Chapter 2

IMPACT OF CANADIAN SUPREME COURT CASES ON ARBITRATION AND LABOR RELATIONS

I. The Supreme Court of Canada and Grievance Arbitration: A Persistent Vision of Legal Integration

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To relate the broad lines of the evolution of the jurisprudence of the Supreme Court of Canada in matters of grievance arbitration is a responsibility that is both elevating and perilous. Where to begin? And to what extent should this review be merely descriptive, so that all can grasp the nature of the issues raised, or take a global approach, limiting the account to a series of general pronouncements entirely lacking in flavour. Without promising anything—you be the judge of the result—I have chosen a mixed approach wherein I propose, at the outset, to briefly recall the three guiding principles bestowed upon grievance arbitration by the Supreme of Canada and next, to examine, with critical comments, how these have evolved over the last few years.

The Central Benchmarks of a Pro-Arbitration Judicial Policy

This heading may seem surprising and even appear contradictory. Is it possible that the courts could demonstrate some tendency that is favourable to grievance arbitration in a way that is often detrimental to their own power to intervene? For some 30 years the answer to this question in Canada has been positive. In one decade (1975–1986) the Supreme Court of Canada established what I would describe as the foundations of a policy to support the development of a grievance arbitration process that is firm, efficient, and complete. Three distinct but complementary elements constitute the fundamental basis of this judicial policy.

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Let us briefly recall them, not in the chronology of their formulation but adopting a method of presentation that puts the emphasis on the essence of each of them.

The Exclusive Expertise of Boards of Arbitration . . . The First Key

Even though legislators in the majority of Canadian jurisdictions directly or indirectly imposed grievance arbitration as the forum to resolve disputes arising under a collective agreement, it took many years and a number of departures from that principle before the Supreme Court clearly established the exclusive nature of grievance arbitration. The decision in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*[1] marks the starting point of this new approach. On behalf of the Supreme Court, Mr. Justice Estey clearly stressed the reasons for the approach then adopted:

> From the above survey of the cases, a general consensus is evident. The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement. Nor can the courts properly decide questions which might have arisen under the common law of master and servant in the absence of a collective bargaining regime if the collective agreement by which the parties to the action are bound makes provision for the matters in issue, whether or not it explicitly provides a procedure and forum for enforcement. . . .
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> What is left is an attitude of judicial deference to the arbitration process. This deference is present whether the board in question is a "statutory" or a private tribunal (on the distinction in the labour relations context, see *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888; *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*, [1962] S.C.R. 318, *affirming* [1961] 29 D.L.R. (2d) 76; *Re International Nickel Co. of Canada and Rivando*, [1956] O.R. 379 (C.A.)). It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective

[1] [1986] 1 S.C.R. 704.

agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.[2]

A unanimous decision of the Supreme Court, *St. Anne Nackawic* represents the definitive launching point of the Court's recognition of arbitral exclusivity in Canada. As can be seen, the Court takes into account not only the will of the legislators, as well it should, but is also especially sensitive to the issue of the respect that should be given by judicial tribunals in the face of the overall structure of a system in which "....labour relations legislation provides a code governing all aspects of labour relations...."[3] The concept of concurrent jurisdiction in the adjudication of disputes flowing from collective agreements was then seriously shaken.

The Broad Power to Interpret Statutes... The Second Key of Efficiency

Until 1975 the courts, as well as arbitrators themselves, generally believed that an arbitrator had no authority to apply statutes in the framework of an arbitration award, unless it was to assist in the interpretation of a collective agreement.[4] According to that perspective, the arbitrator had no choice but to interpret and apply a collective agreement in accordance with its express provisions. As a result, "if the alleged misconduct did not constitute a violation of an express provision of the collective agreement, the subject matter of the dispute was not arbitrable."[5]

The leading decision of *McLeod v. Egan*[6] reversed this restrictive approach, concluding that a board of arbitration could indeed go beyond the four corners of the collective agreement to determine the substantive rights and obligations of the parties subject to it.[7]

By considerably widening the scope of grievance arbitration, this decision signalled what I call "the first revolution of grievance arbitration" in Canada, namely the very transformation of the nature of this method of adjudication. In my view, *McLeod v. Egan* marks the entry of grievance arbitration into a modern phase that transformed not only that institution's original purpose but also, by incidental effect, the essence of the disputes that would henceforth be submitted to it. From that time forward, the answer to a

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[2] *Id.* at 720–21.
[3] *Id.* at 721.
[4] Brown & Beatty, *Canadian Labour Arbitration* (loose leaf edition), at 2-60.
[5] Parry Sound Soc. Servs. v. Canadian Union of Pub. Employees, [2003] 2 S.C.R. 157, para. 24 (Iacobucci, J.).
[6] [1975] 1 S.C.R. 517.
[7] *Parry Sound*, para. 24.

grievance could be found not only in the language of the collective agreement, but could possibly be drawn from the provisions of statutes and regulations.

The transformation of the essential nature of arbitration as a private process towards a broader scope that includes a public dimension involved a break from the long years of a statutory regime based on the cornerstone principle of the contractual freedom of the parties to a collective agreement and an arbitral jurisprudence that shared and gave precedence to that philosophy. The "*McLeod* revolution" therefore brought, in its wake, two major changes in the law of Canadian labour relations: The first is judicial and relates to the very scope of the grievance arbitrator's role; the second, which I would describe as more cultural, promoted a questioning and re-examining of the most fundamental conventional values of the world of collective bargaining and labour relations.

Judicial Deference . . . The Third Key of a Rational and Integrated Vision

The recognition of the principle that arbitrators are ". . . . the forum preferred by the legislature for resolution of disputes arising under collective agreements"[8] and the prospect of grievance arbitrators analyzing the whole of statutory law to resolve disputes might have brought little but symbolic impact if, on the other hand, arbitrators' awards remained fully open to judicial review by the courts. That signals the critical character of the last piece of "pro-arbitration" judicial policy established by the Supreme Court, namely the articulation of what some commentators have qualified as the "restrained and unified theory of judicial review."[9] The cornerstone decision reflecting this respect for administrative decision making is *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*.[10] Even today the Supreme Court itself does not hesitate to say that that decision "marked the beginning of the modern era of Canadian administrative law."[11]

In a unanimous decision that is remarkable for its clarity, the Court stressed the importance of the higher courts demonstrat-

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[8]St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704, 720 n.1.

[9]Langille, *Developments in Labour Law: The 1982–82 Term*, (1983), 5 Sup. Ct. L. Rev. 225, 246.

[10][1979] 2 S.C.R. 227.

[11]Dunsmuir v. New Brunswick, 2008 C.S.C. 9 (Mar. 2, 2008), para. 35 (Bastarache and LeBel, JJ.).

ing "judicial restraint" with respect to the interpretation rendered by a labour relations board respecting the provisions of its own enabling statute. The existence of a privative clause protecting the decisions of an administrative body when those decisions flow from its jurisdiction, the distinct and special nature of the board, the scope of its powers, the "great sensitivity" of its members, and their "long experience" in the field of labour relations constitute the factors that prompted the Supreme Court to recognize that the "interpretation" of the statutory provisions then at issue was "at the heart of the specialized jurisdiction confided to the Board" and "not only would the Board not be required to be 'correct' in its interpretation, but one would think that the Board was entitled to err and any such error would be protected from review by the privative clause. . . ."[12]

Thus, the Supreme Court was pronouncing an extremely important principle: Faced with an ambiguous statute, the high courts should remember ". . . . that statutory provisions often do not yield a single, uniquely correct interpretation . . ."[13] and should consider only whether the interpretation of the administrative body was ". . . . so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review."[14]

In one decade the Supreme Court of Canada has thus fashioned the broad lines of a grievance arbitration system that is firm, efficient, and complete—the three characteristics that link together and mutually complement each other within the principles reviewed above. I would say that the philosophy pursued by the Court crosses many lines and converges towards a common objective, namely to grant to the arbitration process real predominance with respect to disputes flowing from a collective agreement. This is, if nothing else, a progressive vision of justice, it must be said, as the Supreme Court did not hesitate to favour access to an adjudication that is close to the workplace while giving the highest priority to the expertise of the arbitration system's decision makers. By holding to the basic principle of the exclusivity of arbitration, the Court has sent a clear message as to its own will to put an end to the artificial parsing and other jurisdictional disputes that did

[12] *Canadian Union of Pub. Employees,* at 236.
[13] National Corn Growers v. C.I.T., [1990] 2 S.C.R. 1324, 1340 (Wilson, J.).
[14] *Canadian Union of Pub. Employees,* at 237.

little but delay, if not totally drown, a dispute that might flow from a collective agreement.

From this same perspective, opening to arbitrators the power to consider the whole of the relevant law when that is necessary to deal with a grievance did away with the blinder interpretation of collective agreements that, although they do constitute the basic law of the shop, are nevertheless a part of a much larger legal framework that cannot be ignored. According to the Supreme Court, arbitral exclusivity is not achieved at the expense of applying the law in its fullness. On the contrary, it favours the more complete transposition of the law into the workplace, without requiring recourse to a multitude of forums.

Finally, the policy of judicial deference puts the crowning touch on the values of exclusivity and the broad power to interpret statutes: Although the Supreme Court may not be able to abandon its power of control and scrutiny with respect to issues of jurisdiction, it has imposed upon itself a "restraint," even when it does not agree with the interpretation made by a board of arbitration. When I explain this theory of judicial deference to my students and colleagues in Paris, they are always astounded to hear that a court of final instance could have decided in this way to demonstrate "respect" and "restraint" towards the decisions of administrative tribunals of first instance. That scepticism may largely be explained as the product of another judicial context and another industrial relations culture. But I believe that the Supreme Court's policy of deference, quite apart from the particularities of Canadian administrative law, cannot be separated from the will of the Supreme Court, I would even say its determination, to confer upon the grievance arbitration system a "particular status" within the overall administrative framework that takes into particular account the especially delicate nature of managing disputes in the unionized workplace. The question now becomes whether, having laid out these cornerstone principles, the Supreme Court itself has remained true to them over the last 20 years.

The Evolution of the Principles of the Pro-Arbitration Judicial Policy

As I noted earlier, I do not intend to review the whole of the decisions pronounced by the Supreme Court since the mid-1980s. For the purposes of this analysis I will nevertheless refer in a preliminary way to two leading decisions that, as will be seen, have

had wide repercussions on the development of the law of grievance arbitration since the beginning of our new century.

In 1995, the Supreme Court reiterated the principle of arbitral exclusivity in the important decision of *Weber v. Ontario Hydro*.[15] An employee was suspended for an abuse of sick leave. His union filed a number of grievances challenging the employer's use of private detectives, who had entered the employee's home by disguising their identity. At the same time, the employee had commenced a civil action based on the tort of trespass and on the violation of his rights under the *Canadian Charter of Rights and Freedoms*. The employer, Ontario Hydro, moved to strike out of this civil action, arguing that the dispute flowed from the application and interpretation of a collective agreement.

In a split decision, the majority of the Supreme Court, having reviewed the possible approaches that could apply,[16] reaffirmed, in strong terms, the principle of arbitral exclusivity for disputes "....which expressly or inferentially arise out of the collective agreement..."[17] while noting that the courts nevertheless retain residual jurisdiction, based on their special powers.[18]

Weber is doubly interesting because the majority recognized that the arbitrator has jurisdiction to deal not only with questions relating to the collective agreement, but also with issues that flow from the *Charter*. Madam Justice McLachlin, as she then was, commented in that regard:

> It was argued, *inter alia*, that a labour arbitration was not the appropriate place to argue *Charter* issues. After a thorough review of the advantages and disadvantages of having such issues decided before labour tribunals, La Forest J. concluded that while the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their *Charter* rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing

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[15] [1995] 2 S.C.R. 929.

[16] The Court referred to the concurrence of jurisdiction as between arbitral regimes and civil actions (*Id.* at 951–55), as well as the straddling of jurisdiction based on the nature of the cause of action (*Id.* at 955–56) and to the theory of exclusive jurisdiction, which the majority finally applied (*Id.* at 956–59).

[17] *Id.* at 957.

[18] *Id.* For examples of this inevitable qualification to the principle of arbitral exclusivity, see *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219,* [1986] 1 S.C.R. 704, 725–32 (the power to grant an interlocutory injunction), and *Brotherhood of Maintenance of Way Employees, Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495.

> court. And the specialized competence of the tribunal may provide assistance to the reviewing court.[19]

The majority also added the following important comments:

> While the *Charter* issue may raise broad policy concerns, it is nonetheless a component of the labour dispute, and hence within the jurisdiction of the labour arbitrator. The existence of broad policy concerns with respect to a given issue cannot preclude the labour arbitrator from deciding all facets of the labour dispute.[20]

Fewer than ten years after *St. Anne Nackawic*, the Supreme Court not only affirmed the concept of exclusive arbitral jurisdiction discussed above but established a direct link between the jurisdiction of boards of arbitration and the approach of "openness" that it had applied in other decisions with respect to the handling of "related" *Charter* issues.[21] As will be seen, the *Weber* decision is now viewed as the new benchmark of the exclusive jurisdiction of boards of arbitration and the critical jurisdiction of arbitrators to apply the whole of the law.

With respect to judicial deference, the years following *New Brunswick Liquor Corporation v. Canadian Union of Public Employees, Local 963*[22] were notable for so many judicial advances and retreats that it would be impossible to make even a summary of them here. Suffice it to note for now that along with the two standards of judicial control flowing from the *New Brunswick Liquor Corporation*—namely correctness with respect to issues of jurisdiction and that of the "manifestly unreasonable" standard for the review of issues within the jurisdiction of an arbitrator—there came, as of 1997, a third standard of control, that of "reasonableness simpliciter."[23] There is obviously nothing in this to simplify the wide area of discussion and disagreement surrounding judicial review. But there is just enough to introduce, for the higher courts, an element of flexibility that was lacking under the two earlier standards of review. The landscape of judicial deference sketched by the Court in 1979 in the *New Brunswick Liquor Corporation* case thus became foggier, presaging turbulent times to come for the decisions of administrative tribunals. Let us now examine the evolu-

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[19] *Weber*, at 960.
[20] *Id.* (emphasis added).
[21] Douglas/Kwantlen Faculty Ass'n v. Douglas Coll., [1990] 3 S.C.R. 570; Cuddy Chicks Ltd. v. Ontario Labour Relations Bd., [1991] 2 S.C.R. 5; Tétreault-Gadoury v. Canada Employment & Immigration Comm'n, [1991] 2 S.C.R. 22.
[22] [1979] 2 S.C.R. 227.
[23] Canada Research & Dev. v. Southam, Inc., [1997] 1 S.C.R. 748.

tion of these different fundamental principles through the lens of the more recent decisions of the Supreme Court of Canada.

Arbitral Exclusivity: Holding the Line… and Straying

First the good news: The principle of exclusive arbitral jurisdiction, even if it has been sorely tested in recent years, does survive and continues to be the cardinal rule as regards "….issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement."[24]

The *St. Anne Nackawic/Weber* approach, which leaves to reviewing courts a very limited jurisdiction with regards to the application of collective agreements,[25] has been firmly sustained by the Supreme Court, indeed even in cases where it might have been possible, although I think not desirable, to get around it. I am thinking here, for example, of the decision in *Allen v. Alberta*,[26] where public service jobs were privatized. A letter signed by the Government of Alberta and the union provided that employees who chose to work for the new private employer would be deemed to have resigned from the public service and would have no right to severance pay under the collective agreement. The letter expressly declared that it did not form part of the collective agreement and was not subject to grievance arbitration.

The civil action brought by the employees in pursuit of their severance pay was dismissed. However, the Supreme Court confirmed that notwithstanding the provisions of the letter of understanding, the claim of the employees is "….a dispute arising out of the application or violation of a collective agreement."[27] It appears that only a pre-employment contract, made by employees outside of the terms of a collective agreement, can constitute a "cause of action" that is independent of the collective agreement that will subsequently apply to these same employees. In that extremely rare situation, it must be noted, an arbitrator would not have jurisdiction and any dispute would be within the competence of the courts.[28] The first decision, by reason of its particular facts, does not really call into question the principle of exclusive arbitral jurisdiction.

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[24]Bisaillon v. Concordia Univ., [2006] 1 S.C.R. 666, para. 33 (LeBel, J.).
[25]See *supra*, note 18, for the definition of this restrained judicial authority.
[26][2003] 1 S.C.R. 128.
[27]*Id.*, para. 16.
[28]Goudie v. City of Ottawa, [2003] 1 S.C.R. 141.

It is in the decision of *Bisaillon v. Concordia University*[29] that the Supreme Court reaffirmed, perhaps most dazzlingly, the quintessence of the principle of exclusive arbitral jurisdiction. In that case an employee, who was a member of one of the nine unions with bargaining rights at Concordia University, asked the Superior Court to certify a class action against the employer to challenge a number of decisions taken with respect to the administration and use of the pension fund that covered the University's unionized and non-unionized employees, as well as its managers. It is important to note that each of the collective agreements made reference to the pension plan.

In a split decision, the Court concluded that the class action was an inappropriate avenue of redress as it would be incompatible with the exclusive jurisdiction of a grievance arbitrator as well as with the bargaining rights of the various certified unions. Recalling that:

> This Court has considered the subject-matter jurisdiction of grievance arbitrators on several occasions, and it has clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement, [30]

the majority of the Court reiterated the course to be followed to resolve the dispute before it:

> The Court of Appeal should not have focussed on determining whether the grievance arbitrator under one agreement had jurisdiction over every potential member of the group covered by the class action. Instead, it should have begun by determining whether a grievance arbitrator had jurisdiction to rule on the individual proceeding between Mr. Bisaillon and Concordia. It should then have enquired into the nature of the individual claims of the majority of the other members of the group and into the *in personam* jurisdiction of the arbitrator with regard to those claims. Absent such an analysis, the Court of Appeal's position removed individual proceedings, over which the arbitrator had jurisdiction, from the grievance arbitration process and assigned them to the Superior Court—which otherwise had no jurisdiction over the parties or the subject matter—simply because a motion for authorization to institute a class action had been filed. This position disregards both the principles applicable to class actions and the nature of this procedure. [31]

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[29] [2006] 1 S.C.R. 666, para. 33 (LeBel, J.).
[30] *Id.*, para. 33 (LeBel, J.).
[31] *Id.*, para. 49.

In that case, it seems undeniable that the only possible approach would be to apply and interpret those provisions of the collective agreement relating to the pension plan.

Apart from the foregoing conclusion, it is interesting to note that the majority of the Court stressed that granting a unionized employee the right to bring a class action independently from his union would be incompatible with the fundamental principle of the exclusive representational rights of unions. By reason of its incorporation by reference into the collective agreement, according to the majority the pension plan "became a condition of employment in respect of which the employees lost their right to act on individual basis."[32] The close connection between the exclusive right of representation enjoyed by unions and the scope of arbitral jurisdiction, something I will discuss below, stands in high relief.

For the purposes of this review it should be appreciated that the *Bisaillon* decision sanctifies, in startling fashion, the principle of the exclusive jurisdiction of arbitrators articulated in 1986 in *St. Anne Nackawic* and reaffirmed in 1995 in *Weber*. Although all the while being aware of the potential problems of arbitral solutions,[33] the majority, I am happy to say, did not flinch. The enormous gap that would have resulted for the principle of exclusive union representation flowing from the opposite result[34] surely explains in substantial part this very important decision of principle.

If it can be said that issues of jurisdiction as between grievance arbitrators and superior courts have maintained the same position for 20 years, the line of jurisdictional demarcation is nevertheless less true when one looks at the relation between boards of grievance arbitration and other administrative tribunals.

In 2000, in *Regina Police Ass'n Inc. v. Regina (City) Board of Police Commissioners*,[35] the Supreme Court declared that the expressed will of the legislator must be considered when determining if a dispute should be heard by a specialized administrative tribunal or by a grievance arbitrator. In that case a statute dealt specifically with the system of discipline for police officers. Indeed, the collective agreement in that case expressly acknowledged that reality, to the extent that it stated that the grievance arbitration provisions

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[32] *Id.*, para. 56.
[33] *Id.*, para. 58–64
[34] If in doubt, see the themes expressed in the minority decision: *id.*, para. 66–100 (Bastarache, J.).
[35] [2000] 1 S.C.R. 360.

of the collective agreement could not be used in matters where the law governing police in Saskatchewan applied.[36] Given this legislative context, which could hardly be more specific, this decision does little to put into question the fundamental principles of the exclusive jurisdiction of arbitrators that, in any event, were noted by Mr. Justice Bastarache.[37] The situation became substantially different a few years later when the Supreme Court ruled in the case of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Procureur Général)*,[38] which I will refer to as the *Morin* case. In that case the Court was called upon to rule on the scope of the jurisdiction of the Quebec Human Rights Tribunal on the one hand and grievance arbitration on the other.[39]

In a divided decision, the majority of the Supreme Court of Canada initially stressed that "…. there is no legal presumption of exclusivity *in abstracto*."[40] This opening, it must be agreed, did not augur well for the jurisdiction of arbitrators, especially as it came from the same judge who wrote, nine years before, the strong majority decision in *Weber*. In an approach that is admittedly novel, while recognizing that "the arbitrator has jurisdiction over matters arising out of the collective agreement's operation"[41] the majority decided that "this is essentially a dispute as to how the collective agreement should allocate decreased resources among union members"[42] and that the dispute "is the process of the negotiation and the inclusion of this term in the collective agreement."[43]

Drawing a distinction that is fine—very fine if in fact there is any—the majority concluded that the dispute did not "arise out of

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[36] *Id.*, para. 20.
[37] *Id.*, para. 21–26.
[38] [2004] 2 S.C.R. 185.
[39] In 1997 the teachers' unions entered into a modification of a collective agreement with the province of Quebec, which provided that experience acquired by teachers during the 1996–1997 school year would not be recognized or credited toward their salary increments or seniority. This term only affected teachers who had not yet obtained the highest level of the pay scale—a minority group composed primarily of younger and less-experienced teachers. The younger teachers complained that this term discriminated against them, treating them less favourably than older teachers and violating the equality guarantee of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. The complainants took their complaint to the Human Rights Commission established to resolve *Charter* discrimination claims and the Commission brought the matter before the Quebec Human Rights Tribunal. The Attorney General of Quebec, the school boards, and the unions filed a motion asking the Human Rights Tribunal to decline jurisdiction on the ground that the labour arbitrator possessed exclusive jurisdiction over the dispute. *Morin*, para. 2–4
[40] *Id.*, para. 14 (Chief Justice McLachlin).
[41] *Id.*, para. 16.
[42] *Id.*, para. 23 (author's italics).
[43] *Id.* (author's italics).

the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement"[44] and in a point of precision that appears to me to be important, that the dispute at hand "is not a dispute over which the arbitrator has exclusive jurisdiction."[45]

In other writings I have analyzed at some length, and openly criticized, this decision that in many respects contradicts the principles in the decisions of *St. Anne Nackawic* and *Weber*. It obviously does so without saying it openly, or even between the lines. In fact, it calls into question the fundamental value of exclusive union representation.[46]

By establishing a subtle distinction between the application and interpretation of a collective agreement and the "process of negotiation" that precedes its execution, the majority of the Court may have permitted hundreds of discontent employees to circumvent the fundamental rules of exclusive union representation and the exclusive jurisdiction of arbitrators,[47] while at the same time opening the door to other independent legal actions, undertaken by groups of unionized employees challenging the provisions of collective agreements.[48] My concern here, and I stress it, is not so much about the erosion of arbitral jurisdiction. That, on the whole, is relatively marginal as the majority did not exclude it even in a case that involved a claim of discrimination in the drafting of the collective agreement or of its validity.[49] My greater concern is the direct attack on one of the axioms of exclusive union representation, the exclusive power of a union to act for and in the name of all of the employees who are subject to its certification as bargaining agent.[50]

I have two final comments with respect to the *Morin* case that, as you can see, troubles me still four years after it was handed

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[44] *Id.*, para. 24 (author's italics).

[45] *Id.*

[46] See, in particular, Nadeau "*L'arrêt Morin et le monopole de représentation des syndicats: assises d'une fragmentation,*" (2004) 64 R. du B. 161.

[47] It is obvious from the majority's decision that this purely numerical aspect was taken into account. *Morin,* para. 30.

[48] For examples of cases launched in the wake of *Morin* (or affirmed by it), by employees using the Human Rights Commission against their employers and the unions representing them, and in respect of which the Human Rights Tribunal asserted jurisdiction, see *Commission des droits de la personne et de la jeunesse v. Université de Montréal*, 500-53-000205-045 (Sept. 2, 2004); *Commission des droits de la personne et de la jeunesse v. Hôpital Juif Mortimer,* 2007 QCTDP 29 (Oct. 26, 2007); and *Université Laval v. Commission des droits de la personne et de la jeunesse*, 2005 QCCA 27 (Jan. 24, 2005) (C.A.).

[49] *Morin*, [2004] 2 S.C.R. 185, para. 24 & 25.

[50] This principle was clearly established in *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207.

down. I noted earlier that two years after the decision in *Morin* the Supreme Court, at least a majority of it, reiterated, without compromise, the basic principles of the *Weber* decision. Additionally, in 2006, the dissenting judges in the decision of *Isidore Garon Ltd. v. Tremblay*,[51] in a comment not challenged by the majority, indicated that notwithstanding the concerns expressed about *Weber* (Judge LeBel had referred only to my own published article)[52] "…. *Morin* does not provide any indication that this Court intended to fundamentally change the approach it established in *Weber*."[53] I find myself reassured, but in only a superficial way!

Moreover, it is not gratifying to note, four years after the judgement of the Supreme Court in *Morin*, the state of total confusion that surrounds the actual case before the Human Rights Tribunal, a tribunal that, it should be recalled, according to the Chief Justice "was a '*better fit*' for this dispute than the appointment of a single arbitrator to deal with a single grievance within the statutory framework of the *Labour Code*."[54]

Over the course of months and years now, the Human Rights Tribunal has dealt with innumerable claims raising, among other things, the problem of actions brought by individual employees against defendants who are not the "parties" responsible, under the relevant law, for the application of collective agreements.[55] The Tribunal has not yet begun to deal with the merits of the case. In late summer of 2007, the Tribunal refused to give effect to a settlement made between various parties to the action commenced by the Human Rights Commission as "several parties who are victims (individual employees) oppose the settlement…."[56] Since then, according to what I am told, a settlement totalling some $22 million has been withdrawn by the Government of Quebec and it is likely that the procedural wrangling will again surface before the Tribunal. That kind of efficiency can only leave us perplexed.

In summary, the evolution of the jurisprudence of recent years shows that although the Supreme Court does not appear inclined

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[51] [2006] 1 S.C.R. 72 (LeBel, J., McLachlin, C.J.C., and Fish, J. concurring).
[52] *Supra*, note 46.
[53] *Isidore Garon Ltd.*, para. 106 (author's italics).
[54] *Morin*, para. 30 (author's italics).
[55] Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Procureur général), [2005] R.J.Q. 2451 (T.D.P.Q.); Commission scolaire des Affluents v. Commission des droits de la personne et des droits de la jeunesse, [2006] R.J.Q. 367 (C.A.); Commission des droits de la personne et des droits de la jeunesse v. Québec (Procureur général), 2006 QCTDP 6 (CanLII).
[56] Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Procureur général) 2007 QCTDP 26 (Sept. 13, 2007).

to question the concept of exclusive arbitral jurisdiction when that question arises in relation to the superior courts, it appears far more divided when the issue is the sharing of jurisdiction between grievance arbitrators and administrative tribunals. And yet, the reasons that underlie the importance of a system of independent grievance arbitration, developed by the Supreme Court in 1986 and 1995, remain, in my view, every bit as relevant when the problem involves another administrative tribunal that, by reason of its own expertise and its removal from the world of unionized work, more often than not will have the effect of driving the parties apart from any prompt settlement, rather than applying with efficiency the rules of the law of the workplace, which I believe should be the real goal. In my view it is only for the legislator to modify the applicable rules and, should it be found appropriate, to introduce areas of common or shared jurisdiction between grievance arbitration and other administrative tribunals. I have no problem when this is done deliberately, as it will give rise to discussions, to parliamentary commissions where opinions can be argued, but I have some difficulty accepting it when the Supreme Court, for the purposes of a particular case and for reasons that are not always compelling, inserts itself into the role of the legislator and introduces opportunistic exceptions to the principle of jurisdictional exclusivity.

The Expansion of the Jurisdiction to Interpret Statutes: The Enigmas of "Implied Law" and Their Impact on the Scope of Arbitral Jurisdiction

If there is any decision of the Supreme Court that can be said to have "shocked" the Canadian legal community that is specialized in collective bargaining and human rights, it is clearly the decision in *Parry Sound*.[57] And yet, at the outset, the Supreme Court appeared to simply apply the rules flowing from the decision in *McLeod v. Egan*,[58] mentioned earlier. But the message of this landmark decision of 2003 is powerful, and it carries a philosophy that involves the merger into arbitration of human rights that cannot be lost on unions, employers, or arbitrators. On the facts, the majority of the Supreme Court refused to view a provision of a collective agreement preventing a probationary employee from

[57]Parry Sound Soc. Servs. v. Canadian Union of Pub. Employees, [2003] 2 S.C.R. 157, para. 24 (Iacobucci, J.).

[58][1975] 1 S.C.R. 517. The Court repeatedly stresses this natural outgrowth of *McLeod v. Egan* to emphasize that it is following established principles that have never been challenged by Canadian legislators.

grieving his or her termination[59] as an obstacle to the full jurisdiction of a grievance arbitrator to apply the Human Rights Code,[60] "....irrespective of the parties' subjective intentions."[61]

In a decision that is inspiring both for grievance arbitrators and for all who would wish to see a better linking of human rights and rights of employment, Mr. Justice Iacobucci[62] declares that even where there is no alleged violation of one of the express provisions of a collective agreement, a grievance arbitrator nevertheless has the jurisdiction to interpret and apply statutes governing human rights.[63] In that regard, the majority states:

> But even if it is true that a dispute must be arbitrable before an arbitrator obtains the power to interpret and apply the *Human Rights Code*, it does not thereby follow that an alleged contravention of an *express* provision of a collective agreement is a condition precedent of an arbitrator's authority to enforce the substantive rights and obligations of employment-related statutes. Under *McLeod*, the broad right of an employer to manage operations and direct the work force is subject not only to the express provisions of the collective agreement but also to the statutory rights of its employees. This means that the right of a probationary employee to equal treatment without discrimination is implicit in each collective agreement. This, in turn, means that the dismissal of an employee for discriminatory reasons is, in fact, an arbitrable difference, and that the arbitrator has the power to interpret and apply the substantive rights and obligations of the *Human Rights Code* for the purpose of resolving that difference.[64]

I could quote extensively from this important decision, but I will limit myself to one observation. The decision in *Parry Sound* not only confirmed, with some fanfare, the broad powers of interpretation and application of statutes by grievance arbitrators, confirming the hybrid character of arbitration, but it also sounded the reminder, as much for the employer as for the union, that human rights, by their particular nature, cannot be separated from the legal sphere of the workplace.

Even though the Court may not have commented on the exclusive aspect of arbitral recourse in that decision,[65] a reading of the

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[59] *Id.*, para. 2 (art. 5.01 of the collective agreement).

[60] The employee alleged that her cessation of employment was linked to her maternity leave, which was taken during her probationary period.

[61] *McLeod v. Egan*, para. 36.

[62] Writing for Chief Justice McLachlin and Justices Gonthier, Bastarache, Binnie, Arbour, and Deschamps. Justices Major and LeBel dissented.

[63] *McLeod v. Egan*, para. 48.

[64] *Id.*

[65] *Id.*, para. 15.

"considerations of public interest"[66] formulated by the majority highlights a number of the strengths of arbitration with respect to disputes raising issues of human rights: The prompt, informal, and non-costly resolution of employment disputes and the availability and expertise of a tribunal with "considerable experience" in resolving such conflicts. All of this with the recognition, which I consider extremely important, that the power that the Court recognizes arbitrators have to enforce respect for statutes serves two objectives: "(i) ensuring peace in industrial relations and (ii) protecting employees from the misuse of management power."[67]

In light of so forceful a decision, it is easy to understand how the law of grievance arbitration in Canada has been moving through a highly dynamic phase, obscured only by the lame diversion, in 2004, of the *Morin* decision discussed earlier.

Where, then, is the limit of this "implicit content" of a collective agreement? Does it extend to rights other than those that flow from statutes dealing with human rights? These questions, which flow naturally from *Parry Sound*, have a direct impact on the scope of an arbitrator's jurisdiction to deal with a grievance. In another split decision, the Supreme Court, in *Isidore Garon Ltd. v. Tremblay*,[68] introduced some refinement to the criteria to determine what law is "implicit" in relation to a collective agreement. Asserting the Court's "concern with preserving the internal coherence" of the rules of common law and those of the collective bargaining regime,[69] Madam Justice Deschamps invoked the standard of "compatibility" to decide whether a legislative standard will be viewed as "supplementary or mandatory" to the collective agreement.[70] Accordingly, the standards provided in the *Quebec Civil Code,* in that case relating to the notice period for the termination of employment,[71] are not all incorporated implicitly into the collective agreement.[72] Judging that the right to notice is a "personal right, and what it consists of depends on the individual circumstances of the employee who claims it,"[73] that particular right was found to be "....incompatible with the collective labour relations

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[66] *Id.*, para. 50–54.
[67] *Id.*, para. 51.
[68] [2006] 1 S.C.R. 72. The majority judgment of Deschamps, J. was concurred in by Justices Bastarache, Binnie and Charron. Chief Justice McLachlin and Justices LeBel and Fish dissented.
[69] *Id.*, para. 63.
[70] *Id.*, para. 25.
[71] Article 2091 of the *Quebec Civil Code.*
[72] *Isidore Garon Ltd.*, para. 30.
[73] *Id.*, para. 36.

context."[74] Because this statutory provision could not be considered to be implicitly incorporated into the collective agreement, the majority ruled that the arbitrator had no jurisdiction to hear grievances that relied exclusively on article 2019 of the *Quebec Civil Code*.[75]

A number of commentators believe that the decision in *Isidore Garon Ltd.* represents a retreat from the important initiative of *Parry Sound*. In my view, the Supreme Court did not necessarily backtrack, but rather indicated the set of principles it would apply in its determination of a statutory provision that would be viewed as implicitly contained in a collective agreement. There, as elsewhere, the Supreme Court outlines an approach that is based on a hierarchic view of rights. Human rights, notwithstanding that they are personal in nature, are considered as being implicit in all collective agreements.[76] The same can be said of all standards of general application articulated within public statutes.[77] With respect to other laws, including the *Quebec Civil Code*, the common law of Quebec, and numerous revised statutes,[78] the Court prefers to base its analysis on a "case-by-case" approach, on the rather amorphous basis of the principle of "compatibility" to determine whether certain rights are to be viewed as "incorporated" within the body of the collective agreement.

For the purposes of this discussion, it should be remembered that the position of the majority of the Supreme Court in *Isidore Garon Ltd.* essentially restates the classical rules of our system of collective bargaining, namely the notion, which has been around for more than 60 years, of the essential autonomy of the parties to a collective agreement in defining the standards that are to apply within a given workplace. Apart from human rights and other standards determined by legislatures to be of a public order, a right flowing from an ordinary law can, according to this traditional approach, become the source of an obligation and subject

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[74] *Id.*, para. 32.

[75] However, it should be noted that the decision in *Isidore Garon Ltd.* also resolves another dispute between *Filion & Frères (1976) Inc. and le syndicat national des employés de garage de Québec Inc.* While the latter parties' collective agreement had no provision dealing with the closing of the business, the situation in *Isidore Garon Ltd.* was slightly different as the collective agreement specified that in a layoff for more than six months the employer must provide notices as contemplated in *La Loi sur les normes du travail du Québec.*

[76] Parry Sound Soc. Servs. v. Canadian Union of Pub. Employees, [2003] 2 S.C.R. 157, para. 24 (Iacobucci, J.).

[77] That is acknowledged by all of the Court's judges in *Isidore Garon Ltd.*, [2006] 1 S.C.R. 72, para. 61 (Deschamps, J.), para. 152–57 (LeBel, J.).

[78] *Id.*, para. 158–59 (LeBel, J.).

to arbitral jurisdiction if the parties expressly incorporate it into their collective agreement. Where the parties are silent, such a right, even if it is an intrinsic part of the legislative context so dear to the Supreme Court, will not ascend to the level of a superior status that makes it a source of rights and obligations or arbitral jurisdiction unless it also passes the delicate test of "compatibility." On the whole, the thrust of *Parry Sound* has not been slowed down by *Isidore Garon Ltd.*, but merely "circumscribed." The latter decision underlines, if it were necessary to do so, that although the Supreme Court of Canada does not hesitate to revisit substantial segments of the law, including various aspects of collective bargaining, when the vindication of human rights is at issue, it adopts a much more conservative attitude, not to say a surprisingly traditional attitude, when confronted with other areas of the law.

The Judicial Review of Arbitral Decisions . . . or the Twists and Turns of the Complex Notion of "Reasonableness Simpliciter"

To write an account, even in summary form, of the recent evolution of the judicial review of grievance arbitration decisions as developed by the Supreme Court is a daunting task. That is not so, it should be said, because of the number of decisions or because those decisions raise questions of great complexity. First and foremost it is daunting because, over the last three decades, the guidelines for judicial intervention have been so multiplied and fractured that it is difficult to extract any clear picture.

There are nevertheless some noteworthy markers about which I would caution "looks can be deceiving." The general wisdom among the Canadian legal community views "patent unreasonableness as the general standard of review of an arbitrator's decision."[79] That is so when the arbitrator rules on questions within his or her expertise. But the reality that emerges from an examination of the jurisprudence of recent years is that the Supreme Court has slowly but surely freed itself of that standard, drawn from the *New Brunswick Liquor Corporation*[80] case of 1979, so as to convert this general standard into an exceptional standard.

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[79]City of Toronto v. CUPE, Local 79, [2003] 3 S.C.R. 77, para. 14 (Arbour, J.). *See also* Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre), [1996] 2 S.C.R. 3, para. 12 & 30.

[80]*Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation,* [1979] 2 S.C.R. 227.

Except for the decision in *City of Toronto*[81] in 2003, where the Court combined the standard of correctness in relation to a question of law raised in that case[82] with the standard of manifest unreasonableness in respect of an evaluation of the whole of the conclusions of the arbitrator's award,[83] the "halfway house" of "reasonableness simpliciter," whose emergence I have already noted, has gradually been imposed in all of the recent decisions of the Supreme Court.

It is arguable that the drafting of certain privative clauses in the Alberta labour statutes reviewed in *Voice Construction v. Construction & General Workers Union, Local 92*[84] and *Alberta Union of Provincial Employees v. Lethbridge Community College*[85] could leave the impression, even if I seriously doubt it, that they did not afford to arbitrators "the protection of a full privative clause"[86] and therefore are an important factor to consider in the application of the standard of "reasonableness." However, I am impressed by the urgency with which the Supreme Court seems more and more inclined to identify "questions of law," a factor that, according to the Court, "militates in favour of less deference to the board [of arbitration]."[87]

But it should not be concluded that the presence of a "complete"[88] privative clause has the effect of modifying that firm

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[81] City of Toronto v. CUPE, Local 79, [2003] 3 S.C.R. 77.

[82] In that case, the law that applies to a board of arbitration that questions the clear findings made previously by a criminal court (issues of res judicata and abuse of procedure) *id*., para. 15.

[83] The Supreme Court found that the arbitrator made an error of law (standard of correctness) by failing to give full force and effect to a verdict of criminal guilt rendered against the employee. By that error, "....the arbitrator reached a patently unreasonable conclusion." *Id.*, para. 58, (Arbour, J.); see also to the same effect but with some cautionary notes *id*., para. 60 and 69–76 (LeBel, J.).

[84] [2004] 1 S.C.R. 609.

[85] [2004] 1 S.C.R. 727.

[86] *Voice Construction*, para. 23; *Lethbridge Comty. Coll*., para. 15. This conclusion flows from the fact that two aspects of the *Labour Relations Code* of Alberta seem to deny access to judicial review in one paragraph while in the next paragraph establish a 30-day time limit for filing challenges or judicial review applications against arbitration awards. In my view, the time limit does not diminish the fundamental character of the privative clause, but only provides a procedural rule where such a clause cannot apply (jurisdictional error).

[87] *Lethbridge Community College*, para. 19. In *Voice Construction*, the Court concluded that the "question of law" at the heart of the dispute, "....the interpretation of the collective agreements," constitutes "....the *core of an arbitrator's expertise* and this, in turn, *points to some deference*." (para. 29) (author's italics.) This is a long way from the principles of deference put forward by Dickson, J. in the *New Brunswick Liquor Corporation* case in 1979, [1979] 2 S.C.R. 227.

[88] Articles. 139, 139.1, and 140 of the Quebec Labour Code. Justice Bastarache speaks in terms of "....a relatively strong privative clause" in reference to these articles: *Lévis (City) v. Fraternité des policiers de Lévis.* [2007], 1 S.C.R. 591, para. 20. This formulation squares with the one adopted in 1993 in *Domtar Inc. v. Québec (CALP)*, [1993] 2 S.C.R. 756 at 773, where, in relation to provisions identical to those in the Labour Code, the

orientation of the Court. In *Levis v. Levis Police Association*,[89] the standards of correctness and reasonableness were adopted by the majority of the judges of the Court[90] to justify judicial intervention into the arbitration award. Again, not surprisingly, the device of qualifying different issues in a dispute as "questions of law"[91] and the fact that one of those was said to be of general importance with precedential value[92] drew the Court away from the standard of review of manifest unreasonableness.

In cases involving human rights it is difficult to be sure whether the Supreme Court has adopted the same approach, particularly by reason of its total silence on the issue of the standard of review applied in the decision of *McGill University Health Centre (Montreal General Hospital) v. Montreal General Hospital Employees' Union*.[93] At most, it can be noted that Madam Justice Deschamps affirmed the decision of the Superior Court that concluded "that these observations [those of the arbitrator] were based on a *correct and reasonable interpretation of the evidence*" and on a *correct* application of the principles stated in the *Meiorin* decision.[94] We can only regret this muted approach of the Court to the standard of judicial review to be applied in that decision. Cases raising issues of fundamental rights have grown more frequent in the last ten years. Often arbitral awards are attacked on judicial review and the judges of the inferior courts display more and more of a stutter-step in dealing

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Court spoke of a "full privative clause" (L'Heureux—Dubé, J.). In *United Brotherhood v. Bradco*, [1993] 2 S.C.R. 316, the Court spoke in terms of "true privative clauses" (at 332 per Sopinka, J.).

[89] [2007], 1 S.C.R. 591, para. 20.

[90] In a separate judgment, Justice Abella expressed her disagreement with the adjustment of the standard of review depending on the different issues that the arbitrator must deal with. She opts instead for the application of a single standard of review that is deferential, with the decision being "reviewed as a whole." (*Id.*, para. 116 & 112).

[91] In this case the majority identified two distinct issues, one being "pure questions of law" and the other questions of "mixed fact and law." (*Id.*, para. 21 & 24).

[92] This factor, a veritable open door to judicial intervention by reason of its amorphous character, was first articulated by the Supreme Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982, para. 37 and 38 (Bastarache, J.)

[93] [2007] 1 S.C.R. 161.

[94] *Id.*, para. 7. In fact, the Superior Court (D.T.E. 2004-T-819) used the standard of manifest unreasonableness with respect to interpreting the collective agreement (para. 16 & 19) and the standard of correctness in relation to establishing whether the employer met its obligation of accommodation (para 34). I cannot help but stress that Justice Poulin opted for the latter standard of correctness while nevertheless noting that that issue was a question of fact within the expertise of the arbitrator (para. 34). The least we can say is that the learned judge's conclusions as to the standard of review are difficult to rationalize with her own reasoning. As to the important decision in *Meiorin*, see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3. That decision redefined the various parameters of the duty of accommodation in the workplace. It has given rise to much arbitral jurisprudence.

with the appropriate standard of review, rather than an orderly interpretation of the principles to be followed in such cases.

Although the Supreme Court of Canada has continued systematically to invoke, at the beginning of each of its decisions, that there are three standards of judicial review in Canada, it has become more and more evident, at least in the labour relations sector, that henceforth it applies only two of them, namely "correctness" and "reasonableness simpliciter." The burial of the standard of manifest unreasonableness, which seemed inevitable, finally came in March of 2008 in the context of the decision in *Dunsmuir v. New Brunswick*.[95] Having gone through an extensive exercise of review and reflection, the Court opted for the merger of the two standards of reasonableness into one,[96] which is henceforth to be called… the "*new standard of reasonableness*"!

Although I can sense your voracious appetite to know everything about this primer on standards of review, I will nevertheless confine myself to two general observations. In part, in general pronouncements worthy of the greatest of balancing acts, the Court recalls the principles of deference towards the decisions of administrative tribunals although all the while insisting that "…. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations."[97] It would be difficult, we will all agree, to be more clear unless, and this is my view, there is a wish to always preserve the wide discretionary power inherent in judicial review while nevertheless striving to express one or two general principles.

In my view the problem with this approach, a problem which is verifiable in *Dunsmuir*, is in the delicate phase of transposing all of these rules, principles, and attributes of the new standard of reasonableness as applied to a specific case. In *Dunsmuir*, the Court takes the arbitrator to task for reasoning that is "deeply flawed," resulting in a reading of the statute that "….fell outside the range of admissible statutory interpretations,"[98] charging the arbitrator with not having taken proper account of the legislative

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[95] 2008 C.S.C. 9 (Mar. 2, 2008). The reasons of the majority were written by Bastarache and LeBel, JJ.

[96] *Id.*, para. 45.

[97] *Id.*, para. 48. *See also*, in the same vein, para. 45–46.

[98] *Id.*, para. 72. *See also* para. 157 (Binnie, J.) and para. 170 (Deschamps, J.).

"context"[99] and even of having interpreted "literally" a provision of the statute that gave him jurisdiction![100] I confess that I can find nowhere within the opinions of Justices Bastarache, LeBel, or Binnie[101] an attitude, however slight, of deference, of "respect for the decision making process . . . with regard to both the facts and the law"[102] that could have permitted, and according to my reading, *should have permitted*, the conclusion that the award did fall among a ". . . . range of possible acceptable outcomes which are defensible in respect of the facts and law."[103] I do not argue that the arbitral award under consideration represented the only interpretation that could be given to the statutory provisions that were considered. No matter how much I read and reread the provisions of the statute giving the arbitrator his jurisdiction, taking into account the "legislative context" in which they are found, I simply cannot conclude, unless I apply the standard of correctness, that the arbitrator's conclusions did not constitute one of a number of different acceptable, reasonable outcomes.[104]

On the whole, this first introduction of the new standard of reasonableness raises profound concerns among those, like myself, who hold to the good old principle of judicial restraint developed in the late 1970s by the Supreme Court of Canada. The ranking of the scope of privative clauses, the porousness of the standard of expertise, and the parsing of disputes into various "questions of law" justifying recourse to various standards of review constitute elements that, taken together, are difficult to reconcile with a genuine policy of judicial deference. In the result, even if the Supreme Court does not itself seem oriented towards a cycle of sustained interventionism, it seems to me that more and more there is reason to fear slippage on the part of the lower courts, which are already more prone to be interventionist.

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[99] *Id.*, para. 76.
[100] *Id.*, para. 170.
[101] Deschamps, J. concluded that the standard of correctness should apply: *id.*, para. 168.
[102] *Id.*, para. 48.
[103] *Id.*, para. 47.
[104] *Id.* For a more elaborate comment on this aspect of *Dunsmuir*, see Nadeau, "*L'arrêt Dunsmuir c. Nouveau Brunswick ou quand la Cour suprême du Canada réécrit le droit. . . .*" Bulletin de la Conférence des arbitres du Québec, Mars 2008, Vol. 34, no. 2 (available online at www.conference-des-arbitres.qc.ca/bulletins.asp).

Assessment and Perspectives for the Future

This review of the evolution of the recent case law of the Supreme Court of Canada concerning grievance arbitration leads me to three final observations. *Firstly*, the Supreme Court has remained faithful, for some 30 years, to the special status that it grants to grievance arbitration within the edifice of Canadian justice. That is a tangible sign that it still believes that this process has the flexibility, the expertise, and the accessibility necessary to resolve efficiently disputes in the unionized workplace.

Secondly, the Supreme Court has not hesitated to further enhance the central role of grievance arbitration by a natural grafting on of the power to deal with the questions of human rights. This policy choice—criticized by some—appears to me to be logical and falls into line with the philosophy of openness and universality of human rights put forward by the Supreme Court and applied to the whole of the Canadian legal world. In my view, there is simply no reason for the unionized workplace to be cut off from this powerful influence or that issues of human rights should be subject to a multitude of forums. That approach, argued by some as a way of maintaining *their concept* of the nature and purpose of grievance arbitration, denies the spectacular evolution of this mechanism of adjudication for more than 30 years. That attitude reflects, surely without intending to, a segmented view of the law that appears to me to be as anachronistic as it is incompatible with the importance of ensuring a more thorough integration of human rights into Canadian society.

Thirdly, despite some hesitation and false steps, the Supreme Court continues to maintain that it is appropriate to demonstrate deference and to apply a standard of reasonableness with respect to "a *discrete* and special administrative regime in which the decision maker has a *special expertise*" of which the only example cited by the Court is that of "labour relations."[105] It is true that the more contemporary terms of expression enunciated by the Court are less enthusiastic than those of the pro-restraint initiative pronounced by Mr. Justice Dixon in *New Brunswick Liquor Corporation*. But they are nevertheless a forceful affirmation that arbitration

[105] *Dunsmuir,* 2008 C.S.C. 9 (Mar. 2, 2008), para. 55 (author's italics).

awards are still not to be the subject of open and unbridled judicial interventionism.

For a period of more than 30 years the Supreme Court of Canada has given a powerful thrust to grievance arbitration, a thrust that has largely contributed to attracting talented arbitrators and advocates and that has contributed to the development of a wide area of expertise well adapted to the world of collective bargaining.[106] Over the course of the years, largely because labour law is no different than other areas of law, the disputes have become more complex and the stakes have become greater. Collective agreements and employment statutes did not remain on the sidelines of this phenomenon. That is why it is necessary, more than ever, for the Supreme Court to continue to grant to grievance arbitration a central place in the decisionmaking process of collective bargaining. To be sure, and I know my colleagues will deal with this, the challenges of grievance arbitration are many, but I am confident that the ability of Canadian arbitrators to adapt, an ability that has been called upon continuously for 30 years, will endure and will allow them to continuously discharge the role of first importance, which the Supreme Court has confided in them, to advance respect for the rule of law in a world where the workplace is ever changing.

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[106]In *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, the majority of the Court, in a judgment written by Binnie, J., recognized that with respect to interest arbitration "The practice of labour relations in this country has developed into a highly sophisticated business. The livelihood of a significant group of professional labour arbitrators depends on their recognized ability to fulfill these criteria" (para. 112). He added: "An individual who combines relevant expertise with independence and impartiality can reasonably be expected to be experienced in the field, thus known to and broadly acceptable to both unions and management." (para. 110). The majority also adopted the words of Professor Weiler, who stresses, properly in my view, that ". . . the independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security *but by training, experience and mutual acceptability.* (para. 191–192) (author's italics). In my view, these extremely pertinent observations should hold equally true for grievance arbitrators.