nation, they do not want a third party to resolve the matter, correcting wage inequities is "old hat" to the industrial relations scene. Unions have regularly grieved and arbitrated the proper rate for a job, and arbitrators have been called upon to resolve disputes over these rates and to establish the rate the employer must pay. An arbitrator might determine whether the rate set by the employer was proper or should be changed on the basis of testimony and/or his or her personal observation of the job. Contrary to much current thinking, formal job evaluation has never been held to be essential to an arbitrator's determination of the relative worth of a job.

On the other hand, the male-dominated world of industrial relations and arbitration appeared to wear blinders when the job inequity resulted from a comparison of sex-segregated jobs. Whether this resulted from basic prejudice, a fear that men's wages would be reduced, the enactment of state protective laws, which unfortunately had the effect of creating a sex-segregated job structure wherever women were hired, or a combination thereof, is no longer relevant.

Finally, we think that arbitrators should encourage the use of arbitration to combat discrimination as a matter of living up to their social responsibilities. The fact is that employment discrimination has been illegal under the Civil Rights Act for over 19 years, but employment discrimination continues. Although arbitration may not be the perfect solution for ending discrimination, it can make a significant contribution. To paraphrase the Supreme Court, it seems that arbitrators have an obligation to utilize arbitration to its fullest capacity as at least one antidiscrimination tool, if not the only one, as "a matter of simple justice to the employees themselves. . . ."[31]

III. A CANADIAN ADVOCATE'S VIEW

ROY L. HEENAN*

It is a great privilege for me to be invited to address this distinguished gathering. I am also pleased to follow Bob Garrett, not only because I enjoyed the humor of his remarks, but also because I can subscribe to them almost entirely. When I say almost entirely, coming from Canada and particularly Quebec, I must

[31] *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 205, 207, 9 FEP Cases 919 (1974).

*Heenan, Blaikie, Jolin, Potvin, Trepanier, Cobbett, Lawyers, Montreal, Quebec.

protest his comment about Monsieur Voltaire. When he asked "Who the hell is Voltaire?" we are slightly disturbed. In Quebec, we draw a lot of inspiration from the French authors. In fact, you may know of a famous playwright, Molière, who wrote, among other works, *Le Malade Imaginaire,* literally translated as "The Hypochondriac," and here in Quebec we have been arbitrating this case for years!

I must say that I have always held arbitrators in great respect even if I have to consider their role as somewhat unfortunate. In Mexico, where I was born, there is a gypsy curse that reads, "Que entre abogados te encuentres." Translated, this means, "May you be found between lawyers," and since arbitrators are often so found, you can see the depth of my sympathy.

In this distinguished gathering of experts, most of whom practice in the United States, it would be presumptuous to attempt a criticism of labor arbitration in North America as a whole. What I can most usefully do, though, is to make some observations on the Canadian experience based on over 20 years of practice representing management, in the hope that some of what I say may be of some relevance to our American friends.

In the first place, what distinguishes labor arbitration in Canada legally from that in the United States is that grievance arbitration is made compulsory by statute during the life of the collective agreement and, indeed, during all times prior to the acquisition of the right to strike or lockout. Since in Canada (except in Saskatchewan), by law there is no right to strike or lockout during the collective agreement, and by law also all grievances—rights disputes—must be arbitrable. Although most collective agreements have their own provisions concerning the grievance procedure and arbitration, generally speaking it is not legal by contract to prohibit a grievance from going to arbitration.

Perhaps because of this compulsory aspect of grievance arbitration, our arbitral jurisprudence did not develop in a haphazard fashion during its early stages. A relatively small number of respected arbitrators, mainly from Ontario, carefully crafted their awards which were duly recorded by the *Labour Arbitration Cases.* As one reviews the first volume of the LAC, the names of Fuller, Finkelman, Hanrahan, Laskin, Anderson, Arthurs, Cross, and Reville, as examples, keep reappearing.

Although they did not have an obligation to follow each others' reasoning, perhaps because of respect or friendship, they

did. As a result there developed a body of decisions that were simply written and could be readily understood. (I am always amazed when I turn to the LAs in the U.S. to discover that I can find support for all sides of almost any proposition.) Further, the approach of these early arbitrators in Canada respected very much the concept that the *parties* made the collective agreement and the arbitrators applied them for the benefit of the immediate parties. From these early decisions there developed an understanding of what could be expected.

The rules of the game were set down and were clearly known. Indeed, I always remember the 1967 decision of E. E. Palmer in the case of *Gabriel of Canada Ltd.* dealing with the seniority of foremen returning to the bargaining unit. He could write:

> "On this basis, it is clear the union's position is bereft of support in reported arbitration decisions. Indeed, the general position seems to be so clearly established by arbitration boards, that, irrespective of the merits of the union's arguments, it is now too late in the day to vary this position. Clearly, the parties must be deemed to know the overwhelming probability of arbitrators' accepting the company's position in such a case as this and to rule otherwise would run contrary to the expectations of the parties."[1]

That is the key. The parties have expectations. They come to the negotiating table with an understanding of the rules. The greatest service an arbitrator can render the parties is to respect those expectations. I often say that grievance arbitration is at its best when it is at its dullest and most predictable. Certainty contributes most to stability.

By the same token, the representatives of the parties can then advise their clients responsibly, and you get responsible administration of the collective agreement. Settlements in the grievance procedure are also encouraged because the parties can reasonably anticipate which matters they might win in arbitration and which ones they might lose. That knowledge assists the parties in the administration of the collective agreement and in successful use of the grievance procedure, resulting in settlements. The difficulties occur when the parties start winning the cases they can reasonably expect to lose and losing the cases they should win. At that stage, the administration of the collective agreement by both sides becomes erratic.

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[1]E. E. Palmer, M. Tate, J. W. Healy, Q.C., *Re Int'l Ass'n of Machinists and Gabriel of Canada Ltd.*, 18 LAC 373, 379 (September 13, 1967).

I know of a few arbitrators, for instance, who have an unfortunate habit of always halving discipline and modifying discharge, undoubtedly out of humanitarian considerations. But what they do not realize is that this approach discourages employers from taking a measured and responsible approach to discipline. If an employer is aware that the arbitrator in his contract will always reduce the discipline, what is to prevent him from always exaggerating the discipline, knowing that the arbitrator will reduce it in any event? This surely does not encourage a proper administration of the collective agreement.

So, the first rule I would propose is that arbitrators attempt to meet the reasonable expectations of the parties.

A more recent development in Canadian grievance arbitration is unfortunate. I distrust any arbitrator who approaches each case as though it were a great new legal principle waiting to be discovered. Unfortunately, and for several reasons, recently a few—and fortunately very few—arbitrators, mainly academics, have been trying to break new ground. Every arbitration case is viewed as an opportunity to unleash a new truth on an unsuspecting world. These decisions tend to be long, wordy, and very legalistic. More particularly, these awards do not appear to be written with the immediate parties primarily in mind.

I am reminded of the noted American humorist who, during his college days at Harvard, was asked to write a thesis on the Newfoundland Fisheries case. His interpretation, though scholarly and well reasoned, was written entirely from the point of view of one of the fish. I sometimes feel that way when reading some arbitration reports; the decisions were not exactly what the parties could have expected. Although it may be a valid intellectual exercise, it is not exactly helpful to the immediate parties.

Ted Weatherill, one of our most respected arbitrators, remarked recently, in a most interesting paper, on this evolution of "doctrines" by certain arbitrators. After commenting particularly on the doctrine of equitable estoppel and the doctrine of fairness, he said: "I don't suggest that these doctrines are out of place in arbitration. What is out of place, I think, is dressing up these fairly understandable ideas in this incomprehensible garb, and then drawing far reaching conclusions from the expansive, impressive but vague language used."[2]

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[2]J.F.W. Weatherill, unreported remarks at C.L.V. Conference, Toronto, March 10, 1983, 3.

After noting that the word *doctrine* gives a cloak of "academic razzle-dazzle," he went on to comment on the "doctrine of fairness": "A requirement of 'fairness' while it sounds nice would appear to me to be a vehicle for imposing on the parties the view of the arbitrator—for going far beyond the carefully elaborated doctrine of estoppel and certainly for relegating to the background the collective agreement the parties have made."[3]

The doctrine of equitable estoppel appeared in its most novel form recently in the case of *C.N.R. Co. et al. and Beatty.*[4] The case concerned the sick leave benefits that the employer had provided which were more generous than those clearly provided in the collective agreement. When the employer gave notice that the past practice would cease, Professor Beatty applied the doctrine of equitable estoppel and found that the C.N.R. was estopped by its conduct from applying the collective agreement.

In the most recent reports, fortunately, we see that Mr. Teplitsky, Q.C., took another look at this doctrine in *Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43,*[5] where, after commenting on the *C.N.R.* case, he refused to apply oral representations and wrote: "The representation which is relied on is not in writing and does not form part of the collective agreement and in my opinion, cannot be enforced by an arbitrator whose jurisdiction is limited by the terms of the collective agreement." We may hope that this more rational approach will be continued.

Similarly, some arbitrators have attempted to introduce a doctrine of implied fairness on management rights, which exists although unwritten in the collective agreement. In the case of *York University and York University Faculty Association,*[6] the doctrine of fairness is elevated to a "duty [on the employer] to act fairly," and a majority of the arbitration board wrote:

> "In fact it seems to us that the duty to act fairly would logically be extended beyond a simple prohibition against discriminatory treatment without seriously blurring its meaning. In our view, the premises that support a prohibition of discriminatory decision making

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[3] *Id.*, at 6–7.
[4] 82 CLLC 14163 (1981).
[5] 57 LAC 3d 74 (1982).
[6] 26 LAC 2d 17, 19 (1980). *See also City of London & C.U.P.E.*, 26 LAC 2d 256, 264 (1980), and *Re Metropolitan Toronto and Toronto Civic Employees Union Local 41 et al.* (commonly known as the "Marsh" case), 79 DLR 3d 249 (Ont. Div. Ct. 1977).

would also logically imply a duty not to execute the terms of an agreement arbitrarily or unreasonably."

These higher flights of fancy have fortunately been tempered recently by both other arbitrators and recent court decisions. Thus, in the case of *Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association,*[7] The Supreme Court of Canada refused leave to appeal from a judgment of the Ontario Court of Appeals in which it was held:

> "In our opinion, the management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause, unless those powers are otherwise circumscribed by express provisions of the collective agreement. The power to challenge a decision of management must be found in some provision of the collective agreement. . . .
>
> "Having regard to the nature of the agreement, and to its provisions, we see no necessity in this case to imply a term that the management rights clause will be applied fairly and without discrimination. If such a term were to be implied, it would mean that every decision of management made under the exclusive authority of the management rights clause would be liable to challenge on the grounds that it was exercised unfairly or discriminately. In our opinion, this would be contrary to the spirit and intent of the collective agreement."

Criticism of Arbitration

It is fashionable in certain circles to criticize labor arbitration as not meeting its goals. Primarily, these criticisms revolve around the following themes: (1) arbitration is too technical and legalistic, (2) arbitration is not sufficiently expeditious, and (3) the civil courts are being called on too much to intervene in the arbitration process. These cries are usually joined with a cry for a legislative intervention process. I, for one, believe that too much attention is being given to these criticisms, which are usually overstated, without realizing that, on the whole, labor arbitration is serving the parties well.

The argument is often made that arbitration is too technical

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[7] 124 DLR 3d 684, 687 (1981). *See also United Glass & Ceramic Workers & Libbey St. Clair Inc. et al.*, 125 DLR 3d 702 (1981); *Re Falconbridge Nickel Mines Ltd. & Brummer,* 129 DLR 3d 561 (1981); and, by implication at least, the decision of the Supreme Court of Canada in *Nicholson & Haldiman-Norfolk Regional Board,* 88 DLR 3d 67, Laskin, C.J. (1978), at 675.

or legalistic. It should be remembered that the role of the arbitrator is to substitute for the courts in deciding on the interpretation, application, or violation of the collective agreement.

Certainly there is a case to be made for discouraging arbitrators from conceiving new legal doctrines, as I have attempted to outline above, or from writing decisions for posterity rather than for the immediate parties. These are the decisions that tend to be overly technical or legalistic. This having been said, my own experience is that arbitrators on the whole avoid these faults and most decisions are written very much with the immediate parties in mind. It should not be forgotten, however, that the purpose of arbitration is to determine whether there has been a violation of the collective agreement or to interpret it, and of necessity a certain amount of reasoning is not only useful, but imperative for arbitration to fulfill its role properly. The parties, for their own future conduct, must know not only what the arbitrator decided, but why he decided. I would submit that decisions that do nothing more than indicate who won a case would not truly assist the parties, particularly in the collective bargaining process. There is a real difference between, on the one hand, legal pontification and writing for posterity, which should be discouraged, and on the other, explaining to the parties the reasoning that leads to a decision, which should be encouraged.

Then there is the argument that arbitration is not sufficiently expeditious. Carole Wilson has repeated this criticism in her paper. However, this surely is a problem that the parties themselves can rectify if they so wish. Indeed, most of the solutions that Carole outlines are those in which the parties themselves have negotiated an arrangement to meet the delays. It appears to me that if arbitration is taking too long, the parties can easily find solutions at the bargaining table. For instance, large employers and unions can set up fixed dates for arbitrations and retain arbitrators for those dates ahead of time, knowing that they will have at least one case to present. However, as we know and as Carole recognized in her remarks, there are many grievances that are taken to arbitration for tactical or negotiating reasons, often with no intention of proceeding to a speedy arbitration. Obviously, delays will result again if busy arbitrators cannot give a date for three or four months, but the parties are always free to choose another arbitrator, to arrange dates in ad-

vance, or to have a panel of arbitrators. My experience is that most parties will prefer to wait for three or four months to get an experienced arbitrator on an important case. But, in any event, the solution to the problem of delay is surely in the parties' hands, and the solution should come from them, as it has in the past.

With regard to the third criticism—that civil courts are being called upon too much to intervene in the arbitration process—it is my experience that a very small proportion of the arbitration awards are taken to the courts and a small percentage of these challenges are successful. I see nothing wrong with this. Obviously any person called upon to decide anything would prefer that there was no form of appeal from that decision. But arbitrations involve matters of great importance in terms of principle, as well as amount, and surely the safety valve of being able to go to the courts is useful in the event of a totally unreasonable decision, since this ensures the integrity of the process.

I was surprised that Carole, in her paper, repeats many of the usual criticisms of legalism, time, and expense of arbitration, but, on the other hand, she pleads for arbitration, rather than other tribunals, as the forum in which to combat employment discrimination because the process is relatively expeditious and inexpensive. I find this a very telling admission of how useful the arbitration process is and how well regarded it is by the parties themselves.

Indeed, in many jurisdictions in this country, the statutes provide that grievances must be settled by arbitration "or otherwise." A particularly eloquent testimony to the success of labor arbitration is that the parties have not fashioned an "or otherwise" alternative to arbitration. If arbitration were really failing us, surely the parties would have found alternatives by now. It is for these reasons that I believe that arbitration in labor matters is alive and well and serving the parties effectively. Most of the problems that have provoked the criticisms can surely be resolved by the parties in negotiations, if this is necessary.

This comment is predicated on the assumption that most arbitrators will continue to understand their role as interpreters of the collective agreement as written for the benefit of the immediate parties, not to save the parties from themselves or to advance the state of legal doctrines. My experience is that most arbitrators understand that very well.