy.

The relationship of the judiciary to the industrial relations system has contributed to the framework of rules within which the parties, including the arbitrator, must operate. To take an arbitration award to the courts for enforcement necessarily submits the institution to the supervisory power of the superior tribunal. The judicial perception of arbitral responsibility in an industrial relations setting will be determinative of the official form of that institution.

**Grievance Arbitration**

To-day grievance arbitration is the product of collective agreements and legislation. It is intended to settle the disputes that arise during the term of such agreements. The agreement may provide for arbitration to deal with all disputes that may arise during its term or as is more normal the case, for those disputes relating to the interpretation, application or administration of the agreement during its term. Grievance arbitration is therefore to be contrasted with interest dispute arbitration exemplified by a compulsory or voluntary arbitration of a wage negotiation dispute. Grievance arbitration as opposed to arbitration *per se* is a relatively recent phenomenon in the industrial relations systems of both Canada and the United States. Arbitration

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3 I firmly believe that arbitrators must be cognizant of the existence and the implication of these contextual constraints. Other institutions, internal and external to the system, are more appropriately designed to deal with many problems that periodically face arbitrators and promote in them feelings of despair, indirection or the urge to forge in new directions. For an excellent analysis of the development and structure of the "internal labor market" within which arbitration operates see, Doeringer and Piore, *Internal Labor Markets and Manpower Analysis* (1970).

4 Yet in Canada the statutory requirement of an absolute no strike clause in every collective agreement has created arbitral problems when the arbitration clause is not co-extensive. This problem although a product of bargaining rather than legislation, exists in the United States as well, making the continuing duty to bargain somewhat illusory.

5 The fundamental distinction is the existence of a collective agreement dealing with and creating standards in relation to particular subjects. When a dispute arises with regard to the subject matter, these standards are interpreted and applied to authoritatively settle the issue. Such standards do not exist in interest dispute adjudication and intractable problems evolve due to their absence. However it must be recognized that if the parties consent to the arbitration of all disputes and the collective agreement is not totally comprehensive, an arbitrator may be left without standards for particular subject matter. The problems of interest dispute arbitration are then present.
per se pre-dates grievance arbitration by centuries, specifically in the area of commercial dealings. Its apparent popularity stemmed from a sense of inadequacy of the common law rules regulating mercantile transactions. The development of grievance arbitration in the twentieth century may well have been a product of a similar impulse in that the courts had refused to have anything to do with collective agreements. In many states of the United States and in Canada the collective agreement was initially not an enforceable document in a court of law. The only way to enforce it was by economic conflict and this proved extremely impracticable from both an employee and employer point of view. Hence in the anthracite coal mining industry and in the hosiery industry grievance arbitration systems evolved to deal with disputes arising out of the day to day administration of the collective agreement. However the great impetus for the acceptability, workability and legitimacy of grievance arbitration did not arrive until after the War Labour Boards of both Canada and the United States required that grievance disputes be settled without a stoppage of work.

Prior to and even after the legislative imprimatur of collective bargaining physical violence was not uncommon. The legislation required management to bargain with a collective yet attitudes remained unchanged. Even today some bargaining is only grudgingly undertaken and accompanied by hostility and mistrust. But generally, as unions became more experienced in "table" strategy and management became conditioned to their presence, collective agreements became more complex and sophisticated. From skeletal agreements dealing solely with compensation, the collective agreement today is reminiscent of sections extracted from tax manuals and just as intricate in operation. The development of this institution to a stage where it is capable of accomplishing the tasks for which negotiation is appropriate has had a concomitant impact on grievance arbitration. It might well be argued that in the early development of the industrial relations systems we now know, grievance arbitration

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8 Fleming, supra note 6.


In Canada the compulsatory nature of grievance arbitration was maintained by the virtual duplication of P.C. 1003 in provincial labour relations legislation. In the United States it became and remains strictly voluntary.
had to undertake tasks for which it was ill-suited. Skeletal agreements grudgingly made could scarcely be documents lending themselves to a meaningful yet restrained elaboration of provisions. Arbitrators were forced into interest dispute arbitrations during these early days. But today despite the maturity of collective bargaining and industrial relations sophistication, a debate lingers on the proper role of grievance arbitrators. Few participants in the dialogue appear cognizant of the institutional limitations of arbitration or the capabilities of other dispute resolution processes.

The Scope and Limitation of the Arbitrator's Role

The debate is polarized around two central themes of grievance arbitration. One group advocates that the arbitrator must conduct himself as a judge. However there is an important ambiguity in their perception of the judicial function. Mechanistic or positivistic literalism has been adopted by one faction of this central theme emphasizing the need for predictability, reliance and reckonability of the written word. The other related faction has emphasized a need for a purposive approach to the collective agreement and a felt need to look beneath the surface of the words in order to find the parties' "intention". This latter faction is not opposed to elaborating these purposes or principles in order to effect the distilled intentions of the parties to the contract.

The other central theme visualizes the arbitrator as a labour relations "physician"; but again there is ambiguity in the precise definition of his role.

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10 This idea is developed in Killingsworth and Wallen, "Constraint and Variety in Arbitration Systems", from Labour Arbitration: Perspectives and Problems (1964) at 56.


The following articles represent the writings, in addition to the above, upon which the models of this first section draw.

Some supporters of this notion feel the essence of the arbitrator's function lies in mediation. Long run labour relations goals are considered achievable only by compromise through continual negotiation. Others rallying under this banner feel that an industrial policy-maker's stance must be taken at a time when so much reliance is placed on arbitration and at a time when its public impact cannot be ignored.

These complex and somewhat interrelated notions can be synthesized into three theoretical models. It is admitted that each model is an artificially pure formulation. No one arbitrator could be exclusively identified with a single proposition. However the existence of mixed forms of arbitration does not subvert the efficacy of these models. It is only through an isolation of the particular forms of the arbitral process that one can detect basic institutional requirements. There is an inextricable relationship between the job we ask arbitration to do and the design of that framework within which the arbitrator must operate.

The advantages of arbitration are claimed by all three models. That is, each model emphasizes an inexpensive speedy remedy devised by an expert who has been appointed by the parties. The expense factor is generally less than the comparative service in a judicial setting, but this may vary depending on the nature of the dispute. Nevertheless, the fact that the union pursues the action and pays the bill creates benefits to an individual grievant not unlike a legal aid programme. Speed is the essential factor. Dispute resolution in a dynamic industrial context is required to give quick, definitive solutions. Informality contributes to a healthy attitude in dealing with the continual differences that will arise in symbiotic relationships. Hopefully it encourages a more relaxed and trusting atmosphere. At the very least a business like interest in the settlement of a particular dispute without the excessive dramatization of the civil and criminal public processes is present.

The acceptability of the arbitrator derives from his mutual appointment by the parties affected by his decision, quite unlike the imposition of public tribunals. This facilitates the selection of people who are familiar with and competent in an industrial relations system. Finally the decision-making in grievance arbitration permits the development and application of expertise. Each model differs as to the implications this expertise has for the forms and limits of the decision-making process. The adjudicative model would argue that to describe arbitrators as "experts" is not to suggest that they are industrial economists, psychologists or sociologists. The arbitrator is not an industrial consultant. Rather, he is an expert in the interpretation and application of the legal regime embodied within the notion of a collective agreement. He is familiar with the vocabulary used in collective agreements and their operational premises. He is also familiar with the legitimacy of possible reasoning sources and has a good grasp of what the parties except from him and the agreement. The advocates of adjudication assert that this

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16 Hays has questioned the impartiality of an arbitrator so appointed. Hays, Labor Arbitration: A Dissenting View (1966) 62.
form of expertise is demanded by the institutional structure of grievance arbitration. Something less or something more frustrates the efficient functioning of arbitration and impairs the utility of related institutions within the system.

The mediational and policy-making models of grievance arbitration are in fundamental opposition to such a limited interpretation of expertise.

The touchstone of the mediational model is mutual acceptability. It is a means of furthering the deified end of industrial peace. Only through mutual trust and understanding will conflict be eliminated and not merely postponed. Mediation envisages continuous collective bargaining rejecting the distinction between agreement negotiation and administration. Standing unwisely on "apparent" rights, negotiated at a time when the present problems were unforeseeable is harmful to industrial relations in the long run. This is not to deny that the collective agreement is a source of guidance for long run mutual objectives. It is rather to assert that unwise reliance on strict legal rights is lethal in any symbiotic relationship.

This model perceives the arbitrator as a conduit to facilitate meaningful communication. He is to dig up the real industrial relations facts and persuade either party to lose gracefully or restrain from unwise reliance on a contract right. It is a pragmatic process. However the model has one significant factor pure mediation lacks. This is the authority to decide which flows from arbitration as the replacement of the strike during the term of the agreement.

A few basic assumptions about the natures of legal reasoning and the collective agreement underpin this model. One assumption perceives legal reasoning based on enacted rules as a sterile mechanistic reliance on the written word of the contract. Such reliance and consequent development of precedent results in decisions that are oblivious to the industrial relations significance of the dispute. The second assumption focuses on the nature of

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16 This model is a product of the writings of Fuller, supra note 16; Shulman, supra note 7; Taylor, supra note 16 and Weller, supra note 16.

"By this view the arbitrator has a roving commission to straighten things out, the immediate controversy marking the occasion for, but not the limits of, his intervention. If the formal submission leaves fringes of dispute unsettled, he will gladly undertake to tidy them up. If the arguments at the hearing leave him in doubt as to the actual causes of the dispute, or as to what the parties really expect of him, he will not scruple to hold private consultations for his further enlightenment. If he senses the possibility of a settlement, he will not hesitate to step down from his role as arbitrator to assume that of mediator." Fuller, supra note 16 at p. 4.

"At any event, especially in new contract cases, they frequently agree upon the tripartite arbitration board with a majority vote required for a decision. Three-party bargaining is thus substituted for two-party bargaining and the 'outsider' has been brought in to act as a kind of mediator with a reserve power." (emphasis added) Taylor, supra note 16, at p. 794.

17 Taylor, supra note 12, p. 795.

18 These very assumptions will be examined and if done effectively, the legitimacy of this model will be destroyed. It appears that these assumptions are a product of judicial intervention which brought strict, literalistic interpretations with it. However there is no reason to accept such analysis as reflective of the potential of legal reasoning or to argue that arbitrators would proceed this way.
the agreement. The parties' relationship is a continuous and complex one
and it is impossible to embody in the agreement all of the understandings in
relation to the conditions of employment and management. To rely exclusively
on such a document is naive and unwise. The arbitrator must rove in a con-
tinuous hiatus inducing compromise, declaring settlements as awards thereby
avoiding internal union constituency problems and enacting decisions which
make industrial relations sense, given his familiarity with the parties and
their mutual trust in him. Arbitration is a voluntary process. Either party can
rid itself of the arbitrator and no enforcement mechanism should be re-
quired.

This model requires a peculiar institutional structure. The arbitrator is
vital or central to its makeup. He should be of a permanent chairman type
thereby facilitating complete knowledge of the parties and fostering mutual
trust. Secondly, the environment should have a minimal legal structure. This
will insure against unwise reliance on rights. Finally there must be an un-
differentiated authority between those people who negotiate the agreement and
those who administer its day to day operation. This will facilitate com-
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Certain problems arise from the structure of this model. Is the concept feasible? The parties have failed to agree at the lower reaches of the grievance
process. The mediator encourages a settlement by threatening to decide. Does a coerced agreement accomplish mutual and lasting acceptability?

Secondly, what is the impact of mediated grievances on interdependent insti-
tutions? If collective bargaining is perceived as a mechanism of social ordering,
will reliance on negotiated agreements be affected? The parties may cease to
regard collective bargaining as a meaningful exercise if reliance on the
agreement is frustrated. Responsibility in bargaining may be discouraged,
relying on the arbitrator as a supermanager.

Thirdly, contract administration

10 This notion dominates Judge Hays' perception of the process, prompting his

20 Shulman, supra note 11.

21 It is implicit in both Taylor's and Shulman's writings that this is the motivating
force or impetus of settlement. See Taylor, supra note 12; Shulman, supra note 11, 1923.

22 Carl Stevens has developed this "threat of decision" into a sophisticated arbi-
tration model which is designed to operate in 'interest dispute' areas. In such areas,
because there exists no standards for decision the arbitrator is pressured into splitting
the difference between the two parties' proposals in lieu of no other criterion for a just
result. The parties react to this by exaggerating their demands in an effort to achieve
a greater gain when the "split" is made. All "real" negotiating is absent because each
party feels the "split" will be a better package than he could obtain otherwise.

In 'normal' negotiating, settlement pressure or a 'contract zone' is generated by
one's bargaining power as reflected in one's potential ability to inflict the costs of
disagreement on the other party. The uncertainty apparent in the reciprocal perception
of each party's capacity generates both agreement and disagreement. Disagreement con-
tinues until some clarity in perception is achieved. These pressures are absent if arbi-
tration as opposed to economic conflict is the terminal point in private negotiation.
Stevens suggests that these pressures can be restored or simulated by 'either/or' arbi-
tration and by minimizing any certainty in the arbitration process. It should be under-
stood that this model has one purpose only; to make the parties settle prior to arbitra-
tion. See Stevens, Is Compulsory Arbitration Compatible with Bargaining? (1966), 5
Industrial Relations 38; See generally Stevens, Strategy and Collective Bargaining
Negotiations (1963); Brown, "Interest Arbitration", Task Force on Labour Relations,
Study No. 18 (1969), (Canada); and Schelling, The Strategy of Conflict (1960) 143.

28 Fuller, supra note 12, 39.
may be adversely affected. The parties may cease to make a conscious effort to settle the disputes prior to arbitral intervention. Will arbitration operate effectively under such pressure? Lastly, will the integrity of the arbitration suffer if mediating efforts fail and the arbitrator is forced to decide?

This policy making model is concerned with the public nature and responsibility of grievance arbitration. It is supported by a philosophy that emphasizes the public nature of the modern corporation and the industrial union. There is a felt need to be receptive to public goals rendering the private origin of corporations, unions and arbitration insufficient to justify a claim of absolute freedom. In Canada grievance arbitration is effectively compelled by statute and in the United States it is statutorily recommended

24 I am not arguing that mediation or conciliation is inappropriate per se. My position is that it is inappropriate for the arbitral institution to perform such a function. A separate mechanism might prove extremely functional, if it were incorporated into the contract administration machinery. Under present conditions it is likely that premature positions are taken creating intransigence notwithstanding the merit of the issue. Conciliation machinery might well facilitate communication in a facesaving way, eliminating the need or compulsion to go to arbitration.

25 This model is derived from Blumrosen, Public Policy Consideration in Labor Arbitration, supra note 12; E. Jones, Power and Prudence in Arbitration, supra note 6; Sumers, Labor Arbitration: A Private Process with a Public Function, supra note 12; Weiler, Two Models of Judicial Decision Making, supra note 12; Weiler, Labour Arbitration and Industrial Change, supra note 12.

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The decisions of the labor arbitrator, in the ancient tradition of his peers, (1) should conform to the clearly expressed intent of the parties to the agreement, but (2) should conform only so long as that intent remains with the bounds of generally deducible public policy, but (3) absent the guidance of the parties, and on occasion despite it, should reflect contemporary community attitudes of what is fair in procedure and equitable in result. Jones, supra note 6, 741.

26 The public nature of these institutions and concomitant responsibilities are exhaustively developed in A. A. Berle, Jr. and Gardener C. Means, The Modern Corporation (1932); Berle, The 20th Century Capitalist Revolution (1954); Galbraith, The New Industrial State (1967); Kariel, The Decline of American Pluralism (1960).


Manitoba, Labour Relations Act, R.S.M. 1970, c. L 10 as amended by S.M. 1970, c. 46; 1971, c. 60; 1971 c. 86, s.23.

New Brunswick, Labour Relations Act, R.S.N.B. 1952, c.124 as amended by S.N.B. 1953, c.21; 1956, c.43; 1959, c.56; 1960, c.45; 1961, c.52; 1966, c.73, s.18.

Newfoundland, Labour Relations Act, R.S.N. 1952, c.258 as amended by S.N. 1959, No. 1; 1960, No. 58; 1963, No. 82; 1966, No. 39; 1967, No. 12; 1968; No. 71, s.19.

Nova Scotia, Trade Union Act, R.S.N.S. 1967, c.311 as amended by S.N.S. 1968, c.59; 1969, c. 79; 1970, c. 5 1971, c.70, s. 19.


Quebec, Labour Code, R.S.Q. 1964, c. 141 as amended by 1965, c. 14; 1968, c. 19; 1968, c. 45; 1969, c. 40; s.88-90. (supra note 205)

Saskatchewan is the lone exception. Arbitration is not required nor is a no strike-no lock out clause mandatory as in all the other jurisdictions.

However, if arbitration is provided for in the collective agreement the provision must be implemented. The Trade Union Act, R.S.S. 1965, c.87 as amended by 1966, c. 83; 1968, c. 79; 1969, c. 66, s.23A, 23B.
to the parties. Arbitration is required as a primary source of relief for both parties where available. Once an award is rendered it is somewhat insulated from judicial review. The remedial authority of the arbitrator is pervasive. It embraces the ability to order specific performance of a contractual provision of employment as well as the ability to award substantial monetary damages. Awards rely on public mechanisms of enforcement backed by the sanctions of the state. Finally arbitration has expanded into areas of concurrent jurisdiction with the labour boards, suggesting that policies underlying the appropriate legislation must be fulfilled by the arbitral process.

This model concludes that in effect, grievance arbitration is a statutory tribunal. In Canada this is a drastic admission justifying the present penetrating judicial review. In the United States this notion is buttressed by the public deference accorded to privately initiated tribunals.

It is no longer adequate to gauge a decision by the degree of mutual acceptability engendered in the parties. The arbitrator must exercise restraint in the relying upon conceptual reasoning derived from the agreement and contract doctrine. The standard of a decision must be its functional relationship to what the arbitrator believes to be the appropriate goals of the industrial society. The agreement is not an illegitimate source of reasoning; but neither is it definitive. If it is inconsistent with public policy evidenced by a statute or by widely held community views it must give way. The materials for guiding the arbitrator must be unlimited.

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30 The second part of this paper is devoted to examining the extent of such deference.

In Canada either the labour legislation of the respective jurisdictions provide for enforcement - Alta., S. 78; Ont., S. 37; Que., s. 81, 89; Sask., 71(1), 23, 23A(c) or the arbitration legislation is reverted to.

33 Canada: John Inglis & Co. Ltd. (1952), C.L.L.C. 17,049 (O.L.R.B.)
United States: Carey v. Westinghouse, supra note 29; Jones, supra note 6, 763.
34 States Jones, supra note 6, 763: It simply is not a "proper conception of the arbitrator's function" to say that he draws his judicial life solely from the collective agreement, that he cannot be considered to possess greater powers than those expressly or by necessary implication conferred upon him by the parties in their collective agreement.
35 Jones, Id. 743. Jones has isolated at least five "communities" that will give direction to the arbitrator.
This model espouses a decision-making process that is essentially pragmatic while conscious of such values as the maintenance of production, the continued viability of collective bargaining and the responsibility to a wider political community. The key aspect of this model is that it will decide issues not reached by any meaning honestly attributed to the collective agreement. Managerial rights disputes are a paradigm illustration of the operation of this model. It is implicit in the reasoning of these decisions that the decision-makers are of the opinion that the legal system has delegated to them the power of making authoritative binding decisions in disputes which are of critical concern to the parties and to the industrial relations system as a whole. Furthermore any innovation that is unacceptable is thought to be only temporary in light of instantaneous impeachment. In any event a decision rendered with due regard to its industrial relations significance is better than no decision at all. The watch word of this model is discretion in the "strong sense". It must be exercised in the light of public policy and the industrial relations requirements. Like the mediator, the industrial policy-maker accepts the incomplete nature of the collective agreement and perceives legal reasoning as mere obfuscation of the unbridled discretion behind mechanistic doctrines that fail to deal with the needs of an industrial society.

Once again the disagreement centers on the institutional design of arbitration and the discussion parallels the debate pertaining to the limits of judicial action. Yet arbitral enactment must have a more compelling justification because of its patent private origin. Should one accept a potential public function of arbitration, how is the arbitrator to get the information and data necessary to make an informed choice in these areas? The problem lies in a limitation of tools. He hears only the parties to the specific dispute and in a dispute over an issue created by the subcontracting of work for example, this is inadequate. In such a case the arbitrator must recognize that if he is going to make an "authoritative value judgment" he must be responsive to all parties affected. He should consider the immediate disputants, the party to whom the work has been subcontracted and his employees as well as the conflicting public interests of employment security and continued economic production. Is this possible? Similarly in the area of a public policy embodied in a contrary statute, what information and tools will he need to evaluate its significance? There are other institutions that perform these functions more efficiently operating on a day to day basis in relation to such issues. Finally, one must have regard to the parties of the collective

86 In the Matter of Coca-Cola Bottling Co. of Boston (Arbitration Award 1949) in Cox and Bok, Cases and Materials on Labor Law (1969) 543 is a classic example of this approach.

37 Jones, supra note 6, 788.

88 Dworkin, The Model of Rules (1967), 35 U. of Chi. L. Rev. 14. In this article and in Dworkin, Judicial Discretion (1963), 60 J. of Phil. 624, two notions of discretion are developed in the light of the obligatory or permissive use of principles. The former can be considered "weak" while the latter is said to describe discretion in the "strong" sense. Essentially this model adopts this latter notion of discretion.

39 This form of analysis will be undertaken in the second part of the paper to arrive at a meaningful allocation of responsibility between the courts and arbitration. But, as we shall soon see, it applies with equal legitimacy in establishing the capacities and limitations of arbitration in relation to other institutions within the industrial system.
agreement. Have they really conferred a definitive power of decision in “any” dispute that arises? What weight does the policy of freedom to contract have in all of this? Little responsibility to deal with difficult issues is encouraged in the parties when the collective agreement is viewed in this light. The policy making model is based upon presuppositions that may be erroneous. The institutional design of arbitration may not be appropriate to effect such ambitious objectives and an attempt to do so may impede the effectiveness of both arbitration and other related institutions.

The essential feature of the adjudicative model is its reliance on the institutional structure of a decision-making process as a control on the substantive aims it can achieve. Arbitration is only one of many modes of social ordering and Professor Fuller has pointed out that the characteristic feature of any such mode lies in the manner by which the affected parties participate. Each mode derives its legitimacy and acceptability from the peculiar form in which affected parties participate in the decision-making process. These modes of social ordering designed to accommodate such participation malfunction when they undertake problems that impede such participation. A fortiori, these forms of participation must be preserved if the long-run viability and integrity of a particular institution is to be maintained. This entails restraint on the part of those controlling an institution. An arbitrator presented with a problem that cannot accommodate the effective participation of the parties through an adversary process, should defer to some other more appropriately designed institution. At the very least he should be conscious of the institutional costs incurred in dealing with the issue.

The adjudicative model of grievance arbitration conceives the presentation of proofs and reasoned argument to an impartial decision-maker who makes decisions on the basis of this presentation as the form of participation essential to the functioning of arbitration. The adversary process may be formal or informal; but its viability depends on maximizing the participation of the affected parties in the decision-making process. Furthermore, Professor Fuller points out that “It is important that an arbitrator not only respect the limits of his office in fact, but that he also appear to respect them.”


41 This discussion of adjudication is more a distillation of Professor Weiler's lucid writings on the area of adjudication than an original contribution by this writer. However, the following are other materials heavily relied upon. Fuller, The Morality of Law (1964); Fuller, The Anatomy of Law (1968); Fuller, The Forms and Limits of Adjudication (unpublished); Fuller, Collective Bargaining and the Arbitrator, [1963] Wis.L.Rev. 3; Hart and Sacks, The Legal Process (tent. ed. 1958); Mishkin and Morris, On Law in Courts (1965).

The essence of the judicial function lies not in the substance of the conclusion reached, but in the procedures by which that substance is guaranteed. One does not become a judge by acting intelligently and fairly, but by accepting procedural restraints designed to insure — so far as human nature permits — an impartial and informed outcome of the process of decision. Fuller, “Collective Bargaining and the Arbitrator” Id. p. 18.

42 Fuller, Forms and Limits of Adjudication, Id. p. 18.

43 Id. 44.
This assurance is developed by the rationality of the decision-making process. Claims of right are made by the parties on the basis of the pre-existing rules contained in the collective bargaining agreement. The arbitrator is required to apply these rules in a rational way in order to resolve the dispute submitted to him. His function is conceived as one of "discovering" the implication of these standards. Meaningful participation by affected parties requires the submission of a specific concrete dispute, an impartial decision-maker, an adversary process and a pre-existing system of mutually accepted standards to be utilized in the decision-making process.

To summarize the thesis of the adjudicatory model: the entire institutional structure of arbitration; its incidence, access to it, mode of participation in it, the basis for decision, the nature of the relief available in it, are all defined by and flow naturally from its function, which is to dispose of private disputes arising out of primary conduct by granting relief to parties on the basis of an evaluation of this conduct in the light of the legal standards established by this agreement.44

The Collective Agreement: Its Nature and Scope

The advocates of both the mediation and policy-making models do not deny the adjudicative structure of arbitration or the compelling nature of specific standards established by the agreement. They claim instead that the adjudicative model does not defeat or even meet the logic of their position. The error in strictly applying the adjudicatory model to grievance arbitration lies in the inadequacy of existing standards contained in a collective agreement. The presupposition of the adjudication model is the existence of a comprehensive regime of specific legal rules (or provisions of a contract) to be utilized by both the parties and the arbitrator. The nature of the collective bargaining process creates an agreement which is ill-suited to such a model. The antagonists assert that the collective agreement is inadequate as a sole source of directives.45 The skeletal or incomplete nature of the collective agreement is due to a number of factors which presumably make it so unique that traditional contractual doctrine is inapplicable. Furthermore, the use of traditional legal reasoning is characterized as anathema to effective industrial interaction. One unique fact is the large number of people regulated by such an agreement. The greater the number of people involved and the more complex the context in which they operate the more unlikely is the complete

44 See Paul Weiler's Two Models of Judicial Decision-Making (1968), 46 Can. B. Rev. 406; Legal Values and Judicial Decision-Making (1970), 48 Can. B. Rev. 1, for an analysis and justification of each constituent element of adjudication. Adjudication is suited to solving claims of right. Many problems do not lend themselves to the application of rules, principles or policies. These issues must be handled by other dispute resolution institutions such as negotiation or pure managerial discretion.

45 Chamberlain, Collective Bargaining and the Concept of the Contract (1948), 48 Colum. L. Rev. 829; Taylor, supra notes 11 and 12; Shulman, supra note 12, Jones, supra note 6, 742; See also supra note 7. Professor Cox in The Nature of the Collective Bargaining Agreement (1958), 57 Mich. L. Rev. 1; Reflections Upon Labour Arbitration, 72 Harv. L. Rev. 1482; also highlights the uniqueness of the collective bargaining agreement. However such peculiarities do not drive him away from an adjudicatory model of grievance arbitration. Rather he implores that an articulated and purposive approach be taken by arbitrators.
codification of their interaction. This incompleteness is compounded by the exigencies of the negotiating setting. "Eleventh hour" meetings are not conducive to the clear-headed and astute draftsmanship required. It is not even conducive to a thorough canvassing of all contingencies, given the wide range of conduct that is to be governed. The symbiotic relationship of the parties and the statutory obligation to bargain creates an atmosphere in which the consequences of disagreement speak disaster to either party. At times hard issues are often deliberately avoided or ignored while the contract must be written in language recognizable to the men in the shop. In the end you are left with, at worst, a totally incomplete document and at best, an industrial constitution. Classical contract doctrine is inapplicable to each, and legal reasoning is merely a charade to disguise an unfettered discretion in the unwritten area of the agreement. To restrict your focus to the mere "bones" of an agreement, given the general occurrence of a no-strike clause which is generally not co-extensive with the arbitration clause, is normally to decide for the employer. Legal reasoning is considered devoid of equity and consonant with an attitude of letting "the chips fall where they may".

This is why the mediator and the policy-maker take the position they do. Their perception of the agreement and legal reasoning leaves them at large. They therefore seek the comfort and assistance of guidelines or at least some rationale that will lessen the burden. The mediator seizes upon the acceptability of a decision to the respective parties as his guide. However the adoption of this standard conceals a "sleight of hand". This is the reliance upon the arbitrator's decision-making powers to "encourage" agreement. Is a coerced settlement free from its own criticism that an adjudicatory decision merely postpones conflict? Mediation may have a destructive impact on the very important and related institutions of collective bargaining and grievance administration. Coerced compromise does not allow for reliance on bargained provisions nor does it encourage creativity in the negotiation process. Private social ordering gives way to continual third party intervention. As well, mediation can be a slow drawn out affair. The wearing of two hats (mediator and arbitrator) impedes the efficiency of each office. The mediator whose pure function is to facilitate communication cannot achieve it with the residual power to decide to the prejudice of the party who is too candid. The arbitrator with the power to decide, takes a position in mediation which if unsuccessful becomes terribly difficult to shed in assuming the role of the impartial arbiter. The integrity or morality of arbitration thereby suffers.

The industrial policy maker supplies quite a different directive for guidance in the unwritten area of the collective agreement. His is the furtherance of industrial relation goals having regard to societal and party needs.

40 Chamberlain, Id. 834.
41 Id. 838.
42 Jones, supra note 6, 766.
43 Taylor, supra note 12, 794.
45 Taylor, supra note 12, 793.
46 Fuller, Collective Bargaining and the Arbitrator, supra note 12, 43. Professor Fuller characterizes such an existing dichotomy as parasitic, flourishing as does the prostitute who owes her fortune (or misfortune) to the virtuous woman.
As an expert in such matters he fashions a jurisprudence that will further such ends. His real claim of right is that the parties and society generally respect his judgment and defer to it. Is he right in this assumption? Do the parties expect him to impose value judgments upon them where they have failed to reach agreement? Is the arbitrator equipped to draw the territorial boundary between such matters as job security or economic productivity? The structure of arbitration is adversarial. Such a structure is not designed or suitable for ascertaining the necessary information to make such determinations.

However the advocates of adjudication are not content with solely discrediting these two models. They argue that an astute appreciation of both the collective agreement and legal reasoning allows for an efficient, comprehensive and predictive ordering quite within the institutional limitations of adjudication. Professor Fuller has said that there is nothing ineffably peculiar to the interpretation of a collective agreement. Expertise is surely required because the jargon of the agreement and the context in which it operates are foreign to the typical judge. Arbitration allows for a speedy and efficient briefing for any arbitrator who is deficient in some particular aspect of a dispute. Professor Summers has recently responded to the contention that the uniqueness of collective agreement renders traditional contractual doctrine inapplicable. He suggests that such factors as the number of people involved, incompleteness, compulsion to bargain and the symbiotic nature of the parties' relationship are not peculiar to collective agreements alone. Many kinds of contracts in the traditional sense, embody such features. Insurance contracts apply to many people, and almost all agreements are incomplete in some respect and many more so than a collective agreement. Exclusive dealerships reflect a compulsory bargaining relationship. In fact the symbiotic aspect of the collective agreement should facilitate mutual understanding rather than impede it. If the contract is an instrument of social ordering, the collective agreement might well be the paradigm of its effectiveness. However Professor Summers did not therefore conclude that the common law of contract should be utilized in the interpretation of collective agreements. Rather his thesis was that specific contractual doctrine was only applicable to the context in which it originated. Contract law had itself recognized a lack of transferability by qualifying whole areas of transactions and allowing a development of law applicable only to those areas (such as insurance).

The term 'contract' describes a family of relationships, but within the family are many genuses and the collective agreement is one genus in that family.

Certain principles of contract designed to accentuate and facilitate the aspect of mutuality in an agreement were applicable to any agreement and should be utilized to avoid diseconomies in a continual reconstruction of

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63 Id. 12.
65 Id. 537.
universal principles. Professor Cox adds that some contractual rules are helpful in providing the conceptual tools of analysis “even though the answers are based in the functional character of the agreement.” Therefore this suppletive law is to be utilized in a purposive way and where inapplicable or inconsistent with industrial relations goals it should be abandoned.

The adjudicative model as well rejects the necessity for the negotiation of specific contractual provisions intended to deal with specific fact situations. The interpretation of a contract, a collective agreement or a constitution is more than merely a syllogistic enterprise. It could be argued that the advocates of the other two models are positivists given their perception of the nature of rules or contract provisions. Words are necessarily ambiguous without regard to the context in which they are operative. They must be construed and interpreted in light of the negotiating history, the past practice of the parties and industrial relations common sense. The creation of rules, be it statutory or contractual, is a purposive activity and therefore underlain by principles and policies. Purpose should be paramount when an arbitrator construes, interprets and applies the standards and ‘shared values’ of the parties. The provisions of the agreement are generalized attempts to deal with industrial interaction and concomitant problems. The solutions are necessarily abstract and incomplete. No legislature or negotiating committee is omniscient. Provisions enacted are not to be read as theorems of Euclid but

60 Id. However full scale adoption would, he argues, result in a failure to deal with concrete problems and manifest itself in either/or solutions totally inappropriate for this context of application. (at 545).

Professor Cox has argued for a similar adaptation. Cox, Reflections Upon Grievance Arbitration supra note 45, 1489.

67 Cox, Id.

68 The essence of contractual interpretation is to construct an informed objective meaning. Rules such as parol evidence are being abandoned even in classical contract interpretation because of the manifest disservice to this goal, see Farnsworth, “Meaning” in the Law of Contracts (1967), 76 Yale L. J. 939.

60 Cox, Reflections Upon Labor Arbitration, supra note 45, 1493 and Chamberlain, supra note 55 as well as numerous other writers develop the constitutional analogy of self-government. And it is in this field of statutory interpretation that the most academic work has been undertaken as opposed to the conceptualizing of contractual interpretation. Professor Farnsworth (id.) noted this while Hart and Sacks, supra note 12 and Mishkin and Morris, On Law in Courts (1965) bear testament to the validity of such an assertion.

60 Rules are fairly concrete guides for decisions geared to narrow categories of behaviour and prescribing narrow patterns of conduct. Principles are vaguer signals which alert us to general considerations, that should be kept in mind in deciding disputes under rules. So we decide under rules but in the light of principles. Hughes, Rules, Policy and Decision-Making (1968), 77 Yale L.J. 411, 419. For this same development see also Hart and Sacks, supra note 12, 166; Mishkin and Morris, supra note 59, 239; Dworkin, The Model of Rules (1967), 35 U. of Chi. L. Rev. 14.

A classic application of the argument and its limitations can be found in Halback, Stare Decisis and Rules of Construction in Wills and Trusts (1964), 52 Calif. L. Rev. 921.
rather as underlain with purpose. It is the arbitrator's function to engage in a reasoned elaboration of these "standards" having regard to their purpose in the light of the concrete problems with which he is faced. Cohen has called this "filling in" function intelligent "legisputation". The concept of legal rules visualized by the mediation or policy-making models is far too narrow to explain the material existing in the legal system and utilized in legal reasoning. In hard cases lawyers have always resorted to other materials to present principles or policy. This material differs from rules only in the degree of direction it offers. Purpose, principle and policy (they are virtually interchangeable) should be resorted to and utilized consistently so that the parties can predict and rely upon their use in the adjudicative process. This will enable the parties to participate vicariously in the reasoning process perpetuating the rationality of the entire process. At the same time this will facilitate private social ordering in other interrelated institutions within the industrial relations system.

The position taken is quite obviously not a new one. It is one that cuts between the extremes of legal positivism and legal realism. But it functions well on a practical level as well as on a philosophical one. Purpose is derived by going through the same mental process the draftsman did, in the light of both the past practice of the parties and the specific industrial relations context. The use of past practice to supplement the agreement is based on the premise of looking for mutually accepted standards and purposes manifested by the objective conduct of the parties. The discretion the arbitrators have

If adjudication comes to represent the wooden, mechanical application of rules without regard to the sense they are supposed to embody, people will lose their respect for the legitimacy of these decisions and, perhaps, for the system of which they are a part. There is enough evidence of a turning away from the common law to systems of private business practice, arbitration, Ministerial discretion, and so on, to support the view that the law must incorporate some semblance of justice or reasonableness to be effective as law. One can achieve real order, as opposed to paper order, only when one strives for good order.

62 Cohen, Judicial Legisputation and the Dimensions of Legislative Meaning (1960-61), 36 Ind. L.J. 414, 417. Interstitial and molecular as opposed to molar have also been descriptive of this phenomena. See Cardozo, The Nature of the Judicial Process (1921); Pound, An Introduction to the Philosophy of Law (1922).

63 Hughes, supra note 60. 437; Dworkin, supra note 60, 22. This degree of direction can be viewed as an element of weight allowing for balancing as opposed to the compulsion of rules. Intelligent statutory interpretation can be viewed as a calculus of principles and policies behind applicable standards. The following cases epitomize this process: N.L.R.B. v. Hearst Publications Inc. (1944), 322 U.S. 111; Phelps Dodge Corporation v. N.L.R.B. (1941), 313 U.S. 177; and Sidmay Ltd. v. Wehtlam Investments (1967), 61 D.L.R. (2d) 358 discussed in Weiler, Legal Values and Decision-Making, supra note 61, 20. Recent writings of Dworkin and Hughes on this subject can be found in The Antioch Review 151 and 223 (Summer 1970).

64 Heydon's Case (Exchequer), 76 Eng. Rep. 637, is illustrative of the "mischief" rule and is cited in Hart and Sacks, supra note 12, 1144 and Fuller, The Morality of Law (1964) 82. The draftsman's thought processes are outlined in Hart and Sacks, supra note 16, 200.

is in the "weak" sense of weighing competing interpretations of rules, purposes or principles in light of their industrial relations background.66

The task of finding where the boundaries would have been drawn if the parties who signed the contract had drawn them explicitly is then a problem of interpretation within the jurisdiction of the arbitrator who is given power to decide questions concerning the interpretation and application of the agreement. For it is the agreement that draws the boundary line even though it does not draw it expressly. The interpreter must remember that the contract goes a distance but it also stops, because it is a product of competing wills and its policy inheres as much in its limitations as in its affirmations.67

Judicial Review of Grievance Arbitration in the United States and Canada

Introduction

Part One of this paper was devoted to an elaboration of the nature of grievance arbitration in light of the institutional structure of adjudication and the natures of legal reasoning and the collective bargaining agreement. Grievance arbitration as a dispute resolution institution within the industrial relations system is suited to a particular task by virtue of its structure and its relationship to other conflict solving institutions within the system. That task is the settlement of disputes arising out of the interpretation, construction and application of the collective bargaining agreement. The limitations of this particular function relate to the elaboration of standards mutually accepted by the parties affected by the decision. Any abdication or transcedence of this particular function has debilitating effects upon interrelated institutions within the industrial relations system. To abdicate means to impose a burden on a related institution that is ill-designed to perform these neglected tasks. To transcend means to encroach upon the functions of these same interrelated institutions for which the institutional structure of arbitration is ill-suited.

The second part of this paper will introduce the court into the set of interrelated institutions that make up the theoretical abstract known as an industrial relations system. The position of this paper, restated to include the court, asserts that judges, arbitrators and the actual industrial participants should act as partners in a collaborative effort to enhance the quality of order within the industrial relations system. Their joint efforts should proceed on the basis of a rational division of labour, each concentrating on the job he is best capable of performing. What is best for each is determined by an intelligent evaluation of the differing yet relevant institutional characteristics each possesses.

To analyze this system and neglect the judiciary, so instrumental in determining the character of the power context in which the entire industrial relations system operates is naive as well as incomplete.68 Professor Cox

66 Dworkin, supra note 38.
68 Dunlop, supra note 1, c. 4. This context was briefly alluded to in the Introduction to this paper.
has noted that when a motion is filed to compel or stay arbitration or to enforce or vacate an arbitration award, the court becomes a superior tribunal and the arbitrator can only adjudicate as this body will permit. The court may strengthen the institution by putting the force of law behind the arbitration clause or award or shrivel and distort the process by excessive intervention.\(^9\) There has been confusion of thought over the appropriate role of arbitrators and judges in the area of grievance arbitration. The first half of the paper was intended to outline a 'philosophy' of grievance arbitration in concepts that can be articulated in rational terms instead of the historical assertion that grievance arbitration is some mystical state of mind that only members of the cult can experience.\(^7\) If the courts in North America accept the legitimacy of this 'philosophy' and embrace the limitations of their own institutional structures then functional order and efficiency in grievance arbitration will be maximized. Judicial restraint will obviously depend on the belief (probably acquired by experience) that arbitrators do act and only act as outlined above. Whether they do or do not depends upon the arbitrators themselves and the absence of pressures on them created by the malfunctioning of related institutions. Arbitrators can go a long way in initiating the proper functioning of these related industrial institutions.

**Historical Overview**

There exists a continuum of possible state intervention in an industrial relations system. A historical summary in the area of grievance arbitration in North America demonstrates how instrumental the state can be.

Initially unions were treated as unlawful associations in unreasonable restraint of trade.\(^7\) This view outlawed all their activities. But slowly their status was transformed into that of a society lacking legal status while not outright unlawful. The law recognized only individuals or corporations and not unincorporated associations. This holding jettisoned judicial enforcement of the collective bargaining agreement.\(^7\) Until this position was altered by legislation in both the United States and Canada one could state that collective agreement administration was a private process,\(^7\) utilizing a relatively well-known and ancient dispute settling mechanism called arbitration.\(^7\) However even private arbitration systems did not escape judicial scrutiny from time to time. Should a party to such an agreement want to extricate himself from the obligation or want an arbitration award enforced or vacated, recourse was had to the courts. The court did respect the prior agreement of

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\(^7\) Id. 1489.


\(^7\) Dawson, Fleming, Jones, Sturges, Witte, supra note 6.
the parties if it was an agreement to submit a present or existing dispute to arbitration. This was also the attitude if an award had been rendered and one party was seeking enforcement. However the exceptions to these positions were: 1) if the promise to arbitrate was an executory one relating to future disputes, or, 2) if the award rendered was subject to bias, fraud, arbitral misconduct, denial of natural justice or without a fair hearing or in excess of jurisdiction (encompassing arbitrability).

The status problems of trade unions while somewhat accommodated by the stretching of existing judicial doctrine was finally ameliorated by legislation and the executory aspect of the arbitration promise was likewise accommodated. The common law position of judicial review of arbitration, was codified and in some jurisdictions extended by permitting judicial intervention on questions of law if the arbitrator or any one of the parties desired. A brief recitation of s. 10 of the United States Arbitration Act reflects the legislative reaction in this area of review.

10 SAME; VACATION; GROUNDS; REHEARING
In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-
a) Where the award was procured by corruption, fraud, or undue means.
b) Where there was evident partiality or corruption in the arbitrators, or either of them.
c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause show, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.
d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was submitted was not made.
e) Where an award is vacated and the time within which the agreement required the award to be made was not expired the court may, in its discretion, direct a rehearing by the arbitrators.

It is at this juncture that United States and Canadian arbitration history bifurcates. Before considering the American departure in detail it is necessary to make a few summary comments about the relationship between private arbitration and judicial review.

Private Arbitration and Judicial Review:
A Conceptual Framework

Judicial review of private arbitration is subject to two conflicting dictates. On the one hand, the parties have privately and voluntarily opted

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76 Vynoir's Case, 4 Coke 81b - 82a (1609).
78 National Labor Relations Act, 49 Stat. 449 as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C.A. 141, s. 7, s. 301; The Labour Relations Act, R.S.O. 1960, c. 202, s. 3. (However, see Rights of Labour Act R.S.O. 1960. s. 3).
79 United States Arbitration Act 61 Stat. 669, 9 U.S.C.A. s.2, s.2. All provinces in Canada have such legislation.
80 See Curtis, supra note 71, 91.
for this extra-legal dispute settling mechanism. The courts should respect their wishes in light of the "freedom to contract" and in the absence of any conflicting, legitimate public policy considerations. On the other hand, the very nature of this consensus demands that a specific promise should in fact exist and that the process should be performed as agreed to and expected. Some cynics have suggested that judicial hostility, manifested by an apparent desire to protect their historical jurisdiction, has prompted the courts to pursue this latter dictate with exceptional fervour: doubts being resolved against the perceived encroaching institution.\textsuperscript{81} In any event a vigorous review of these systems has been pursued by the courts in both jurisdictions and in an effort to prevent injustices have created injustices of their own. Traditional doctrine has been applied to the industrial context with no thought of its adequacy and despite considerable criticism.\textsuperscript{82} This has prompted the position championed by Dean Shulman\textsuperscript{83} that the law should stay out of grievance arbitration and reflected in Professor Fuller's statement:

The danger of an extension of judicial control over arbitration lies, not only in the delays, costs and formalities it would entail, but in the kinds of interpretation it would produce.\textsuperscript{84}

Furthermore voluntary grievance arbitration is structured to accommodate certain "shared values" in the industrial setting.\textsuperscript{85} This is why it is resorted to. These values include speed and inexpensiveness. Speed is important because the industrial entity is an ongoing enterprise which needs a quick resolution of disagreement. Expense is important because of the number of the potential disputes or grievances and their relative size if they can be quantified at all. The technical expertise possessed by the adjudicator and his selection by the parties for this reason is a dominant value. The complexity of jargon used in agreements and the plant was canvassed in the first half of the paper. Although not an insuperable barrier to overcome, the lack of stringent procedural and evidentiary rules of arbitration permit speedy access to background data should the adjudicator be deficient for one reason or another. The relative informality of a grievance arbitration proceeding minimizes the hostility in an adversary proceeding, accommodating the symbiotic relationship of the parties. Lastly, an important value is the finality of decision. The dispute is definitively resolved and the industrial enterprise can get back to its normal operation. This value although related to speed incorporates the notion of certainty.

Judicial review, on the other hand, maintains the integrity of the arbitral process by eradicating fraud, bias, or patent misconduct. It maintains the voluntary nature of grievance arbitration. A party cannot be coerced into this setting nor can a party be left without a remedy at the hands of an over-zealous adjudicator who has exceeded his mandate. However to fulfil

\textsuperscript{81} Jalet, \textit{Judicial Review of Arbitration} (1959-60), 45 Cornell L. Rev. 519, 531.
\textsuperscript{83} Shulman, \textit{supra note 12}, 1024.
\textsuperscript{84} fuller, \textit{Collective Bargaining and the Arbitrator}, \textit{supra note 12}, 43.
\textsuperscript{85} Hart and Sacks, \textit{supra note 12}, 340.
these purposes the general values of the grievance process must be compromised. Judicial review slows the dispute resolving process, aggravates economics and adds to formalities. The final and binding nature of an award is likewise impaired.

Any evaluation of judicial intervention must first recognize that specific instances of court review are justified. If an arbitrator has shown bias or fraud it is quickly accepted that the general values of arbitration are not absolute. Even though court intervention creates institutional costs, it is accepted that these costs are outweighed by the benefit of court review in this instance. There is a general overriding need to maintain the integrity of the dispute resolving process. Should a court intervene for some other objective the evaluative response may not be similar. Court review of an interpretative error may result in a disposition no more compelling than the arbitrator's original decision. Here the costs of judicial intervention would outweigh the benefits. In such case a intervention would not be appropriate.88

Standards formulated to control judicial review of the grievance process should reflect an awareness of these institutional costs and benefits.

Judicial Review of Grievance Arbitration

In the United States

The arbitration laws enacted in the various states, as well as the federal United States Arbitration Act did not clearly apply to the grievance arbitration of collective agreements.87 Some state arbitration laws explicitly provided that they did not apply to collective agreements while others excepted personal service contracts or as the federal act, did not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce".88 Therefore the executory aspect of the arbitration promise was not uniformly corrected in relation to collective bargaining agreements. Whether an arbitration law did or did not apply, the grounds for review of rendered awards was virtually the same because this legislation merely codified the common law criteria.

In 1947 the Labor Management Relations Act created a new possibility. Sec. 301 (a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship the parties.89

It appeared that arbitration could therefore be compelled under the Federal Arbitration Act90 once the union or the employer had invoked the federal jurisdiction under Section 301. However, as previously noted, there is

88 For a report, related to administrative agencies, which lists the costs and benefits, while avoiding any functional assessment of their weight, see: (McRuer Report, Ontario) Royal Commission, Inquiry into Civil Rights, v.1, (1968) 275-79.
87 Cox, op. cit. supra note 76, 250.
an exception to that Act which might include collective agreements. In addition, the Act applies only to maritime transactions or a contract evidencing a transaction involving commerce.91 Furthermore, the Norris La Guardia Act92 appeared to bar equitable relief with its prohibition in relation to injunctions in any case involving or growing out of any labor dispute.

All of these problems were resolved in Textile Workers Union v. Lincoln Mills of Alabama,93 a case involving a union request for the enforcement of a promise to arbitrate in a collective bargaining agreement. It established,

"The substantive law to apply in suits under 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Rules of decision are to be underlying policies, from general legal principles, and from state decisions which commend themselves to the federal courts, not as binding rules, but as persuasive authority.94

Consequently this particular action did arise under the laws of the United States and that in enacting section 301, "Congress adopted a policy which placed sanctions behind agreements to arbitrate disputes, by implication rejecting the common-law rule."95 It was held that the Norris-La Guardia Act did not bar a decree requiring a company to submit a dispute to arbitration involving the application of a collective agreement.

That is as far as Lincoln Mills went. Federal law was to apply and that which did not exist would be creatively fashioned. This left open an entire spectrum of inquiries concerning the procedure and substantive standards to be applied in the enforcement of an arbitration clause, and the enforcement or vacation of an arbitration award. One could argue that the Federal Arbitration Act applies. However the pregnant silence of the Supreme Court in Lincoln Mills and in subsequent cases suggests to the contrary.96 This is not to deny the existence of lower court decisions running both ways subsequent to Lincoln Mills.97 Professor Cox has reasoned that the best guess would be in the negative on the basis of the Act's chronological position and legislative history. It could be used for guidance in judicial reasoning as could the common law rules existing in this area and the policy dictates of Congress as evidenced in the National Labor Relations Act.98 In any event it was clear that the court had reasoned its way to a penumbral position, and was free to develop standards of enforcement and review consistent with labour relations goals should it so desire.

91 Id. s. 2.
93 353 U.S. 448 (1957).
94 Cox, supra note 76, 252.
The predominant judicial attitude existing prior to Lincoln Mills is reflected by the now infamous case of International Association of Machinists v. Cutler Hammer. It is worthwhile to reproduce the per curiam opinion.

The clause of the agreement that 'the Company agrees to meet with the union early in July, 1946 to discuss payment of a bonus for the six months of 1946' can only mean what it says, that the parties will discuss the subject. While the contract provides for arbitration of disputes as to the 'meaning, performance, non-performance or application' of the provisions, the mere assertion by a party of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue.

It is for the Court to determine whether the contract contains a provision for arbitration of the dispute tendered, and in the exercise of that jurisdiction the Court must determine whether there is a dispute. If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.

Final and binding arbitration is a voluntary mechanism. To ascertain if such agreement exists the court must ask: 1) was an agreement to arbitrate made, and 2) has there been a breach of this agreement? These two determinations require findings on the scope of both the agreement and the arbitration clause.

In doing this the court "fully acknowledges" its inability to examine or review the merits of the dispute. This would be contrary to the wishes of the parties. The arbitrator has been asked to render a final and binding decision. He has been given exclusive jurisdiction to interpret the collective agreement but he has not been given exclusive jurisdiction to determine the scope of the arbitration clause, otherwise he could completely ignore the parties' wishes in determining his own jurisdiction.

This "logic" can carry the court into the construction and interpretation of the collective bargaining agreement in the name of ascertaining its scope or the scope of any of its provisions. The degree of penetration depends on the structure of the agreement.

An agreement may explicitly exclude or include a specific subject matter in relation to the agreement or the arbitration clause. In this case the court makes very little penetration into the merits and the arbitrator's function remains intact. A second possibility is the definition of party rights with reference to arbitral jurisdiction. This could be done by the vague definition of management rights with an additional qualification that the exercise of these vaguely defined rights are not to be subject to the arbitral process. The court in ascertaining the scope of the arbitration clause must first ascertain the content of the management rights provision excluded from the arbitral scope. The court must penetrate to the very merits of the dispute in the interpretation and elaboration of the management rights provision. This penetra-

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100 67 N.Y.S. 2d 317, 318.
tion results in a court construction of the agreement at the expense of and without the expertise of the arbitrator, the person originally commissioned by the parties to perform this task. A third possibility is the inclusion of a standard arbitration clause requesting the adjudicator to interpret, construe and apply the agreement with the possible qualification that he is not allowed to add to or modify the negotiated terms of the contract. Here the court can intervene at two points. One, it will ascertain the scope of the agreement to determine whether it applies to the dispute in question. If the agreement does not apply the arbitration clause cannot either. Should the agreement apply [as it did in Cutler Hammer], the court must go on to consider if the arbitration clause applies. One possible outcome is that of Cutler Hammer. The court in its wisdom deems the provision in question “beyond dispute”. There is therefore nothing to arbitrate. A variation of this approach is a ruling that the words “interpret and apply” give no jurisdiction to misinterpret. A misinterpretation would modify the meaning of the agreement and disregard an express limitation on the arbitrator’s jurisdiction or power. The legerdemain is completely apocalyptic of the arbitrator’s function. The court, in ascertaining the arbitrator’s jurisdiction or whether the dispute is arbitrable, passes upon and resolves the merits. The arbitrator is left unemployed and the court has buttressed its position with the underlying assumption that the wording of the collective agreement divorced from its context, can be attributed a meaning “beyond dispute”. The court’s approach implies that arbitrability or jurisdiction is a concept that exists in the abstract from which certain consequences flow on “discovering” its existence or absence. The approach is spurious and completely devoid of the institutional inquiry that asks who performs a particular task best. For these reasons the position was severely criticized by commentators. Fortunately this input was instrumental in providing intellectual guidance for the court.\footnote{Supra note 82, in addition to Cox, Reflections Upon Labor Arbitration, supra note 45; Cox, Current Problems in Grievance Arbitration, supra note 76. The two Cox articles exhibit a remarkable similarity to the position, eventually adopted by the Supreme Court.}

The “logic” of this “pre-Trilogy” attitude, was not confined to the issue of arbitrability. It was applied to the review of grievance arbitration awards. Western Union Telegraph Company v. American Communications Association\footnote{299 N.Y. 177, 86 N.E. 2d 162 (1949).} held that a misinterpretation of the collective bargaining agreement was in excess of the jurisdiction of the arbitrator. The arbitrator is given jurisdiction to interpret, not to misinterpret. A misinterpretation is considered a modification of the agreement and this is expressly prohibited. This reasoning is no less beguiling and subject to the preceding criticisms. To say that errors of law and fact are not reviewable because the parties have voluntarily submitted to such contingencies and then to apply the logic of Western Union is to make a mockery of judicial reasoning, impuning the integrity of the court that espouses such casuistry.
The preceding section depicted the background and the pressures giving rise to this trio of cases. Commonly referred to as the Steelworkers Trilogy, they created and elaborated the standards in this legal hiatus. Two conflicting dictates inherent in any arbitration clause have been described. One being that the clause should be enforced if it applies because the parties have opted for an informed arbitrator to interpret their agreement when disputes arise. The other being a derivative of the first, that the court must construe this clause, and the agreement if need be, to insure that it indeed does apply. This latter notion appears to covet the arbitrator's function at times and deprive the parties of their wish for an "informed" decision. A third factor turned the scales in this apparent dilemma and inspired in the court a new direction. This third factor, sec. 203 (d) of the Labor-Management Relations Act, 1947 was adopted by the court as a reflection of legislative policy in this area. This provision was thought to embody Congress' confidence in the grievance arbitration machinery as facilitative of "industrial peace". The section simply reads:

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

United Steelworkers of America v. American Manufacturing Company revolved around the eligibility of a disabled employee to return to work. The specific issue was one of arbitrability or more specifically did the arbitration clause apply? The employee had settled with workmen's compensation on the basis of a 25 per cent partial, yet permanent disability. He then applied to return to work under the seniority provision of the collective bargaining agreement. The company refused, maintaining that the claim was a frivolous and patently baseless one. The union brought an action under s. 301 for enforcement of the promise to arbitrate and the District Court refused, holding that the employee was estopped from returning by accepting the compensation. The Court of Appeal agreed in result but differed in its reasoning. It agreed with the company that the claim was frivolous. Either the collective agreement did not apply or it did apply but the meaning was so clear that the issue was "beyond dispute". Mr. Justice Douglas, speaking for the Supreme Court, reversed the lower holdings. He stated that the "beyond dispute" doctrine of Cutler Hammer could only have a crippling effect on grievance arbitration, a process commended to the parties by Congress. This position appears to be founded on the notion that what is obvious to the court may well be

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105 Id.
106 (1960), 363 U.S. 564.
107 Id. 567-8.
inconsistent with the intended meaning of the agreement. This position embodies the value of arbitral expertise. In addition he took the position that all disputes concerning the agreement not just the meritorious ones were to go through the grievance arbitration process. Mr. Justice Douglas, in formulating a standard of review stated:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, and all that it connotes that was bargained for.108

Attempts to clarify "on its face" emphasis was added to the fact that the court had no business weighing the merits or determining whether there was particular language in the written instrument to support the claim.109 Mr. Justice Brennan elaborated Mr. Justice Douglas' position in relation to the specific wording that a reviewing court may encounter. He noted that the arbitration clause could be narrow or wide in scope depending on the parties' inclination. Whatever its form, it is to be construed in the light of the milieu in which the clauses are negotiated and with reference to national labour policy.110 If the clause states "any dispute" is to be submitted to the process then the court's function is exhausted on this finding. If the issue of arbitrability is explicitly granted to the arbitrator then the courts' function is again exhausted on this finding. If the standard arbitration clause, relating to disputes involving the interpretation and application of the agreement, is present, the court is to interpret its meaning not the arbitrator. The meaning of this clause is simply that the parties have agreed to arbitrate any dispute which the moving party asserts to involve construction of the substantive provision of the contract.111 By adopting this position the court has sought to minimize its involvement in the merits of a grievance. The parties have provided for arbitration and more importantly the court has reacted accordingly.

Before summarizing the courts' position it is necessary to canvass the sister case, United Steelworkers of America v. Warrior and Gulf Navigation.112 Mr. Justice Brennan's judgment applies to all three Trilogy cases and hence makes them very interdependent. Also this case adds substantially to the court's position and illustrates the implication of the American reasoning.

The case involved the subcontracting out of maintenance work resulting in the lay-off of certain employees in the bargaining unit. The supervisors thereafter laid out the work for the "subcontractor" and some of the laid-off workers were hired in this capacity at reduced wages. A clause existed in the collective agreement stating:

"matters which are strictly a function of management shall not be subject to arbitration under this section".

108 Id. 567-8.
109 Id. 568.
110 Id. 570.
111 Id. 571.
112 (1960), 363 U.S. 574.
This is a classic illustration of the employer defining vague rights in terms of arbitral jurisdiction. The arbitration clause was otherwise of the 'standard' variety. The District Court granted the company's refusal to arbitrate on the grounds that the subcontracting out of work was a function of management and management functions were excluded from the arbitration process. The Court of Appeal affirmed for these same reasons.

Mr. Justice Douglas once again delivering the opinion of the court, reversed the Appeal Court. This judgment emphasized the reviewing court's function in the light of the national labour policy and the skeletal nature of the collective agreement.

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favour of coverage.

(emphasis added)

We think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion any attempt to persuade it to become entangled in the construction of the substantive provisions of a labour agreement even through the back door of interpreting the arbitration clause, when the alternative is to utilize the sources of an arbitrator.

The court has applied the conceptual framework recommended above. The court admits that its function is to ascertain whether the reluctant party agreed to arbitrate the grievance, but it also recognizes the limitations of its own institutional nature to achieve this end.

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tension will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The court is not going to increase the costs of judicial intervention into the merits of a dispute when the parties or one party has vaguely defined a substantive right in terms of the arbitrator's jurisdiction. The court does not say it will never enter into such an interpretation; rather it imposes an obligation on the parties to be specific and clear. This specificity and clarity will minimize the costs of judicial intervention by diminishing the need for expertise and the possibility of error. In summary, the court has concluded that the

113 168 F. Supp. 702.
114 269 F.2d 633.
115 363 U.S. 574, 582-83 (1960).
116 Id. 585.
117 Id. 581-82.
costs of some forms of judicial interpretation, in the course of ascertaining whether a party has breached its promise to arbitrate, are too great. These costs were a product of the institutional differences between grievance arbitration and the courts. To insure that these costs are not in excess of the gains of intervention, while maintaining its role as the enforcer of voluntary agreements, the court erected a presumption in favour of arbitration that can only be rebutted with an explicit provision. An explicit provision "which brings the grievance under the cover of the exclusion clause." Furthermore, the court refused to look at the bargaining history as evidence of an intention to exclude this subject matter from arbitration which clearly reflects its concern with institutional limitations. If express contract language requires the expertise of arbitral interpretation to ascertain its real meaning, the bargaining history cannot be anymore lucid.119

Before proceeding to United Steelworkers of America v. Enterprise Wheel and Car Corporation120 note that the court has in effect redefined the nature of the collective agreement. By referring to 'gap filling' in the light of past practice121 and the elaborative role of the arbitrator;122 while not defining anything inconsistent with the adjudicative model and the theory of legal reasoning outlined above, the court has broadened the concept of the labour agreement. This expanded notion with its underlying rationale based upon industrial reality and institutional values is important in understanding the Enterprise case.

While decided on the same day as the preceding two, in this case the courts' attention was directed to the role of the court in reviewing an arbitration award. For one reason or another, the court appears to have abandoned the analytic framework of American and Warrior, reverting to contradictory, abstract statements. Lower courts have grasped these statements when looking for some apparent rationale for intervention.

A group of employees left their job in protest of the discharge of a fellow employee. On returning to work they found their jobs unavailable and a grievance was filed to which the company refused to arbitrate. The District Court ordered arbitration and the arbitrator found the discharges unjust, although some discipline was appropriate. He instituted a ten-day suspension and otherwise ordered reinstatement with back pay. After the discharge, but before the award, the collective agreement expired and the company refused to comply. The District Court directed compliance123 and the Court of Appeal reversed it emphasizing the expiration of the agreement and with it any remedial power of the arbitrator.

The Supreme Court reversed the Appeal Court without articulating a standard for reviewing courts when dealing with arbitration awards. The following reasons were important in upholding the award.

119 Id.
120 (1960), 363 U.S. 593.
122 Id. 581.
123 168 F. Supp. 308.
The arbitrator is to utilize his 'informed judgment' when formulating remedies. The court stated:

There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.\(^{124}\)

The court rejected any suggestion of review on the basis "that if the 'correct' principles of law had been applied to the interpretation of the agreement it could be determined that the collective agreement did not so provide".\(^{125}\) This would amount to an appeal on the merits which is contrary to the final and binding character of the arbitration clause. The question is not whether the arbitrator was "right" or "wrong" on the merits; but rather at this stage of review, did he have authority power, or jurisdiction to do what he did? This is a different question than that involved in arbitrability;\(^{126}\) yet intuitively one feels that the same analysis should apply. In \(\textit{Enterprise}\), the court felt the award was ambiguous on the issue of the existence of power or jurisdiction. It was not clear exactly what source the arbitrator had relied upon for his power to do what he did. In light of the great need for flexibility in remedial situations, the court held that mere ambiguity \textit{as to the source of power} is not reason for refusing to enforce the award.\(^{127}\) Mr. Justice Douglas did not explain this ruling in terms of the court's difficulty in ascertaining whether the authority does or does not exist. In fact his underlying assumption is that power, authority or jurisdiction can easily and objectively be ascertained. Yet the same problems exist here as exist in relation to the concept of arbitrability. There the court responded with 'presumptions' and the standards of 'positive assurance' and 'explicitly excluded'.

The most innocuous statement in \(\textit{Enterprise}\) that appears to cut back everything, reads:

Nevertheless, an arbitrator is confined to the interpretation and application of the collective agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.\(^{128}\)

This paragraph could be very confining and justify an extreme encroachment on the merits by reviewing courts if divorced from everything that has been said in relation to both the issues of arbitrability and authority canvassed by the three cases collectively. This wording appears to encourage the court to determine the scope and content of the agreement in order to ascertain whether the award draws its essence from it. However a just as literal interpretation would leave the court powerless if the last sentence is construed to allow intervention only when the rhetoric of the award manifests an infidelity to this obligation.\(^{129}\) The better view is that it prohibits the exercise of a policy-making model of grievance arbitration considered above. Mr. Justice

\(^{124}\) (1960), 363 U.S. 593, 597.
\(^{125}\) Id. 598.
\(^{126}\) The court specifically rejects that it (arbitrability) is involved in this case.
\(^{127}\) \(\textit{Enterprise}\) op. cit. 598.
\(^{128}\) Id. 597.
Douglas may have thought that some restrictive language was necessary to set parameters for his optimistic and extremely broad characterization of arbitral functioning in *American* and *Warrior*. Furthermore the phrase ‘draws its essence from the collective bargaining agreement’ embraces the newly defined nature of the collective agreement depicted in the *American* and *Warrior* cases. It subsumes notions about the skeletal, yet purposive nature of contract provisions, the elaborative role of the arbitrator, and the ‘common law’ of the shop as evidenced by the past practice of the parties and their bargaining history. The *American* and *Warrior* holdings have not been cut back if this view is taken of the *Enterprise* case and the conceptual framework while not applied in *Enterprise* could legitimately be used in subsequent cases to develop a standard for the review of arbitration awards.

Two subsequent cases, closely following the *Triology*, did not add to the substantive doctrine articulated by the court in *American* and *Warrior*. *Atkinson et al. v. Sinclair Refining Co.* and *Drake Bakeries Incorporated v. Local 50, American Bakery and Confectionary Workers International* were requests for arbitration involving a union’s breach of the no-strike provision of a collective agreement. In *Atkinson* the court held that the subject matter was explicitly excluded from arbitration and in *Drake Bakeries* the court held that it was not specifically excluded and therefore arbitrable.

The final significant Supreme Court case in this area, *John Wiley and Sons Inc. v. Livingston, President of District 65, Retail Wholesale and Department Store Union*, involved the doctrine of arbitrability and it substantially elaborates the holdings of *American* and *Warrior*. The union had negotiated a collective bargaining agreement which did not contain an express provision indicating whether the contract was binding or not on successor corporation. The company did in fact merge with another, although the original company’s physical plant continued operations. The successor was not unionized and the union under the collective agreement of the merged corporation asserted a continuation of the benefits. The successor denied that this was so, as well as pointing to procedural limitations that had arisen under the contract in question. The Supreme Court attacked the problem in a very confusing way. Instead of dealing with the continuation of the contract *per se* or the fact that the application of the agreement was ambiguous

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130 (1962), 370 U.S. 238.
182 This is not to say cases such as *Carey v. Westinghouse* (1964), 375 U.S. 261, 84 S.Ct. 401 are not significant. *Carey* in particular reflects the judicial confidence in the arbitration process. But in this case I believe it is mistaken. However the error has been substantially corrected by lower court procedural holdings. The court in *Carey* deferred to arbitration on the apparent issue of work assignment disputes that had in fact jurisdictional questions at the root of the matter. Quite obviously at any adjudication only one party affected would be represented and presenting proofs and reasoned argument. This is wholly in conflict with the adjudicatory process described in part one and is hardly satisfactory from an industrial relations point of view. However recent lower court decisions such as *C.B.S. v. Broadcasting Association*, 72 L.R.R.M. 2140 (2d Cir. 1969), aff’g 69 L.R.R.M. 2914 have allowed motions to compel joint arbitration in an effort to maintain the integrity of the process. The reason these cases are not dealt with in this paper is due to the fact that they do not pertain or add to the cases in the area this paper is specifically concerned with.
133 (1964), 376 U.S. 543.
in these circumstances and therefore on the basis of American and Warrior, arbitrable; the Court held that in circumstances such as these, the company is required to arbitrate with the union under the collective agreement. This position was arrived at by 1) expanding the implications of the nature of the collective agreement, 2) noting that there was no express provision to the contrary and 3) by having regard to the national labour policy.

The logical question is: how is the arbitrator going to proceed if the contract is silent? The answer is both implicit and explicit. Implicitly the court draws again on the adage that what is clear to a court may be inconsistent with the intention of the parties. The institutional structure of arbitration, embracing a knowledgeable adjudicator, is best suited for this determination and the arbitrator may refuse the union's request on the issue of arbitrability.

Whether or not the union demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non arbitrable because it can be seen in advance that no award to the union could receive judicial sanction.

This passage does not clearly articulate the distinction between 'threshold arbitrability' and 'in fact' arbitrability but it is only logical that the distinction exists. If the court is going to use presumption because arbitration is best suited to deal with ill-defined issues, the arbitrator must be able to refuse to decide when he finds that the agreement does not apply. Such a holding would be a distinct possibility in the Wiley fact situation.

The court devised specific standards and applied the conceptual framework outlined above on the issue of procedural arbitrability.

We think that labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum, they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.

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184 Id. 548.


185 Id. 555.

186 See B.N.A., L.R.X., s. 19 Piano Workers v. Kimball Co., (D.C. No. 111 1965) 58 L.R.R.M. 2752 rejected the distinction and held that the labour arbitrator could not redecide the issue of arbitrability. As to the related issue, Ficek v. Southern Pacific Co., 47 L.R.R.M. 2573 (9th Cir. 1964), cert. denied 60 L.R.R.M. 2284 (Sup. Ct. 1965) held that a company had waived its right to raise the issue of arbitrability by submitting to arbitration. However Humble Oil and Refining Co. v. Teamers Local 865, 65 L.R.R.M. 3016 (S.D.N.Y. 1967) has indicated disagreement. See also B.N.A. L.R.X., s.18d.

187 See Federal Labor Union v. Midvale Heppenstal Co., 73 L.R.R.M. 2384 (3rd Cir. 1970) aff'g 71 L.R.R.M. 2876, where the court upholds the arbitrator's decision that the issue had not been provided for in the collective agreement.

188 376 U.S. 543, 556-7.
Consequently the issue of procedural arbitrability is for the sole determination of the arbitrator. This guide for reviewing courts was arrived at by a benefit-cost analysis of judicial intervention in the light of the institutional differences between the courts and arbitration systems.\(^{139}\) The court feels that the costs of intervention are in excess of those costs generated in the 'substantive arbitrability' issues and therefore a mere presumption will not suffice. Therefore the result is a total withdrawal of judicial intervention.\(^{140}\)

The preceding cases have been subjected to extensive criticism with unusual focus on the rhetoric of the decisions and a marked neglect at devising some kind of conceptual rationale on which to justify the holdings and apply to future cases.\(^{141}\) A conceptual rationale does exist. The court has erected presumptions or totally withdrawn on the basis of institutional values. It has not sanctioned a free working policy-making model of arbitration at the same time. Here is where much criticism has been misdirected. Everything the court has said and done is completely consistent with the adjudicative model of grievance arbitration developed above. This cannot be said for the other models. In addition, the area where the court has freely intervened and in my opinion should continue to do so, is in those decisions dealing with the preservation of the integrity of the adjudicative model involving fair representation, bias, fraud, and improper exclusion of relevant evidence. In applying the calculus used in \textit{American} and \textit{Warrior} to these cases, the court has decided that the costs of intervention do not outweigh the gains. It is in these

\(^{139}\) This deference or total abstention is respected even on the review of an arbitrations award. This suggests that the standards fashioned for arbitrability may indeed be applicable and workable on judicial review of the award. See \textit{James B. Chambers v. Beaunit Corp.}, 59 L.C. 13,071, 69 L.R.R.M. 2732 (6th Cir. 1968).


areas where the industrial relations expertise so facilitative in the interpretation of the collective agreements is not essential. In fact the court has developed its own expertise and feeling in the "adjudicative process" area through the years.

Post-Trilogy Inquiry

The preceding section illustrated the United States Supreme Court's perception of the grievance arbitration process. This perception manifested itself in the form of a set of concrete standards to be applied in judicial consideration of arbitrability. With regard to arbitration awards the industrial relations considerations were reflected in the opinion of Enterprise; yet concrete standards were not developed. The effectiveness of the court's approach can be measured by the reaction of the industrial participants and the response of lower courts in the application of the articulated doctrines. From all reports available, private reaction has generally been neutral or non-existent in relation to the Trilogy.\(^{142}\) The cases did not spawn a proliferation of explicit restrictive clauses to rebut the presumptions created by the court.\(^{143}\) Nor has there been an outcry from the parties complaining of unremedied arbitrational misfeasance.\(^{144}\) However academic circles have not been so tranquil.\(^{145}\)

This placid private response may be interpreted as a vindication of the Supreme Court's policy. Indeed, it could be interpreted as an indication of a completely harmonious relationship between the arbitrators and the parties. But another possible construction is that reviewing courts have not honoured the Trilogy dictates concerning arbitrability. The courts may look closely at arbitral reasoning, vacating unconvincing efforts in reviewing arbitration awards. A judicial response such as this would make private reaction superfluous. An examination of the judicial response is therefore needed.

The Issue of Arbitrability: Trilogy Aftermath

In applying the calculus outlined above the court developed concrete standards for review. These rules, a product of the American,\(^{146}\) Warrior,\(^{147}\) and John Wiley\(^{148}\) cases might be stated in the following fashion.


\(^{143}\) Jones and Smith, The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators and the Parties, supra note 141, 841. Of course there are exceptions to this assertion and it is not surprising to note that the General Electric Corporation is a classic illustration. For a reproduction of the restrictive arbitration provisions in its collective agreement, that takes one full page of a law report, and a commensurate amount of judicial effort: See Electrical Workers (I.U.E.) v. General Electric Corp., 59 L.C. 13, 174 (2nd Cir. 1968); see also Myers, supra note 185, 56-57; Siegal, Labor Law Reports to the A.B.A., 56 L.R.R.M. 26 (1964).

\(^{144}\) Id. See also Christianson, supra note 141, 695.

\(^{145}\) Supra note 141.

\(^{146}\) 363 U.S. 564 (1960).

\(^{147}\) 363 U.S. 574 (1960).

\(^{148}\) 363 U.S. 593 (1960).
1) If there exists the standard arbitration clause in the collective bargaining agreement with no explicit exclusion directed at the dispute in question and the moving party asserts that the collective bargaining agreement has been violated, the presumption in favour of arbitration is operative and predominant. The courts are to direct the dispute to arbitration.

2) If there is an exclusionary clause directed at the particular subject matter in dispute but its meaning with reference to exclusion or inclusion is vague or in doubt the presumption is again operative and predominant. In addition, the presumption includes a prohibition against examining the bargaining history of the parties to ascertain the meaning of an opaque exclusionary provision.

3) If there exists a specific exclusionary provision undoubtedly applying to the particular dispute then the reviewing court must enforce it even though the merits of the dispute are involved. In this case the presumption must give way to the clear and unambiguous intent of the parties to exclude this issue from the arbitration process.

4) If the issue involves not the substantive question of arbitrability but rather the procedural aspect of it, this issue is exclusively for the arbitrator and the courts are to absolutely defer to that process.

The general impression conveyed by lower court rulings is one of enlightened acceptance. Acceptance in the sense that reviewing courts have generally distilled and applied these standards in a way consistent with the Trilogy philosophy.

This is not to say that there has been an absolute compliance, or that reviewing courts have been without difficulty in seeing the meaning of "a claim which on its face is governed by the contract." For example in Independent Oil Workers Union Local 117 v. American Oil Company the Kansas District Court held that it was not sufficient to simply alledge a violation of the collective bargaining agreement. Rather there must exist some term which supports such a claim.

A similar confusion or disregard is apparent in Beckley Manufacturing Corporation v. Local Union 2011 of the International Brotherhood of Electrical Workers. The union complained that the incentive system did not yield what the agreement provided for. The court patently construed and interpreted the agreement holding that the provision in the agreement did not provide for a guaranteed yield. Should this question go to arbitration and the arbitrator hold in favour of the union he would be modifying the terms of the collective agreement which is expressly prohibited. Therefore the dispute is not arbitrable. Clearly such reasoning is spurious and blatantly insensitive to the directives of the Supreme Court.

A somewhat more subtle but equally erroneous decision is Halstead and Mitchell Company v. the Steelworkers. The company reduced its work

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152 72 L.R.R.M. 2915 (3rd Cir. 1969).
force in two departments because it eliminated a third shift for a period of fifteen days. During the fifteen days, many employees, because of rotating shift system, lost five days of work. The reduction in the work force was made without regard to the seniority of the employees affected. The collective agreement contained a 'management rights' clause which claimed to retain all that was not expressly abridged by a specific provision. In addition this clause enumerated certain exclusive management rights including the sole determination of the existence of facts which are the basis of a management decision, absolute control over the volume of production and the authority to lay off, terminate or otherwise relieve employees from duty for lack of work or other legitimate reasons. A seniority clause obligated the company to consider employee seniority in a work reduction and a layoff, with the exception:

... if for any reason there is work fluctuation or equipment downtime within a section or departmental unit necessitating a reduction in the work force for a short period of time not to exceed fifteen work days, the Company shall have the right to layoff or make work assignments as are experienced without regard to seniority.

Clearly this is arbitrable. The union claims that seniority is applicable and that the exception is not operative. They claim that the work reduction was due to excessive inventories and not a work fluctuation or equipment downtime which are the condition precedents to the exception. The company relied on the management's rights clause which gave it sole authority over the determination of the basis or cause of a lay off; thereby bringing the fact situation within the seniority exception. In any event there is a dispute about the meaning and application of the agreement and it is not even one in which party rights have been defined in terms of arbitral power or authority. Therefore the presumption in favour of arbitration should be applied as it should have in Beckley Manufacturing and American Oil. However the Court of Appeal using similar ledgerdemain held that the management's rights clause applied in relation to its (the court's) interpretation of the seniority clause exception. This being the case the seniority exception applies, the work reduction was for less than fifteen days, therefore the company does not have to go to arbitration. Of course not, the court has just performed that function.

Fortunately the preceding are exceptions to a general acceptance of the Trilogy. Generally the courts have applied American and Warrior accurately even in those difficult cases where restrictive language exists in the form of substantive rights. In International Association of Machinists and Aerospace Workers v. General Electric Company particular operations were ceased and employees laid off. The arbitration clause excluded issues involving the company's right to 'shut-down'. However the union claimed that one weeks notice must be given under the terms of the collective agreement before a change in work hours could occur. The company initially

183 For a case similar to Halstead which reflects the general judicial response: see Local 198, Rubber Workers v. Interco Incorporated, 72 L.R.R.M. 2377 (8th Cir. 1969). Aff'g 68 L.R.R.M. 3081.  
contended that the layoff was temporary and therefore no notice was required. At trial it relied solely on the “shutdown” exclusion contained in the arbitration clause. The appeal court was of the opinion that the impact of the exclusionary wording was obscure or in the court’s own words, “a calculated ambiguity”. The court queried what “shutdown” meant and if this was a “shutdown”, what impact would it have on the other provisions of the collective agreement. It could not be said with “positive assurance” that the arbitration clause was unsusceptible to the union’s contention, therefore arbitration was ordered. The holding is very much in accord with the Trilogy. Many other cases could be related to convey this same point. The John Wiley holding has been even more successful. Very little deviation is possible to detect. However the fact that it is an absolute prohibition may explain the unanimity in response.

An area in the arbitrability decisions where judicial deference to arbitration has not taken place, involve those cases dealing with “adjudicative process” issues. These issues relate to the preservation of the institutional characteristics of an adjudicative process and include cases considering the absence of such features as fair representation, a fair hearing and even the existence of arbitral expertise. If one of the constituent elements of the adjudicative process is absent or will be absent, deference to arbitration is not granted. This area is not an exception to the application of the “calculus of intervention” but really an application of it. The court is expert in the determination of the existence of essential adjudicative elements and precious little industrial relations experience is required. Even though this intervention imposes expenditures of time and money, inconsistent with certain fundamental values of arbitration the costs of intervention do not outweigh the gains. The integrity of the entire process is being protected. In Ruth C. Chapman v. Southeast Region I.L.G.W.U. Health and Welfare Recreation Fund the company had paid money representing vacation pay under a collective agreement, to a fund administered by the union. The union then paid the monies to the employees and deducted a certain administrative fee from the amount due to non-union workers. These non-union people brought an action under section 301 claiming the total vacation pay owed in accordance with the collective bargaining agreement and the South Carolina right to work laws. The union requested a stay or proceedings pending arbitration. The court cited Vaca v. Sipes as illustrative of a judicial deference to arbi-


159 (1967), 386 U.S. 171.
tration but noted that the attitude was not an inflexible one. This deference gives way when it is apparent that the adjudicatory process will not function properly. This will be the case if the two parties presenting reasoned argument and proofs are neither adverse in interest nor the parties affected by the decision.

The real claim herein is accordingly against the union itself for what the plaintiffs charge was an unlawful deduction made for the advantage of the union or its affiliate. If wrong has been done the plaintiff's, the active wrongdoer is the Union, aided by the employer.

In addition, the dispute required an interpretation of legislation in the form of right to work laws; a task for which the arbitrator is personally and institutionally ill-suited to perform. These two features resulted in a denial of the motion to stay the proceedings.

The Supreme Court's directives have been adequate and effective. Subsequent courts have had little difficulty in extracting and applying the standards. Has the same response occurred in the review of arbitration awards?

**Review of Arbitration Awards: Trilogy Aftermath**

The development and clarity of the Trilogy reasoning is unsatisfactory in this area. The Supreme Court could be faulted for not concretizing its rationale of restraint in the form of explicit standards; yet reviewing courts have unnecessarily dwelled on the rhetoric of the *Enterprise* decision.

A few points should be restated before examining a number of cases. First, it is not open for the courts to review the merits of the dispute. This would represent an appeal and the parties have provided for final and binding arbitration. The court has no power to correct errors the arbitrator may make, be they errors of law, fact or mixed fact and law. The parties have manifested a desire for the arbitrator's opinion and his alone. Secondly, the

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159 This was noted by the Court in *Republic Steel Company v. Maddox*, 379 U.S. 650, 654 as did the Court in *Vaca* at 185. Mr. Justice White in *Vaca* stated: because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach of contract claim despite his failure to secure relief through the contractual remedial procedures.


161 See *Associated Milk Dealers Inc. v. Milk Drivers*, 73 L.R.R.M. 2435 (7th Cir. 1970) for a similar judicial consideration of institutional structure.


163 An area where there has been confusion and which I really have not dealt with is in the legitimacy of the use of bargaining history to ascertain particular restrictive meaning in the issue of arbitrability. Mr. Justice Brennan's judgment dealing with *Warrior* indicated that the court should not intervene because of the expertise required to distill the meaning of such conflicting data. See *American*, 363 U.S. 564, 572. However, see *Independent Soap Workers of Sacramento v. Proctor and Gamble Mfg. Co.*, 314 F. 2d 38 (9th Cir. 1962).
arbitrator's power comes exclusively from the agreement and is limited by it. The parties can therefore put restrictions on the arbitrator and if these restrictions are contravened a reviewing court can vacate the award due to an excess of jurisdiction or lack of authority. The parties can also preclude certain subjects from coverage under the collective agreement. These subjects so precluded are therefore not arbitrable. The Supreme Court has requested that this exclusion be done with some degree of clarity otherwise a dispute involving such a subject will go to arbitration. This position reflects the courts deference to arbitration and an understanding of its own institutional limitations.

The jurisdiction or power of the arbitrator should be treated in the same way. This has not been the case due to the court's failure to create standards of review in the Enterprise opinion. Lower courts have pursued an abstract concept of jurisdiction with no thought of the costs that this pursuit imposes on grievance arbitration. In fact, the courts regularly misapply the concept and entertain a full appeal on the merits compounding the costs of intervention. The fact that the court agrees or disagrees with the arbitrator's opinion should be irrelevant. The costs of delay, money, formalism and the incentive to appeal are incurred no matter how the court comes out on the issue. Professor Christianson says that of 125 cases he reviewed only 10% were vacated. The 10% are significant; but the entire one hundred twenty-five cases suffer from a distorted concept of review.\footnote{Christianson, supra note 141, 682.}

The cases break down into two general types. First are those cases in which substantive rights are defined in terms of the arbitrator's jurisdiction. The arbitrator appears to contravene the restriction in interpreting a party's rights. The court then has to construe the provision in order to determine whether the arbitrator has in fact exceeded or contravened his jurisdictional restraints and at the same time necessarily determines the party's rights. The other group of cases do not involve an explicit restraint on the arbitrator's jurisdiction. The arbitrator simply misinterprets the collective agreement or in the technical jargon commits an error of law, fact or mixed-law and fact. Such an error should be unreviewable but this is not the case in fact. In choosing between the two literal interpretations of the rhetoric in Enterprise, the courts have accepted an interpretation favouring a review of the merits. The phrase "...yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement" has been used to sanction an extensive review of arbitral reasoning. If the award is "clearly erroneous" or "arbitrary and capricious" it is said to invite review. An examination of the two types of cases elucidates this criticism.

\textit{Magnavox Company v. International Union of Electrical Workers}\footnote{International Association of Machinists Local 2003 v. Hayes Corporation, 296 F.2d 238, 242 (1961).} is illustrative of the first group of cases. Management's rights were defined in

\footnote{410 F.2d 388, 60 L.C. 10,156 (6th Cir. 1969), aff'd 68 L.R.R.M. 2846.}
terms of arbitral power. This situation is quite common in the employee discipline area. An employee who had just returned to work after some heart trouble was ordered to do work and refused on the grounds of his health. He was discharged for insubordination. A clause existed in the collective agreement that restricted the arbitrator from relieving in this situation except where the employee could positively establish a health hazard. The employee could not do this and yet the arbitrator granted relief from the discharge. He did so in contravention of the explicit limitation on his authority. The reviewing court vacated the award.

The following cases differ from those where the arbitrator has just misinterpreted a particular provision. The difference lies in the existence of some express yet ambiguous provision which appears to restrict the arbitrator. Textile Workers Union of America, Local 1386 v. American Thread Company is such a case. An employee allowed a cotton lap to run through a carding machine causing damage. He was discharged. Management had reserved the right to discipline for just cause and just cause was elaborated in the following terms,

JUST CAUSE: Employees shall be disciplined or discharged only for just cause, which shall include, but not be limited to, insubordination; violation of valid plant rules; failure to obey instructions or supervisors; failure of an employee to properly perform his job in accordance with Company standards ...

(emphasis added)

The arbitrator accepted that the conduct took place but did not believe it called for discharge. He did not feel the 'just cause' provision precluded such a position stating that he was:

'not foreclosed from inquiry in this case, whether just cause for discharge, rather for a lesser discipline measure existed.'

A close reading of the provision suggests such an interpretation is possible; otherwise any violation would be grounds for discharge or discipline with no distinction being made between the two penalties. The Court of Appeal vacated the award. The court felt it was implicit that the arbitrator had found just cause existed (he did not, for he stated only that the conduct took place). Consequently, the substitution of some lesser penalty was a modification of the terms of the collective agreement and therefore a violation of an express constraint on arbitral authority. The court concluded:

We are not persuaded that the Supreme Court, in recent cases involving arbitration and the right to enforcement of arbitration agreements, intended that courts should permit an arbitrator to render decisions which do such violence to the clear, plain, exact and unambiguous terms of the submission and the contract of the contending parties.

Even assuming the term of the collective agreement concerning just cause was as clear as the court would have us believe, does a misinterpretation modify the terms of the collective agreement or is it simply a mistake? This is getting dangerously close to the Western Union doctrine: the arbitrator has no authority to misinterpret the collective bargaining agreement. This

109 Id. 897.
170 Id. 899.
171 Id.
patently disregards the 'final and binding' provision of the collective agreement.\textsuperscript{172} If a no-modification clause exists, then any interpretation of the collective agreement which \textit{the court thinks} is contrary to the “clear, plain, exact and unambiguous terms” of the collective agreement is to be vacated. This in effect results in a complete derogation of arbitral expertise in the name of ascertaining the arbitrator's jurisdiction. Surely the costs of such an approach should be examined. Is the court's judgment any better than the arbitrator's and is this intervention worth the price? Admittedly, as the arbitrator's opinion appears more and more erroneous, it becomes difficult to deny a remedy. But theory does just that. If the arbitrator is wrong but has not exceeded his jurisdiction, there is no remedy in theory. That is, unless he exceeds his jurisdiction every time he is wrong and, if this is the case, let us do away with the concept of jurisdiction and power and just openly say that either party can appeal the case and have the merits reviewed. In \textit{Truck Drivers and Helpers Union, Local 784 v. Ulry Talbert Co.}\textsuperscript{173} an employee was discharged for falsifying his work records. The arbitrator found that the conduct took place but that the penalty was excessive. Management had retained the right to discipline for proper cause and dishonesty was specifically mentioned as a proper cause. Furthermore, the arbitrator was precluded from substituting his judgment for management's. He could only reverse its action, if he found "that the Company's complaint against the employee was not supported by the facts, and that the management had acted arbitrarily and in bad faith or in violation of the express terms of this Agreement."\textsuperscript{174} The Court of Appeal vacated the award because the arbitrator had substituted his judgment for management's. There are at least two problems with the reasoning. Does "proper cause" for discipline mean that any discipline is justified? Surely one could argue that "proper cause" or "just cause" includes a consideration of the severity of the penalty.\textsuperscript{175} Secondly, did the arbitrator clearly misapply the standard he was given. Certainly the standard looks onerous if read in a conjunctive way, but a common sense approach could very well imply a disjunctive meaning.\textsuperscript{176} If that is the case, the company may have acted arbitrarily in dealing with the grievant. In the event he did misapply this standard, is a court justified in vacating the award?\textsuperscript{177} This is the classic case of drafting management's rights in terms of an arbitrator's jurisdiction, creating in effect an opportunity for appeal. This explains why many courts have utilized the phrase "manifest infidelity" or "clearly wrong"

\textsuperscript{172} This further assumes that the court can effectively distinguish an interpretation from a misinterpretation. A more convincing ground for vacation in this case was the consideration of evidence not presented at the hearing. This being an 'adjudicatory process' issue the Court could and should intervene.

\textsuperscript{173} 330 F. 2d 562 (1964).

\textsuperscript{174} Id. 564.

\textsuperscript{175} Lynchburg Foundry Co. v. Steelworkers, 69 L.R.R.M. 2878 (4th Cir. 1969) held that. At 2879 the court states:

\begin{quote}
This rigid interpretation of the arbitrator's scope of authority is not warranted and would be acceptable only if a contract expressly forbade the arbitrator to exercise any discretion in fashioning the award. (emphasis added)
\end{quote}

\textsuperscript{176} Dunau, supra note 185, 453 elaborates this argument.

\textsuperscript{177} International Association of Machinists, Dis. #8 v. Campbell Soup Co., 59 L.C. 13, (7th Cir. 1969) distinguished Ulry in that no specific provision called for discharge. Otherwise the same reasoning would have been applicable.
as a bench mark for intervention, in these cases and denotes some awareness of institutional limitations involved. That is, they will not intervene unless the arbitrator has applied this standard which marks both the limits of his power and the legitimacy of management conduct, in a clearly erroneous fashion. Possibly the better approach, if total abstention is unfeasible, would be to put the onus of explicitness and clarity on the draftsman as is done in the issue of arbitrability. The restraining provision must be explicit and clear as to meaning. If it cannot be said with "positive assurance" that the restriction was exceeded the court should find in favour of the award. This may be what many courts are presently attempting to do.

The second group of cases takes the reasoning of *American Thread* and *Ulry* one step further. A step which is inconsistent with not only the philosophy of the *Trilogy* but the old common law position as well. These decisions have applied the "clearly wrong" standard to instances where the provision misinterpreted (in the court's opinion) is not of the type that defines substantive rights in terms of the arbitrator's jurisdiction. This intervention amounts to an appeal on the merits notwithstanding the court's feeble attempt to mouth the *Trilogy* rhetoric and conclude that jurisdiction has been exceeded. In *H. K. Porter Company Inc. v. United Saw, File and Steel Products Workers of America, Federal Labor Union 2225*4178 one company took over another and at the same time assumed responsibility for the collective bargaining agreement containing the pension and insurance rights of employees. In time the agreement was renegotiated and reference was made to the continuance of the rights under the prior agreement with some explicit modifications. On removal of part of the operations out of state a dispute arose as to the pension and insurance rights of employees let go. Arbitration was ordered and the arbitrator ruled that, notwithstanding the *sixty-five* (age) and *twenty-five* (continuous service) eligibility provisions, employees who had greater than twenty-five years service but were not sixty-five years of age would get full pension and insurance. In addition those who were sixty-five with less than twenty-five years of service would get a pro-rated amount of pension and insurance. Pensions were denied to those who were not sixty-five and did not have twenty-five years of service. His reasoning was based on the fact that the past practice of the parties indicated the pension clause was much broader than its strict wording. In fact over a five-year span he cited twenty instances of deviation from the wording. The Court of Appeal vacated the award. While agreeing that past practice could be utilized in the interpretation and construction of the agreement, it differed with the arbitrator's interpretation of the underlying principle of these deviations. The court noted that the deviations only accommodated people with service that totaled twenty-five years despite a lack of continuity. Therefore the pro-rated aspect of the arbitrator's award was erroneous.

Yet, absent any provision either, explicitly or implicitly authorizing the arbitrator's ruling in part two of his award or any prior practice which reasonably could so interpret it, he lacked a basis for his conclusion. As already stated, the arbitrator may not administer his own brand of industrial justice.170

178 333 F.2d 596 (1964).
170 *Id.* 602.
Whether the arbitrator was right or wrong the important feature of this case is that the court's disagreement was fatal to the award. This is the Western Union doctrine which was apparently consigned to oblivion with Cutler Hammer in American Manufacturing. Power or authority is not in question here. Rather, it is because the decision is clearly wrong that it must fail. Power or jurisdiction is used only to cloth the decision with some degree of legitimacy in light of the Trilogy and the historical common law position. 180

The Torrington Company v. Metal Products Workers Union Local 1645 and the International Union of United Automobile Workers 181 reflects essentially the same approach. The Court of Appeal differed with the arbitrator's interpretation of a twenty-year past practice giving employees time off with pay to vote in elections. A new collective agreement had been negotiated without the incorporation of an express term continuing this policy. In the court's opinion, in light of the fact that the company had given the union notice that the policy was to be discontinued and the union had apparently withdrawn a proposal to have the policy incorporated into the agreement, the policy was no longer operative. The arbitrator interpreted the past practice as continuing without an express provision excluding its operation. This conflict with the reviewing court's opinion was fatal to the award.

Baldwin-Montrose Chemical Co. Inc. v. International Union, United Rubber, Cork, Linoleum and Plastic Workers of America 182 and Textile Workers v. Paper Products 183 represent cases which would not be in Professor Christianson's ten percent because the courts agreed with the arbitrator but are as equally erroneous as Torrington or H. K. Porter. In Baldwin-Montrose the court felt the language of the agreement was "reasonably susceptible" to the arbitrator's interpretation. The court in Paper Products, notwithstanding a misconception of the legitimate uses of past practice, agreed with the arbitrator's interpretation. More precisely, it met the standard of "passibly plausible" erected in Safeway Stores v. Bakery Workers Local 111. 184

Such judicial intrusions are the norm and hardly the exception. Few cases can be found with the kind of restraint Bieski v. Eastern Auto Forwarding Co. 185 suggests as appropriate. In that case the Court of Appeals for the third circuit invalidated an award on an "adjudicative process" issue of the type noted earlier. 186 In doing so the court suggested that the appropriate reviewing standard should be that:

... if the court is convinced both that the contract procedure was intended to cover the dispute (arbitrability) and in addition that the intended procedure was

181 362 F.2d 677 (2d Cir. 1966).
182 383 F.2d 796 (1967).
183 69 L.R.R.M. 2378 (5th Cir. 1968).
184 390 F.2d 79, 83 (5th Cir. 1968).
185 396 F.2d 32, 68 L.R.R.M. 2411 (3rd Cir. 1968).
186 The court was of the opinion that both the union and the employer were opposed in interest to the affected employees.
adequate to provide a fair and informal decision, then review of the merits of any decision should be limited to cases of fraud, deceit or instances of unions in breach of their duty of fair representation.\textsuperscript{187}

However even the third circuit has declined to apply its own concoction.\textsuperscript{188}

Judicial intervention has been appropriate in a number of areas. One isolated situation is where an arbitrator either does not write an opinion or where it is so vague as to be unreviewable.\textsuperscript{189} It may well be that an arbitrator does not have to write an opinion\textsuperscript{190} and that the court's disregard for the Trilogy may cause arbitrators to be purposely vague. But such a reaction can only aggravate the harm to grievance arbitration. The adjudicative process demands an explicit articulation of the reasoning underlying an award and it is only in this way that courts will be educated. How can courts be asked to defer to the arbitrator's expertise if it is not demonstrated. The "mystical cult" perception of arbitral reasoning will not suffice.

Another related area is the "adjudicative process" issues. The rationale and legitimacy is identical to the arbitrability cases dealing with the same considerations. Should, the adversary nature of adjudication in grievance arbitration be impaired by fraud,\textsuperscript{191} a biased or potentially biased arbitrator,\textsuperscript{192} lack of notice,\textsuperscript{193} the exclusion of relevant evidence,\textsuperscript{194} or argumentation by parties who are not in fact adverse in interest,\textsuperscript{195} the award will be set aside. All of these cases involve the integrity of the adjudicative process. In light of the courts expertise in this area, the costs of judicial intervention as well as being minimized are outweighed by the preservation of industrial due process.

\textsuperscript{187} 68 L.R.R.M. 2411, 2415 (3rd Cir. 1968).
\textsuperscript{188} Ludwig Honold Manufacturing Co. v. Harold A. Fletcher, 59 L.C. 13,201 (3rd Cir. 1969), rev'd 56 L.C. 12,207 (D.C. Pa. 1967). "We hold that a labor arbitrator's award does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its content, and any other indicia of the parties' intention. Only where there is a manifest disregard of the agreement, totally unsupported by the principles of contract construction and the law of the shop may a reviewing court disturb the award".
\textsuperscript{189} Telephone Co. v. Telephone Workers, 74 L.R.R.M. 2685 (D.C. Mass. 1970) remanded back to arbitration. But c.f. Dis. 50, Mine Workers v. Bowman Transportation Inc., 73 L.R.R.M. 2317 (5th Cir. 1970) where ambiguities were resolved in favour of the award. My position is not that this latter approach is inappropriate. Only if the award is so obfuscated that it is impossible to tell what the arbitrator did as opposed to being merely ambiguous, should the court refer it back to him. (Note: this is not vacation per se).
\textsuperscript{190} See Mr. Justice Douglas' opinion in United Steelworkers of America v. Enterprise Wheel and Car Corporation, (1960), 363 U.S. 593.
\textsuperscript{194} Harvey Aluminum Inc. v. United Steelworkers, 263 F. Supp. 488 (C.D. Cal. 1967).
One other area where the court has freely intervened is in the area of public policy. An award may appear to conflict with a particular legislative dictate, or require an unlawful act.

The courts have even intervened when an award has conflicted with nothing more than a community value. However this latter instance has disappeared in recent years. One problem in this area lies in the court’s ability to ascertain just what the community values are and what flows from them. Certainly they have to be balanced against national labor relations policy and in recent years the latter has had predominant weight. But in general, public policy intervention is a proper application of the recommended calculus. The policy-maker model of grievance arbitration is limited by the institutional structure of adjudication. Who would present the argument on the existence and interpretation of relevant legislation or community values? Would it be within the parties’ interest or abilities to do so? Does the arbitrator possess the skills and knowledge to detect and interpret relevant legislation? Certainly the court is better equipped in the area of legislative interpretation. However the practical realities of the situation prompt an arbitrator to deal with relevant legislation. An award issued in contravention of the legislation will be invalidated; therefore it appears senseless to neglect its presence. At the same time, his reference to and use of such legislation may invalidate the award on the basis of an excess of jurisdiction. To say that the court is more competent may not be accurate if the legislation is well known to arbitrators. Even if this is the case, the requirement of two adjudications seems wasteful. These conflicting considerations will have to be resolved in the near future.

The approach taken by the American courts in the area of judicial review of labor arbitration awards is one of restrained intervention. The arbitrator has primary jurisdiction, but after such jurisdiction has been exercised the court will grant full review if in their opinion the arbitrator’s reasoning is invalid. The restraint is embodied in standards such as clearly unreasonable, irrational or in violation of the clear, exact and unambiguous language. However little uniformity is apparent and review as granted in Torrington is a carrot obtainable for all who are willing and able to pay the cost. After abstaining on the issue of arbitrability the courts apparently feel that once the expertise has been rendered they are quite capable of evaluating the results. Any other course of action would be the equivalent of a “rubber stamp”.

196 Electrical Workers Local 453 v. Otis Elevator Co., 314 F. 2d 25 (3d Cir.) cert. denied 373 U.S. 949 (1963) rev’g 206 F. Supp. 853 (S.D.N.Y. 1962) and 201 F. Supp. 213 (S.D.N.Y. 1962). An employee was convicted of gambling on company premises. There was a company rule prohibiting this and he was discharged. The arbitrator thought this was too severe and the Court of Appeal reversed the District Court which vacated the award. This vacation was on the basis that public policy had been vindicated by the conviction in a criminal action. See also Int’l Association of Machinists #8 v. Campbell Soup Co., 59 L.C. 13,266 (7th Cir. 1969).

197 Glendale Mfg. Co. v. Local 520 I.L.G.W.U., 283 F. 2d 936 (4th Cir. 1960), cert. denied 366 U.S. 950 (1961). An award ordered the company to bargain (due to a wage reopener) with a union no longer the exclusive representative of the employees.


199 Supra, note 196.
Fact and theory are in conflict and this must be exposed. The references to jurisdiction, power, authority or the intention of the parties are simply guises. The court should admit to this. Once done, a meaningful discussion related to the need for a limited form of appeal to the court can be entertained. This day and age may have rendered the theory of exclusive arbitral jurisdiction obsolete and standards similar to "clearly unreasonable" may accommodate the institutional limitations of a court in the industrial relations system.

Judicial Review of Grievance Arbitration in Canada
The Statutory Structure

The most important piece of labor legislation in the United States is the National Labour Relations Act. This is because of the plenary interpretation accorded to the federal power to regulate interstate commerce. In expressly wording the N.L.R.A. to cover enterprises "affecting commerce", Congress appeared to extend the Act to the full limit of its constitutional power. In Wickard v. Filburn, Congress was held to have authority under the commerce clause to regulate even the production of wheat consumed entirely at the farm on which it was grown because changes in the volume of such wheat could affect the supply and demand for grain sold across state boundaries. Since the Wickard case, the commerce power has been held to extend to used car dealers, grocery stores, newspapers selling but 1½% of their copies in other states, maintenance firms and a host of other activities having but a slender relationship to interstate commerce. There would seem to be very few, if any, business enterprises whose activities have no discernible effect upon the commerce between the States.

This legislative framework, containing sections 203 (d) and 301 of the Labor-Management Relations Act, permitted a uniform approach to grievance arbitration by federal courts. This development was of critical importance in light of the general ineffectiveness of state arbitration legislation.

The Canadian approach has been fragmentary in comparison. The Canadian equivalent to the commerce power has received a very restrictive interpretation at the hands of first, the Judicial Committee of the Privy Council and now, the Supreme Court of Canada. The federal power supports only labor legislation that regulates federal enterprises. Consequently the most important labour legislation is enacted separately by each province. Notwithstanding the similarity between the two industrial relations systems regulation in Canada is predominantly provincial and an analysis of grievance arbitration will reflect this fragmented nature.

Aside from these areas of federal authority, labour legislation is a matter for the Provinces which may lawfully enact such legislation (eg. collective bargaining

200 Carrothers, Labour Arbitration in Canada, supra note 9; Carrothers, Collective Bargaining in Canada, supra note 9; Woods, supra note 9.
201 National Labor Relations Board v. Jones and Laughlin Steel Corporation (1937), 301 U.S. 1.
enactments or minimum wage statutes or general factory acts) in relation to industries and enterprises in each Province, regardless of their economic position vis-a-vis the country as a whole and regardless of the economic consequences of local regulation. This need not be an ultimate unchangeable position but the portents of change are not yet clearly visible. The present constitutional position in Canada is in marked contrast to that in the United States. 

Each province has labour legislation designed to regulate relations within that province. This legislation has some distinctive and important differences from its United States counterpart. Although the basic structures are identical to the Wagner Act, which was used as a model, the provisions relating to grievance arbitration and the right to strike differ substantially. Whereas section 203(d) of the United States Labor-Management Relations Act recommends “final adjustment by a method agreed upon by the parties to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining”, the labour legislation of nine provinces and that of the federal government require that such a mechanism be provided. In five Acts (federal, Manitoba, New Brunswick, Newfoundland, and Nova Scotia) it is prescribed that final settlement be by “arbitration or otherwise”. Similarly, in Alberta and British Columbia it may be by arbitration “or such other method as may be agreed upon by the parties”. In the Ontario Act, arbitration alone is specified for final settlement of disputes arising during the contract term. In Quebec there is an alternative not to arbitration itself, but to the method of arbitration. In Saskatchewan, if the parties have included a final settlement provision in the agreement, the provision must be complied with. Prince Edward Island has recently amended the arbitration provision to read like the Ontario provision.

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206 Jamieson, Industrial Relations in Canada (1957).
207 Federal, s. 125, Manitoba, s. 23; New Brunswick, s. 18; Newfoundland, s. 19; Nova Scotia, s. 19.
208 Alberta, s. 78; British Columbia, s. 22.
209 Ontario, s. 37.
210 Quebec, s. 88-90.
211 Saskatchewan, s. 23A - s. 23B.
212 P.E.I. s. 36.
In addition to the mandatory nature of dispute settling mechanisms, all jurisdictions other than Saskatchewan prohibit strikes and lockouts during the term of the collective agreement.\textsuperscript{213}

The arbitration legislation was and remains applicable to grievance arbitration unlike its United States counterpart. Therefore, except in Ontario, Alberta and Manitoba\textsuperscript{214} where labour legislation specifically precludes the application of arbitration legislation, grievance arbitration is enforced and reviewed by the arbitration statute of the respective province.\textsuperscript{215} Enterprises regulated under the federal labour legislation do not have access to any provincial arbitration legislation. That labour legislation is viewed as a complete code, rendering provincial legislation inoperative.\textsuperscript{216} It would therefore appear, as is the case in Manitoba, that the review and enforcement of arbitration awards in relation to a federal enterprise is subject to the common law doctrines and the inherent jurisdiction of the court.\textsuperscript{217} In Ontario the labour legislation provides for the enforcement of awards by filing them in the office of the Registrar of the Supreme Court in same way as a judgment or order of that court.\textsuperscript{218} No review is provided for by that legislation but because the wording of the Act makes arbitration the sole means for settling disputes, a board is regarded as a statutory tribunal and therefore subject to prerogative writs.\textsuperscript{219}

The Alberta labour legislation provides for a very strict review by the courts.\textsuperscript{220} In Saskatchewan the Minister may establish a Board of Conciliation to deal with disputes and this can be requested by the parties.\textsuperscript{221}

In British Columbia, notwithstanding an arbitration clause, an alternative method of dealing with grievances is open to the parties (if not excluded

\textsuperscript{213} Canada Labour Code, s. 128; Alberta, s. 101; British Columbia, s. 23; Manitoba, s. 26; New Brunswick, s. 21; Newfoundland, s. 23; Nova Scotia, s. 23; Quebec, s. 95. Ontario, (s. 36) and P.E.I. (s. 35) a no strike — no lock out provision is mandatory in every collective agreement.

\textsuperscript{214} Manitoba, s. 25(1), Alberta, s. 78, Ontario, s. 37.


\textsuperscript{216} Oil, Chemical and Atomic Workers International Union v. Polymer Corp. Ltd. 66 C.L.L.C. 14,111 (O.H.C.J. 1966).

\textsuperscript{217} Canadian Co-operative Implements Ltd. v. Local 3960, United Steelworkers of America, 69 C.L.L.C. 14,207 (Man. Q.B., 1969).

\textsuperscript{218} s. 37.


\textsuperscript{220} s. 78. Vacation is to be granted where the arbitrator has misconducted himself, the award has been improperly procured, the judge is of the opinion that a question is not arbitrable, but the arbitrator decided that it was and finally where the Board made an error of law on the face of the award regardless of whether the question of law was submitted to be determined by the arbitrator or arbitration board.

\textsuperscript{221} s.21, s.22.
by the collective agreement). Either party may request the registrar appointed under the Labour Relations Act to assign an official of the labour department to assist the parties to settle the dispute. After the registrar has considered the issue, he may appoint an officer or refer the matter directly to the labour relations board. The board considers whether or not the matter is arbitrable. It may then order the parties to arbitrate the dispute, or rule that the matter is not arbitrable, or make a final binding decision or arbitration award. Under any of these circumstances a Board order is enforceable as a judgment when filed with the Supreme Court of British Columbia and under the last possibility the Arbitration Act of British Columbia does not apply by express exclusion.\textsuperscript{222}

To forestall any impasse over arbitrability, under four statutes (Alberta, British Columbia, Newfoundland and Ontario) it is required that an arbitration clause include "any question as to whether the differences are arbitrable". However the impact of this provision when a court reviews an award is dubious and its meaning has been interpreted to mean substantive arbitrability only.\textsuperscript{223} In addition, provision is made (by nine statutes) for the insertion in the agreement of a final settlement clause by government action if the parties have not done so by negotiation.\textsuperscript{224} Under the federal, New Brunswick, Nova Scotia and Prince Edward Island labour legislation, either party may request the labour relations board to prescribe a clause, which becomes binding as part of the agreement. In British Columbia, with or without request, the Minister may prescribe such a clause. The Alberta, Manitoba, Newfoundland and Ontario Acts spell out the wording of a final settlement clause for insertion should the agreement not contain one.

\textbf{Judicial Review of Grievance Arbitration Awards}

The United States Supreme Court has responded to the legislative deference accorded to grievance arbitration with a deference of its own. This deference can be justified on institutional or functional grounds quite apart from any legislative recommendation. In Canada, with the same institutional considerations present and with a more conspicuous legislative policy in favour of grievance arbitration discernible, an even more responsive position by the Canadian judiciary would be expected. This has not occurred nor is there any indication that it will occur in the near future. The Canadian courts have adopted a position that is antithetical to the Steelworkers Trilogy. Little if any deference is accorded to grievance arbitration. Furthermore, there is no indication that the Canadian courts appreciate the institutional considerations

\textsuperscript{222} s.22 (1) (b).

\textsuperscript{223} Regina v. Weiler et al ex parte Union Carbide Can. Ltd. 68 C.L.L.C. 14,137 (S.C.C. 1968); United Steel Corp. v. The United Steelworkers, Local 2776, [1958] O.W.N. 105, 12 D.L.R. 2d 322. This provision appears to have no impact when the court is reviewing the award. See Re Sudbury Mine, Mill and Smelter Workers Union, Local 598 and the International Nickel Company of Canada Ltd. (1962), 32 D.L.R. 2d 494; 62 C.L.L.C. 15,417, where a Board was held to have declined its jurisdiction by holding that a dispute was not arbitrable.

\textsuperscript{224} Federal s.125; Alberta, s.78; British Columbia, s.22(2); Manitoba, s.23(2); New Brunswick, s.18(2), Reg. 11; Newfoundland, s.19(2),(3), Reg. 11; Nova Scotia, s. 19(2), Reg. 11; Ontario s. 37; Prince Edward Island, s. 36.
involved. The Canadian cases here seldom consider the American decisions. This is despite the fact that Canada has adopted in toto, except for the variations previously noted, an administrative structure identical to that existing in the United States and despite the fact that the industrial relations systems of Canada and the United States operate in almost identical technological, market, budgetary and power contexts. This anomaly is magnified by the pre-occupation of Canadian courts with English doctrines developed in a system that was and remains completely dissimilar to Canada. England does not possess an industrial relations system of the same nature as those of Canada and the United States. Although the technological and market contexts are similar the power context is completely disparate. No administrative agency exists at this time, to administer complex and comprehensive legislation designed to regulate industrial relations. Industrial interaction between the employer and union could be characterized as extremely informal in comparison to its Canadian or American analogue. Indeed the proliferation, functions, responsibilities, and importance of administrative agencies so common to Canada and the United States would appear foreign to the United Kingdom. However, the Canadian courts, long after the abolition of the Judicial Committee of the Privy Council as a final court of appeal, persist in applying English doctrines to institutions that are alien to English life. Such a tenacious resistance to consider Canadian reality and requisites can only be attributed to an almost morbid attachment to the doctrine of stare decisis.

Review of grievance arbitration can be viewed from two perspectives in Canada. One approach considers arbitration to be a private dispute settling mechanism; the other considers grievance arbitration to be a statutory tribunal. Both judicial approaches are devoid of industrial relations and institutional considerations. Each view is reminiscent of the Cutler Hammer doctrine rejected by the United States Supreme Court.

**Consensual Grievance Arbitration**

Labour legislation making a final and binding dispute settling mechanism mandatory while not specifically requiring arbitration is considered private or consensual. It is treated with no more or less deference than that accorded to commercial arbitration boards. Judicial review is available and awards will be vacated if bias, fraud, an absence of natural justice, an excess of jurisdiction or an error of law on the face of the record exists. This appears

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225 *Canadian Brotherhood of Railway Transport and General Workers v. B. C. Airlines Ltd. and Pacific Western Airlines Ltd.*, 70 C.L.L.C. 14,064 (B.C.S.C. 1970) is one of the few cases to cite and apply American doctrine. The case revolves around the impact of a corporate merger on a collective agreement and the John Wiley approach is taken, rejecting an archaic English legal doctrine that had no relevance to industrial relations. [The author notes that this decision has been reversed, [1971] 2 W.W.R. 466].

226 *Royal Commission on Trade Unions and Employers' Associations, 1965-1968* Report. Great Britain is about to jettison their existing legal framework and adopt the Canadian and American structures.


to be the case in both jurisdictions where the court proceeds under the provincial arbitration legislation and where such legislation has been rendered inoperative by labour legislation and the court intervenes on the basis of the inherent jurisdiction of the court.

The doctrine of an error of law on the face of record has been synopsized as follows:

The reviewing court has exclusive power to define the exact issues of law or fact which the parties have specifically agreed in their contract to submit to the arbitrator for his determination. Where the parties have agreed to submit to him the whole dispute between them without separating out specific issues of law or fact, no part of their agreed submission (except presumably the narrow request for determination) is deemed to be the reference of specific issues. The court has full power to set aside the arbitrator's award on the ground of any error of law which he commits in the course of his determination of the specific issues referred to him, which error is outside the scope of the award. However, within the scope of the exact issues specifically referred to the arbitrator, the court will not interfere with his determination even if the court is of the opinion that the arbitrator has erred. In the context of this doctrine, the term "law" includes court rules of evidence and of documentary interpretation as well as the arbitrator's interpretation of the relevant document itself.

This doctrine does not appear to have developed in the early American approach to arbitration. It appears that "error of law on the face" as it relates to private tribunals was established in 1802 and no one has been able to resist its "compelling logic" since. States Lord Denning in Rex v. Northumberland Compensation Appeal Tribunal, the cornerstone to the Canadian approach to grievance arbitration notwithstanding its remote factual context:

Leaving now statutory tribunals, I turn to the awards of arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see 9 & 10 Will. 3, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator, because that could not be said to be misconduct or undue means; but ultimately it was held in Kent v. Elstob (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams J. in Hodgkinson v. Fernie (1857) 3 C.B. N.S. 189, but is now well established. This remedy by motion to set aside is, however confined to arbitrators.

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230 Canadian Co-operative Implements Ltd. v. Local 3960, United Steelworkers of America, 69 C.L.L.C. 14,207 (Man. Q.B. 1969); Schiff, supra note 229; Regina v. Arthurs et al ex parte Port Arthur Shipbuilding Co. supra note 11.


232 Supra note 228.

We are left with an extremely penetrating review of these so-called private tribunals. Not only can a court intervene for fraud, bias or excess of jurisdiction; but also when an error of law is apparent on the face of the record. Of course, if the error of law is the specific issue referred to the tribunal the court is powerless. This stems from the consensual nature of the tribunal. The parties have contracted for an arbitrator's opinion and his alone. To intervene in such a situation would be to entertain an appeal and this would encroach upon the parties' ability to freely contract. A collateral question of law, not specifically submitted to the arbitrator, is presumably not within this rubric of party intention. Consequently, a party should not be precluded from achieving court review of this matter. It is said that the courts are the experts in questions of law of the collateral variety.

The simplicity of the doctrine conceals the monumental problems in its application. This is without first questioning the appropriateness of the doctrine to grievance arbitration. Initially, what is a question of law? Secondly, when is it collateral? In answering these two questions, the Canadian courts have been able to expand or contract the scope of review at whim. This phenomenon is magnified by the nature of a filed grievance. Executed in the shop by laymen, it is a general allegation and most certainly does not separate those issues of fact and law specifically referred to the arbitrator. This leaves the court, by virtue of the law of commercial arbitration, in a position of complete review. However most courts have proceeded, by distilling those issues specifically submitted as opposed to the collateral questions of law.

A paradigm of the expansionary nature in the scope of review is the interpretation of a collateral issue of law presented in Shipping Federation of British Columbia and International Longshorer's and Warehousemen's Union, Local 501. In that case, two gangs refused to work when dispatched to another port, on the grounds that each gang should consist of thirteen workers instead of eleven, in accordance with the conditions prevailing in that port.

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234 See Abel, Materials Proper For Consideration in Certiorari To Tribunals: I. (1963), 15 U. of T. L.J. 102 for an excellent analysis of the confusion in determining what is an error of law on the face.

235 A.B.C. Sheet Metal and Plumbing Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Union 170, 62 C.L.L.C. 15,394 (B.C.C.A. 1962); International Union of Operating Engineers, Local 115 v. Ben Ginter Construction Co. Ltd., 66 C.L.L.C. 14,163 (B.C.S.C. 1966); Re The Bay Co. (B.C.) v. Local 170 of the Pipefitting Industry, 60 C.L.L.C. 15, 325 (B.C.S.C. 1960). It should be noted, once the court holds that this is a specifically referred issue, that ends the inquiry no matter how erroneous the decision was. These cases attest to that. See also General Drivers Union v. Norton, 63 C.L.L.C. 15,489 (Man. Q.B. 1963) and Bakery and Confectionery Workers Union v. Mammy's Ltd. 66 C.L.L.C. 14,147 (Nfld. S.C. 1965). However it should be further noted that jurisdiction, as a grounds of review, impinges upon this finality. For as we shall see, an interpretation that is clearly erroneous, in the court's opinion, will not stand. It will be quashed for an excess of jurisdiction. See Hudson Bay Mining and Smelting Co. Ltd. v. Flin Flon Base Metal Workers' Union, 66 C.L.L.C. 14,166 (Man. Q.B. 1966).


They were suspended for insubordination and lodged a grievance claiming the collective agreement stipulated that when gangs are sent to another port they are to be governed by the working conditions in that port. The arbitration board ruled that the Federation's unilateral reduction of the size of the gang entitled the union to conclude that the Federation no longer intended to be bound by the agreement and thus, the union was discharged from further performance of its contractual duties. The Federation sought review and the British Columbia Supreme Court held that the issue for decision by the arbitrators was:

Did the Shipping Federation on March 23rd, 1959, breach the Collective Agreement of February 16th, 1959 by suspending Gangs 53 and 73 and fill-ins from all work?

All other matters were collateral. The court could therefore review the arbitrator's interpretation of the specific provisions of the collective agreement as they were collateral to the main issue phrased by the court.

Again, in Re Columbia Packing Co. Ltd. and Amalgamated Meat Cutters and Butcher Workmen of North America, Local 212,238 the Supreme Court held that the interpretation of the collective agreement was a collateral question of law. In deciding whether an employee was wrongfully dismissed, the arbitrators held that the collective agreement maintained an unlimited right of discharge. The court disagreed with this interpretation being of the opinion that a relevant provision had been disregarded. The arbitrators had therefore erred in the determination of a question of law that had become material as distinct from the case in which a specific question of law is referred to them for decision.

Similarly in Re Alberta Wheat Pool and Grain Workers Union, Local 333239 the British Columbia Supreme Court disagreed with a holding of a board of arbitrators that granted wages to an employee for time lost due to illness. The court felt that the board had misconstrued the agreement and that this misconstruction was reviewable. The court stated:

This is not a reference in which a specific point of law was submitted for arbitration but is one in which a question of construction and of law arises as being material in the matter referred.240

Hence interpretations and constructions of a collective agreement, facilitating the ultimate determination of "rightness" or "wrongness", are collateral questions or issues of law and reviewable by the court. The reasoning is a spurious attempt to rationalize a full appeal on the merits. The end result detrimentally affects the values of private arbitration: assuming recourse is made to grievance arbitration because of its speed, expense, informality and availability of arbitral expertise. Until the passage of labour legislation the courts had consistently refused to enforce the collective labour agree-

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240 Id. in International Woodworkers of America Local 1423 v. S & K Ltd., 62 C.L.L.C. 15,402 (B.C.C.A. 1961) The British Columbia Court of Appeal quashed an award re-instating a discharged employee. The question of "proper cause" was said to be a collateral issue of law and therefore reviewable when the error in such a determination is on the face of the award and it was.
Unfamiliarity with collective agreements is reflected in the findings of collateral error of laws by applying traditional contract doctrine; doctrine that evolved quite apart from an industrial context. Professor Summers has argued that there is no necessary logic to such an application. Indeed, it entirely misconceives the nature of contractual law as well as the purposive nature of legal reasoning.

Not only does a collateral error of law encompass an erroneous interpretation of an agreement; it strikes at the very understructure of the adjudicative process. Collateral errors of law have been found if the arbitrator has set an "incorrect" burden of proof, improperly used "extrinsic" evidence, failed to use the doctrine of collateral estoppel in just the manner that courts do, failed to apply the common law rules of wrongful dismissal, improperly applied the procedural provision of a collective agreement or improperly excluded evidence. This leaves the courts with powers of complete review over the procedure of grievance arbitration. A failure to apply traditional rules of evidence or procedure is generally fatal to the award.

It was argued above that this approach is unwise. Arbitral expertise is needed in these matters of procedure. The arbitrator should be able to fashion a procedural structure based on the needs of this system. These issues can be considered as neutral in that they apply equally to both parties of an agreement. Moreover, the arbitrator can look for guidance to the many dispute settling institutions that surround him. The present Canadian approach, impinges upon the speed, expense, informality and effectiveness of grievance arbitration.

The concept of jurisdiction in Canada is similar to the casuistry of the American courts on this issue. However Canadian courts are without the benefit of the Trilogy to remind them of industrial relations requirements. Jurisdiction is defined in abstract "logic" with no consideration of the functional limitations of courts. The cases are somewhat more complex than the

241 Supra note 72.
242 Supra note 54. For a refreshing change from this sterile enterprise see, Canadian Brotherhood of Railway Transport and General Workers v. B.C. Airlines Ltd., supra note 225.
244 Re International Union of Operating Engineers and Ben Ginter Construction Co. Ltd. 65 C.L.L.C. 14,066 (B.C.S.C. 1965).
249 Weiler, op. cit. supra note 12.
American because of the doctrines of “error of law on the face”. At times, an excess or declination of jurisdiction is considered to be an error of law on the face of the record and collateral to the specific question referred. It is therefore reviewable. However a more “logical” view, is that jurisdiction is a grounds for review independent of any error of law on the face. In either event, the standard for review is the same. The decision is not reviewable if the interpretation given by the arbitrator is one that the words will reasonably bear. This standard is imposed in situations where a party’s rights have been phrased without reference to the terms of arbitral jurisdiction. It is simply a situation where the court feels the arbitrator is wrong and it is the intensity of this feeling that is determinative. If the court feels so strongly, that it can say that the words are not reasonably susceptible to such an interpretation, the award will be quashed. This reasoning has very few constraints, and those that exist are not of an objective variety. The common law position that the parties are free to contract for final and binding arbitration is illusory. The arbitrator can be wrong but not clearly wrong. To be clearly wrong, is to lack jurisdiction. 

This doctrine, abolished in the United States because it could only have a crippling effect on grievance arbitration, thrives in Canada. The cases are rife with semantical analysis devoid of functional relevance.

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251 This is apparent from noting the effect of a privative clause on a statutory tribunal. Jurisdictional questions are all that remain. See Ontario Labour Relations Board; Bradley v. Canadian General Electric Co. Ltd. (1957), 8 D.L.R. (2d) 65. This is accepted in International Woodworkers of America v. Weldwood of Canada Ltd., 70 C.L.L.C. 14,033 (B.C.C.A. 1970).


Such an interpretation of the Article is, in my opinion, not only a proper one but is probably the right one. But whether right or wrong, in my view the board interpreted and did not amend the agreement. This being so, it did not exceed its jurisdiction and its award is valid.

This circular reasoning leads us to the position that if the arbitrator’s effort was improper, the agreement would be amended and therefore he would lack jurisdiction.

Question: Who is in the best position to decide what is proper?

253 See, Weller, The ‘Slippery Slope’ of Judicial Intervention (1971), 9 O.H.L.J. 1, pp. 60 - 71. “There are few areas of Canadian law where the Supreme Court has done a poorer job than in its efforts in the area of the collective agreement and labour arbitration. There is some hint in the literature of the area that the collective agreement is a very peculiar and esoteric instrument for judicial administration and that labour arbitration is such a distinctive function that it is outside the competence of the ordinary courts. I would strongly disagree with either of these suggestions. The collective agreement is a sophisticated and complex document, and its interpretation requires great sensitivity to its special features and an understanding of its social background. These characteristics it shares with almost all statutory or contractual interpretation. Labour arbitration requires judgment and experience, but it is and should be a form of adjudication, and any kind of judgment requires professional craft and skill. The tragedy of the experience I have recounted in this area is not that the Supreme Court involved itself in an area which was peculiarly unsuited to law and courts, but rather that this sequence of cases epitomizes all that is deficient in the conception of law and judging which appears to be shared on our Supreme Court.” (at p. 70).
The other judicial approach to grievance arbitration treats arbitration boards as statutory tribunals. The legislative policy of Ontario expressly favours arbitration by requiring that it be the exclusive modus operandi of solving disputes during the term of the collective agreement.254 The courts have held this requirement to be coercive. It forces the parties to adopt arbitration. This is despite the fact that in the provinces which have adopted the wording “arbitration or otherwise” no other viable process has developed.255 In fact it is difficult to envisage another viable process. The United States experience only confirms this universality. Even though the legislation only recommends that a process for solving contractual disputes be adopted, arbitration clauses appear in well over 90% of all collective agreements.256

The Ontario courts have insisted that grievance arbitration is coerced by legislation. Therefore the tribunals are to be treated as statutory and supervised by prerogative writs.257 This ruling carries with it a number of consequences; all of which originated before the inception of grievance arbitration, and all of which are unsuited to an administrative agency let alone a grievance arbitration board. Unfortunately the Ontario courts have a very limited conceptual repertoire.

The first case to display this “logic” was Re The International Nickel Co. and Rivando.258 The judgment of the Ontario Court of Appeal is devoid of institutional considerations, industrial relations realities and legislative policy. There is no attempt to distinguish grievance arbitration tribunals from administrative agencies. The court appears oblivious to the fact that the parties select and discharge adjudicators, that the parties “enact” the collective agreement which is to be interpreted by these adjudicators and that they are able to modify its terms on negotiating a new agreement. No mention is made of the importance of grievance arbitration to the continuity of the industrial enterprise and industrial peace generally. Moreover the Ontario courts have ignored the American experience. These “minor” details suggest that there is little logic in applying prerogative writs to such institutions. Any approach taken should be fashioned to accommodate the needs and functional structure of arbitration. Standards of review or review bodies should be devised to curb possible arbitral abuses, without at the same time

254 Ontario, s. 37.
255 Woods, Public Policy and Grievance Arbitration in Canada, supra note 9. Unless one can argue that the parties prefer the alternative of the British Columbia Labour Board to the opportunity of selecting their own adjudicators to interpret the collective agreement they have negotiated, and, who they can discharge for unsatisfactory service.
eradicating the benefits or values of that process. This is the "calculus of intervention" reflected in the approach of the United States Supreme Court in the American and Warrior cases. This analysis encouraged that court to erect presumptions in favour of arbitration. Presumptions if honoured respect the expertise of an arbitrator and recognize the relative judicial unfamiliarity with industrial relations and the nature of collective agreements. Certainly the Canadian courts cannot claim to be more knowledgeable in these matters; nor is their institutional design more compatible with the day to day operations of an industrial enterprise.

The Ontario courts have not considered the issues above. Grievance arbitration tribunals may be reviewed not only on the basis of bias, fraud, and excess or declination of jurisdiction but also for an error of law apparent on the face of the record even if it is the specific issue submitted to the arbitrator. Rex v. Northumberland Compensation Appeal Tribunal259 is ritualistically cited for this proposition notwithstanding the dissimilarity between the English tribunals and arbitration boards and administrative agencies used to implement governmental policy in the United States and Canada.260 The court will not interfere just because one interpretation appears more apt than another. The standard applied for error of law on the face of the record is whether the interpretation of the collective agreement is one that it will reasonably bear.261 Is a court in any better position than the arbitrator to make this interpretation? Arbitration is designed to facilitate a meaningful interpretation; an interpretation the courts were unable or unwilling to render. Does this standard accommodate the institutional limitations of a court? An analysis of the cases suggests that it does not.

The Supreme Court of Canada squandered a marvelous opportunity to correct this misapplication of doctrine in Regina v. Arthurs et al ex parte Port Arthur Shipbuilding Co.262 Reverently citing Lord Denning's distinction between consensual and statutory tribunals, the court squeezed grievance arbitration into the compulsory pigeon-hole.263 This makes grievance arbitration in Ontario more vulnerable to judicial review than the Ontario Labour Relations Board. The Ontario legislation contains a privative clause,264 that while not rendering the Board immune from review, eliminates error of law

260 Hart and Sacks, supra note 14.
262 Supra note 257.
263 Id.
264 s.97 No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit, or restrain the Board on any of its proceedings.
on the face of the record as a basis for it.\footnote{Re Ontario Labour Relations Board; Bradley v. Canadian General Electric Co. Ltd. (1957), 8 D.L.R.(2d) 65. See also, Laskin, Certiorari to Labour Boards: The Apparent Futility of Privative Clauses, (1952) 30 Can. B. Rev. 986; Wanczyczycki, Judicial Review of Decisions of Labour Relations Boards in Canada, (1969) 16; Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796 et al, 70 C.L.L.C. 14,008 (S.C.C. 1970). However, see Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796 (1970), 70 C.L.L.C. 14008 as to the significance of this distinction. Yet Professor Weiler has recently concluded that: 'There is no doubt that the degree of deference to arbitration awards is much less than is the case for Labour Board decisions ...' supra note 25(3) at p. 17.}

This means that only natural justice or jurisdictional issues will support a judicial review of the Board's decisions; whereas the final and binding requirement of grievance arbitration relates only to the absence of a right of appeal, not to the question of judicial review.\footnote{R. v. Barber et al., supra note 257. R. v. Arthurs et al., supra note 257.}

\textit{Regina v. Arthurs et al; ex parte Port Arthur Shipbuilding Co.}\footnote{68 C.L.L.C. 14,136 (S.C.C. 1968), rev'g 67 C.L.L.C. 14,024 (O.C.A. 1967). Recently, legislation has been amended to modify the impact of this decision. Alberta, R.S.A. 1970, c. 100, s. 78(2) (g)} is a paradigm approach of a Canadian court to grievance arbitration. Three employees had absented themselves from work in order to work elsewhere. This was a violation of an express term of the contract and they were discharged. The collective agreement, in addition to that provision, contained a management's rights clause that included the right to discharge for proper cause and an arbitration clause which contained the vague restrictions that the arbitrator could not modify the terms of the collective agreement. The board of arbitration did not feel that there was proper cause for a discharge, in light of the grievors' records of employment and seniority. A suspension was substituted on the basis that some form of discipline was justified. The award was quashed on review by the Ontario High Court of Justice. Mr. Justice Brook distinguished between just cause and proper cause, holding that the latter was much narrower in scope. To interpret proper cause in the way the arbitration board did, was to substitute or read into the collective agreement a term that did not exist. This modification was expressly prohibited by the collective agreement and therefore the board exceeded its jurisdiction. This excess of jurisdiction was an error of law on the face of the record, allowing the court to quash the award. The reasoning is an exact replication of the \textit{Western Union} fatuity rejected by the United States Supreme Court.

Is such a rigid interpretation of proper cause or of just cause justifiable? Is the court equipped to ascertain the intention of the parties or to fashion the needed industrial jurisprudence? The Court's semantical analysis permits
it to convert any disagreement with the arbitrator’s reasoning into an excess of jurisdiction.\textsuperscript{268} Polymer Corporation Ltd. and Oil, Chemical and Atomic Workers Union, Local 16-14\textsuperscript{268} which affirmed the power of an arbitrator to award damages for breach of a collective agreement, was distinguished. Brook J. felt that this was something more than fashioning a remedy. It was a substitution, “expressly” forbidden by the collective agreement.

This judgment was reversed by the Ontario Court Appeal,\textsuperscript{270} with Schroeder, J. A. dissenting. Mr. Justice Laskin noted that at common law courts were not specialized agencies dealing with employment relations and under that common law regime the discharge would probably be final. However the prevalence of collective bargaining agreements and labour legislation has changed all this.\textsuperscript{271} The collective agreement leaves the extent of discipline at large (proper cause) and in elaborating this term, the Board was carrying out the very function assigned to it by the parties. Mr. Justice Schroeder, in an important dissent in that it was later adopted by the Supreme Court of Canada, held that the clear words of the collective agreement must be honoured. The recognized canons of constructions must be employed, and the ordinary natural and grammatical sense of the words used in the collective agreement must be adopted. This deceptively suggests that the recognized canons of construction are appropriate in an industrial relations environment and that the clear and ambiguous meaning of words can be ascertained when divorced from the past practice and negotiating history of the parties.\textsuperscript{272}

Schroeder J. A. did not concur in Brook J.’s distinction between cause and proper cause; rather neither term was to be viewed as giving the board this power.\textsuperscript{273} He then erected a presumption against arbitration by requiring that any intent to give the arbitrator such power “should have been clearly expressed in appropriate language. In the absence of such a provision there is no authority in the board to pursue that course”.\textsuperscript{274} This error of the board

\textsuperscript{268} In Osborne & Hall, Toronto Printing Press and Assistants Union v. Weatherill et al., 70 C.L.L.C. 14,038 (O.S.C. 1970) held that the issue of whether the error was on the face of the record is not relevant if the error is in relation to a collateral or preliminary matter which goes to jurisdiction. In that case the board was said to have declined jurisdiction. Therefore, one can see that this further reduces the barriers for intervention if court so desires, because almost any error can be converted into a jurisdictional error.


\textsuperscript{270} 67 C.L.L.C. 14,024 (O.C.A. 1967).


\textsuperscript{272} See, Summers supra note 54 for a refutation of this position as well as Farnsworth, supra note 58.

\textsuperscript{273} See Lynchburg Foundry Co. v. Steelworkers, supra note 175, representative of the American position, that only accepts such a rigid interpretation if a contract expressly forbade the arbitrator to exercise any discretion in fashioning an award.

\textsuperscript{274} 67 C.L.L.C. 14,024 (O.C.A. 1967) Re Sandwich, Windsor Amherstburg Railway Co. (1961), 26 D.L.R.(2d) 704 (O.C.A. 1961) also illustrates a presumption against grievance arbitration and industrial relations considerations. Oblivious to the impact of labour legislation, Aylesworth J.A. held that it is a prerogative right of management to discharge employees and that it can be cut down only if the agreement is clearly to that effect. R. v. McCulloch et al; ex parte Dowty Equipment of Canada Ltd., 69 C.L.L.C. 14,173 (O.C.A. 1969) is a case where the collective agreement met this requirement of clarity.
was then characterized as an excess of jurisdiction and an error of law apparent on the face of the record. Thus we see the interwoven nature of these two notions which is conveniently separated if a privative clause exists.\(^{276}\) In addition, the evidence of the length of service of the offending employees was held to be irrelevant and extraneous to the issue. It's use also resulted in an error of law on the face of the record, sufficient to quash the award. The Supreme Court of Canada in a judgment by Mr. Justice Judson reversed the Court of Appeal and agreed with Schroeder J.A. Once the board found facts to justify discipline, the particular form chosen was not subject to review on arbitration.\(^{276}\)

In Regina v. Barber et al; ex parte Warehousemen and Miscellaneous Driver's union, Local 419\(^{278}\) the reviewing court disagreed with the arbitrator's interpretation of the collective agreement. This disagreement was fatal to the award. The issue was whether a part-time employee who had suffered a prolonged illness could claim benefits under the insurance welfare plan provided by the collective agreement. The board of arbitrators held that the provision in the agreement was ambiguous, permitting them to consider the extrinsic evidence of 1) the master policy which was intended to discharge this obligation, and 2) the past practice that such a claim had never been allowed before. This extrinsic evidence went against the grievor and his claim was denied. The Ontario High Court quashed the award. The agreement was held not to be ambiguous; hence the use of extrinsic evidence disregarded the plain meaning of the words and gave them an interpretation they could not reasonably bear. This was an excess of jurisdiction and was an error on the face of the record.

Mr. Justice Jessup of the Ontario Court of Appeal affirmed the High Court. He stated:

In my view articles 7.02 and 14.03 of the present collective agreement are incapable of being regarded as ambiguous either latently or patently under any principle of construction which the law countenances. On their face they are clearly unambiguous.

He then went on to assert:

I see no difficulty in applying such articles to all classes of employees.

Such a mechanistic approach to contractual interpretation is difficult to justify in a normal contractual setting let alone when applied to a collective bargaining agreement. The meaning of words cannot be divined by an a priori process divorced from the context in which they were negotiated. The parol evidence rule is presently under attack and often circumvented in traditional contract interpretation. In any event, surely one could construct a case to support the proposition that the subsequent conduct of the parties can amend a contractual term.\(^{270}\)

\(^{276}\) Supra notes 265 and 268.

\(^{270}\) For the legal impact of this decision see: S.K.D. Mfg. Ltd. (1969), 20 L.A.C. 231 (Weiler).


\(^{270}\) See the cases outlined in Summers, supra note 54; Farnsworth, supra note 58. However a collective agreement must be in writing, and hence re-sale must be made to the doctrines of waiver and estoppel.
Section s. 37 (7) (c) of the Ontario Labour Relations Act gives an arbitration board power:

(c) to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion deems proper, whether admissible in a court of law or not.

However Mr. Justice Jessup saw this provision as only relaxing the strict rules as to the admissibility of evidence and in particular allowed hearsay evidence to be adduced without objection. However, that provision does not relieve a board from acting only on evidence having cogency in law.

The “reasoning” allows any Ontario court to characterize the wording of a collective agreement as unambiguous and thereby upset an award if background data has been resorted to. This imposes an onerous burden on the draftsmen of collective agreements. The United States Supreme Court requested clarity in drafting restrictive arbitration provisions. The Canadian courts impose this burden upon the drafting of all contract provisions.

The differences between a collective bargaining agreement and a commercial contract were noted above. It was argued that the differences were not so great as to render adjudication ineffective. A purposive approach to interpretation having due regard to the industrial relations background could accommodate the symbiotic relationship of the parties, the eleventh hour bargaining pressure, the skeletal nature of the agreements and the exigencies of the industrial setting, within an adjudicative institution. However the Canadian courts have rejected these differences by quashing awards which consider them. Arbitration is forced to proceed in a mechanistic fashion replicating Anglo-Canadian judging.

Even aside from the evidentiary aspect of grievance arbitration, the courts will intervene if the provisions of a collective agreement have been given a meaning they cannot reasonably bear. This position is not unlike that taken by the courts in those provinces which are said to have consensual arbitration and this similarity is reflected in Mr. Justice Pennell’s conclusion in The Niagara Wire Weaving Co. Ltd. v. United Steelworkers of America Local 4528281 The powers of the board of arbitration are those conferred upon it by the collective agreement, namely, to interpret and apply the terms of the collective agreement. The majority, it seems to me, disregarded the plain unambiguous words of article 12.03 and read into the agreement terms which do not exist. It is true the board of arbitration is master in its own household, but it cannot exercise a jurisdiction which was never conferred upon it.


I am bound to say that in my respectful opinion the majority have based their decision on an interpretation which cannot be reasonably maintained in the face of the plain, unambiguous words of article 12.03. Accordingly there is an error in law appearing on the face of the record. (emphasis added)

The chameleonic character attributed to the notion jurisdiction suggests the house in which the arbitrator is a master may be as spacious or as minikin as a reviewing court desires. At present it is of the Lilliputian variety. The logic of jurisdiction when defined in the abstract and the multipurpose notion euphemistically called an error of law on the face of the record prohibits arbitrators from ignoring court rules of evidence, recently making common sense assumptions in lieu of concrete evidence, considering mitigating factors in discharge cases, or developing an equitable doctrine of laches or waiver in relation to procedural provisions of the collective agreement. Recently the court has questioned the legitimacy of arbitral use of relevant statutory material which may create horrendous problems in the not too distant future. Other than an intuitive feeling of what a court will consider unreasonable little guidance of when a court will intervene is given to the parties. But one certainty does exist. Whenever there is a doubt, it will be resolved against grievance arbitration and this position creates a powerful stimulus to litigate in the party disfavoured at arbitration. The result leaves grievance arbitration barren of all the advantages that made it viable and distinct from the courts. It is left as a mere staging platform to an inexpert adjudication of a superior tribunal. To be sure, not all questions are brought into the courts; but this has nothing to do with an amicable judicial doctrine. The parties simply cannot afford to bring every question to the courts. However any question that one of the parties considers important enough will be reviewed if arbitration proves unsuccessful. The question for social design and planning is whether this second opportunity is beneficial and necessary? The position taken throughout this paper is that at present it is not. The cases neglect the industrial relations realities, and cut against the institutional


287 If the arbitrator uses a statute and avoids the meaning of a collective agreement his award will be quashed. See, International Chemical Workers Union v. Krever et al, (1968), 68 C.L.L.C. 14,086 (Ont. H.C.); R.C.A. Victor Ltd. v. I.W.A.: (1971), C.L.L.C. 14,099 (Ont. H.C.).

Yet if he neglects the presence of the statute and his award contravenes it, the award will be quashed for illegality. See Re Bendix Automotive of Canada Ltd. and U.A.W. Local 195, (1971), 71 C.L.L.C. 14,089 (Ont. H.C.); (1971), 20 D.L.R.(3d) 151.
capabilities of arbitration and the courts. More importantly, many of these unconvincing outcomes are made academic by the length of time required to process the claims.

To reiterate the theme of this paper, either a functional approach must be accommodated within this concept of jurisdiction or an expert reviewing body should be established. The industrial relations system with the inclusion of the judiciary should be viewed as a collaborative framework with each party and institution performing those tasks it does best. What it does best is a function of its institutional capabilities. Presently Canadian courts are not equipped to take a meaningful day to day role in the industrial enterprise. If the court is going to intervene it must define its role in a manner to minimize the costs that are generated today. To do this, the court must develop a presumption in favour of arbitration that can only be rebutted by the clearest of evidence. Restrictive or limiting clauses on the arbitrator's power must have an explicit and clear meaning in order to minimize the possibility of interpretive error. The clearly wrong standard applied to arbitral reasoning generally, must either be eliminated or applied by a more expert body. The arbitrator has the power to be clearly wrong and only casuistry turns this into jurisdictional errors or errors of law on the face of the record. In any event a “clearly wrong” interpretation will not go completely unremedied. The arbitrator will not be used again and the error, admitting that the bargaining onus will be shifted, can be corrected at the next bargaining session. The arbitrators themselves can minimize the occurrence by developing consistent and rationally articulated approaches to interpretation.288

Adjudicative Integrity

Court intervention to preserve the integrity of the adjudicative process is both a necessary and correct application of the “calculus of intervention”. The courts have historically maintained the moral force of adjudication through the use of doctrines such as the requirement of natural justice. This intervention was justified above in relation to American courts and of course, it applies equally in Canada. The gains of such intervention far outweigh any generated costs due to the court’s expertise in these matters, and the relatively little industrial relations experience required. This position obtains in relation to both consensual and statutory arbitration.

In Bradley et al. v. Corporation of the City of Ottawa et al.289 certain employees had been promoted by the Fire Chief in accordance with his understanding of the seniority provisions of the collective agreement. The Association filed a grievance on behalf of other employees who claimed that they were entitled to these promotions instead. The arbitrator ruled in favour of the Association, revoking the promotions in question. Those employees prejudiced by the ruling, applied for certiorari to quash the award.

288 Conferences and the formation of bodies such as the National Arbitration Association and American Arbitration Association are formalized mechanisms to achieve a high standard of arbitral performance. Canada appears headed in this direction. See the Ontario Labour-Management Arbitration Commission Act, S.O. 1968, c. 86 assented to June 13, 1968 proclaimed in force January 16, 1970.
They asserted that they should have been given notice of the arbitration and allowed to present argument. The Ontario Court of Appeal granted certiorari. Notice must be given to such employees to preserve the participation of the party who is affected by the decision and adverse in interest. The unarticulated major premise was that neither the employer nor the Association could be expected to fairly represent the interests of these workers.

_Hoogendorn v. Greening Metal Products and Screening Equipment Co. et al._200 is another case illustrating this preservation of the adversary character of grievance arbitration. The Supreme Court of Canada quashed an arbitration award sanctioning the discharge of an employee who had refused to pay union dues. In failing to give him notice and allow for his presence at the hearing, the board had violated the rules of natural justice.

Grievance arbitration awards will be vacated or quashed in accord with this same principle of adjudicatory integrity if an arbitrator interviews witnesses or inspects documents in the absence of the parties;201 improperly refuses to hear rebuttal evidence;202 proceeds in the absence of one of the parties' counsel;203 or if fraud or bias exist in the proceedings.204 However in the latter case, the standard of impartiality applied to the flanking arbitrators of a tripartite board is substantially less than that applied to the chairman or a lone arbitrator.205 Arbitration will not be affected in a situation such as a work assignment dispute, where one of the parties (the other union) would not be represented.206 The labour relations board is a more appropriate instrument in resolving such a dispute.

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It should be noted that a recent amendment to the Ontario legislation has created (or codified) a duty of fair representation of a trade union. R.S.O. 1970, c. 232, s. 60.


203 _Westeel Products Ltd., v. United Steelworkers of America, Local 3229, 65 C.L.L.C. 14,044 (B.C.S. 1964)._  


206 _United Brotherhood of Carpenters and Joiners v. Marwell Construction Co. Ltd._, 66 C.L.L.C. 14,115 (B.C.S.C. 1966); contrast this with the United States Supreme Court ruling in _Carey v. Westinghouse_, _supra_ note 132.
Arbitrability in Canada

In contrast to the American analysis, there are very few cases that deal with the issue of arbitrability. One reason for this is that four provinces, including the two largest in terms of litigation, require that such issues be determined by the arbitrator. The provinces are Alberta, British Columbia, Newfoundland, and Ontario. However, these provisions have been held to refer only to substantive arbitrability. In fact, the concept of procedural arbitrability accepted by the United States Supreme Court in John Wiley and Sons and left exclusively to the arbitrators, is not even acknowledged in Canada. Mr. Justice Judson, in R. v. Weiler et al ex parte Union Carbide Canada Ltd., held that section 37(1) of the Ontario Labour Relations Act did not apply when the arbitrator had acted upon a grievance that appeared to be procedurally barred by the collective agreement. The concept of jurisdiction was employed. If the grievance is “out of time” the arbitrator is without jurisdiction. The arguments of industrial relations complexity and arbitral expertise that the United States Supreme Court found so compelling in John Wiley were not mentioned by the Court. Therefore in these four jurisdictions arbitrability is an issue for the arbitrator to decide. However he has no authority to decide erroneously. Should he hold a dispute to be arbitrable and a court disagrees, it will be converted into an excess of jurisdiction and the award quashed. A fortiori, if he determines it is not arbitrable and the court again disagrees, then this is a declination of jurisdiction.

This provision expedites grievance arbitration. It avoids the issue that confronts American courts so often before the award is rendered; but to no ones’ prejudice in that the Courts will always review the determination.

However a very recent case falls closely within the American mould in this area. In International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 742 v. Crown Zellerbach Canada Ltd., an interlocutory injunction was granted to a union restraining the company from contracting

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298 Id.

299 Op cit., supra note 297.


302 This is a value judgment one must make: whether to force all grievances through arbitration to maximize its therapeutic value while eliminating the costs of judicial intervention. The United States Supreme Court in American and Warrior have taken an intermediate position of entertaining the question in the light of a presumption in favour of arbitration. Notably, in relation to procedural arbitrability they have deferred exclusively and absolutely to arbitration, whereas the Canadian Courts have gone in an opposite direction.

out work until after arbitration. The company claimed an absolute right to contract out. The contract was silent on this issue and a management’s right clause did not exist. The court, citing the Steelworkers Trilogy, felt that the union had established a reasonable apprehended breach of the right asserted.

Another recent case in this area is Canadian Brotherhood of Railway Transport and General Workers v. B.C. Air Lines Ltd. and Pacific Western Airlines Ltd.804 One airline took over another in a corporate merger. The employees of the company taken over were given the choice of resignation or to accept employment with no guarantee as to the terms. The new corporation viewed the existing collective agreement as not binding. The British Columbia Supreme Court granted the union an interim injunction and ordered arbitration. Mr. Justice Dohm, in a well reasoned and purposive judgment, rejected the application of the common law doctrine requiring full notice of contracts on the purchase of an enterprise.

In my opinion, the Courts of this country will not apply rigid common law doctrines in the field of labour relations, in the face of what is plainly equitable, reasonable and necessary if the law is to keep pace with modern industrial relations.805

The nature of the collective agreement and the needs and realities of the industrial context did not go unnoticed.

Insofar as a collective agreement and a marriage contract are both designed to promote peace and order in the state they are similar. In my view a collective agreement is more than an ordinary commercial contract and cannot be approached by simply applying the ordinary common law rules of contract.806

He referred to the American cases for guidance, citing John Wiley and Sons with approval, concluding with the following statement:

The flexibility of the common law blended with equity has shown throughout the centuries Judges have proved themselves at least as competent as Legislatures in keeping the law abreast of the times.

It was urged upon me by counsel for the defendants that the request of the plaintiff if granted would be making new law. I do not believe this to be so. I am merely applying long-standing rules of equity to a new situation. However even if it is new law then I must be guided by the great judgments in our law that is never to shirk from accepting the logic and fairness of an argument merely because it is novel.807

Conclusion

Few areas in Canadian law reflect the “arid legalism” so common to judicial review of arbitration awards. The courts have forgone so many opportunities to deal creatively with grievance arbitration in particular and the industrial relations system in general that it is rather late in the day to predict any change. Corrective measures break down into at least three approaches. One is to encourage the courts to become acquainted with the industrial relations system. Labour arbitration cases are reported presently and this will become more extensive and sophisticated as time passes. A

804 70 C.L.L.C. 14,064 (B.C.S.C. 1970). Author notes that this case has recently been reversed at [1971] 2 W.W.R. 446.
805 Id.
806 Id.
807 Id.
ritualistic reading of these cases can only convince the courts that few issues are *unambiguous* and *clear* if submitted for an arbitrator's decision. Hopefully the courts would then implement the legislative policy in favour of grievance arbitration by the creation of presumptions and standards of review which favour arbitration and accommodate the institutional capacities of arbitrators and judges. A second approach would be to preclude court intervention completely or at least as complete as a privitive clause will permit. However, it may be that grievance arbitration can no longer be viewed as a private process. It may be that both parties desire the right of at least a "limited appeal" on certain issues of major importance. Many collective agreements involve widespread product and labour market implications. To leave this to the "final and binding" decision of one or three individuals may no longer be appropriate. A third and for the purposes of this conclusion the final alternative, is the creation of an expert appeal body or labour court. This institution would permit a review of major issues in the light of the needs of the industrial relations system. At this time the implementation of the second or third alternatives is unlikely and there is little indication that the courts will embark along the course alternative one suggests without some assistance and encouragement. Assistance can be given through well reasoned arbitration awards and encouragement can be rendered by continued constructive criticism of the day to day intervention of the judiciary.