Chapter 3

KEYNOTE ADDRESS: LABOUR ARBITRATORS AND THE COURTS: AN EVOLVING RELATIONSHIP*

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It is a cliché to say we live in a changing world. Nowhere is this truer than in the business of governance—how the law is applied to the citizenry—the women and men who make up the fabric of Canada. And nowhere is it truer than in the business of governance of labour relations that regulates the nation's workplaces.

In the past century, Canadian society, like other western democracies, has witnessed a dramatic shift in governance that has transformed labour relations. We moved from a simple model of governance—where legislatures made the law, the executive led by Ministers applied the law, and the courts ruled on what the law was and resolved disputes about how it should be applied—to the modern regulatory state, where executive power to apply the law is conferred on regulatory agencies and tribunals, and where tribunals have, in many fields, supplanted the courts as primary decision-makers.

The shift from traditional governance to the modern regulatory state was a power shift. Power moved from the courts to tribunals. Like all power shifts, it produced tensions and uncertainty, and took a while to work out.

Today, I would like to describe the broad arc of that power shift and how we have arrived where we are now in labour relations: a system in which labour relations are regulated through administrative agencies and their tribunals, yet under the broad umbrella of the rule of law through judicial review by the courts. The challenge has been to integrate labour arbitration into the larger legal system, in a way that is fair, efficient and true to the principal tenet

of the rule of law—that all power must be exercised constitutionally, within the parameters permitted by the constitution and enabling regulation.

I am going to suggest that the history of how we in Canada have integrated the modern regulatory approach to labour law into the larger legal system can be broken into two periods.

The first period was the phase of confrontation between the two systems—administrative regulators and the courts—the difficult transition from court governance to tribunal governance under the modern regulatory state.

The second period was—and is—the phase of mutual respect, marked by recognition of the different roles of labour regulators and the courts and measured deference by the courts to the decisions of labour arbitrators.

The developments in the second period bring us to where we are today. These developments relate to three distinct issues: (1) judicial review; (2) concurrent and overlapping jurisdiction; and (3) the power of tribunals to decide matters of general law, notably questions involving the interpretation of the *Canadian Charter of Rights and Freedoms*.

But before I discuss these phases, let me lay out a bit of the background.

The Backdrop

The last century has witnessed a dramatic change in labour relations in Canada and other western societies.

We are all familiar with the long struggle of the labour movement to win the right to organize workers.

Hostility is the only way to describe the attitude of official society toward early attempts to organize labour. The courts shared this view. Labour law in the first half of the 20th century meant freedom of contract, actions for civil conspiracy in restraint of trade, and anti-strike injunctions. These doctrines were applied regularly to suppress organized action by employees. In England, as late as the 60's, as celebrated a jurist as Lord Denning insisted that organized labour action must, for the good of the country, be constrained.

The beginning of the end of the early period of hostility to organized labour can be traced to the *Wagner Act*[1] passed by the U.S. Congress in 1935. The *Wagner Act* recognized, for the first

[1]National Labor Relations Act of 1935 (29 U.S.C.A. §151 et seq.).

time, the right of employees to belong to the trade union of their choice, free from employer interference. It imposed a duty on employers to bargain in good faith with unions. And last but not least, it established the National Labor Relations Board to investigate allegations of unfair labour practices, oversee union certification, and prosecute offences under the Act. This represented a paradigm shift of adjudicative responsibility for labour relations from the courts to a specialized administrative body. The modern regulatory approach to labour relations was born.

By fits and starts, Canadian legislatures followed suit. Starting in the 1940's, trade union activities in restraint of trade were declared lawful. The doctrine of civil conspiracy was largely repealed. Labour Boards were established. Every private sector collective agreement was required to provide for final and binding arbitration of disputes on the interpretation and application of collective agreements. The modern regulatory state brought labour into the administrative fold. Arbitrators became the front-line adjudicators on labour matters. The courts were confined to the margins—to a supervisory role the parameters of which for a long while remained uncertain.

Today, a half-century on, the ground is once more shifting. A super-competitive global economy and a revival in some quarters of the anti-union animus that marked the first half of the 20th century, are presenting new challenges for organized labour, sometimes producing disputes that find their way before arbitrators and ultimately the courts. Yet the features of labour regulation that have developed in the past 50 years—dispute resolution by arbitrators and a supervisory role for the courts—remain firmly fixed in place.

Against this background, let me discuss the two stages that mark the evolving relationship between arbitrators and the courts over the last half-century.

The First Period: Confrontation

The first period in the modern era of regulatory labour relations—roughly 1950 to 1975—was a period of uneasy co-existence and frequent confrontation between courts and labour arbitrators.[2] The old suspicions of organized labour persisted, and produced a climate of distrust and aggressive intervention.

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[2]See R. Macaulay, *Directions—Report on a Review of Ontario's Regulatory Agencies* (Toronto: Queen's Printer, 1989) at 9.

This tension took two forms.

First, judges continued to play an active role in regulating disputes arising out of collective agreements, effectively circumventing the arbitral system. In the 60's and 70's courts routinely granted interim injunctions against union action—not infrequently *ex parte*.

Second, courts in this period took an expansive approach to judicial review, interfering routinely and repeatedly in arbitral decisions, based on a sweeping and fluid definition of jurisdictional error. The underlying logic was simple. Labour arbitrators were confined to the powers the legislature gave them, or was presumed to have given them. The legislature could not have intended arbitrators to have the power to make errors. Therefore erroneous decisions—as judged by the court—were outside the jurisdiction of the tribunal and had to be set aside.

Courts approached the decisions of labour arbitrators just as Courts of Appeal approached decisions of lower courts—with little or no deference. For example in 1969, in *Port Arthur Shipbuilding v. Arthurs*,[3] the Supreme Court of Canada overturned an arbitration board's findings without suggesting that the standard of review was any different from that which would govern review of a lower court decision. Privative clauses didn't change things; in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*,[4] described as the "high-water mark"[5] of activist review of labour boards in Canada, the Supreme Court quashed the decision of a board to grant certification of a union in the face of a strong privative clause.

The object of such decisions was laudable—no less noble a goal than to ensure that the new administrative tribunals operated within the constraints on power imposed by the rule of law. Not arbitrarily. Not capriciously. Not in error. Fairly and in accordance with the rule of law. But the effect was to perpetuate tension and uncertainty in the law, and undermine the goals of regulatory governance—prompt, accessible and workable solutions delivered by specialized adjudicators.

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[3] *Port Arthur Shipbuilding Co. v. Arthurs*, [1969] S.C.R. 85.

[4] *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425.

[5] Evans, J. M. et al. *Administrative Law*, 3rd ed. (Toronto: Emond Montgomer Publications Ltd., 1989) at 565.

The Second Period: Guarded Respect

In the mid-70's the picture began to change. Courts more and more came to recognize the expertise of labour arbitrators and labour boards, and accord more respect to privative clauses aimed at limiting judicial intervention in arbitral decisions.

These changes are evident in the Supreme Court's consideration of three issues, each critical to how tribunals do their work and to the relationship between tribunals and the courts: (1) judicial review; (2) concurrent and overlapping jurisdiction; and (3) integration with the general values of the legal system and the *Charter*.

Judicial Review

As just discussed, courts in the first period of confrontation were anything but deferential to labour arbitrators. Using a jurisdictional approach, courts interfered broadly with any decisions they did not agree with.

The Supreme Court decision in *CUPE, Local 963 v. New Brunswick Liquor Corporation* in 1979 marked the turning point.[6] Justice Dickson wrote that courts should defer to what administrative tribunals think is reasonable within their own context and special expertise, even if this involved statutory interpretation. The question for a reviewing court was whether "the Board's interpretation [was] so patently unreasonable that its construction cannot be rationally supported by the relevant legislation. …"[7]

CUPE was a watershed decision. It transformed the culture from one of confrontation and intervention to one of respect. It acknowledged that the legislature had entrusted labour relations to an expert body and had conferred power to administer the specialized regime on labour boards, which were tasked with striking the delicate balance between maintaining industrial harmony and upholding collective bargains between employees and employers. Justice Dickson described this task as calling for "[c]onsiderable sensitivity and unique expertise"[8]—qualities courts of general jurisdiction did not possess.

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[6] *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227.
[7] *Ibid.* at 237.
[8] *Ibid.* at 236.

CUPE changed the standard of review. The patently unreasonable test reflected the need for deference to the expertise of labour boards and arbitrators, honouring the legislature's delegation of responsibility for labour relations to labour boards and arbitrators, not the courts. Where a decision was alleged to be in error, the question would not be whether the adjudicator had acted within its jurisdiction—an approach that had devolved into increasingly sterile debates that had nothing to do with the merits of the decision. Rather the approach would be substantive review on a deferential basis.

The approach was, as I said in a later case, *Dr. Q.*, one that "inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law."[9]

CUPE was followed by a period of debate about the appropriate standard of review. At one point, three standards were proposed for different situations—correctness for questions of law and jurisdiction, patent unreasonableness and reasonableness *simpliciter*.[10] In 2008, the Supreme Court in *Dunsmuir*[11] rolled the latter two standards into simple unreasonableness, which is now the accepted approach for all but a few clearly legal decisions. Indeed, even when interpreting legal questions arising from their home statutes, the deferential reasonableness standard is applied.[12]

Concurrent and Overlapping Jurisdiction

This brings us to the problem of concurrent and overlapping jurisdiction—situations where the tribunal regime could apply, but where it could also be argued that the common law courts had jurisdiction, for example where the grievance could be framed in contract or tort. Where arguments could be made both ways, which should be the preferred forum?

Three models were possible: (1) a concurrent model where the litigant gets to choose; (2) an overlapping jurisdiction model under which disputes arising out of collective agreements would be dealt with by the labour tribunal unless the issue went beyond the usual subject of arbitration; and (3) an exclusive jurisdiction

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[9] *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 21.

[10] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[11] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9.

[12] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708.

model, which would confer exclusive power on tribunals to resolve all matters arising from the collective agreement by arbitration.

The Supreme Court of Canada opted for the latter approach in *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers' Union, Local 219*.[13] Justice Estey wrote, "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."[14] Disputes may still arise as to whether a particular dispute between an employer and employee arises out of the collective agreement and hence is within the arbitrator's jurisdiction. However, as the Supreme Court confirmed in *Weber v. Ontario Hydro*,[15] disputes arising from collective agreements are to be resolved by arbitrators, not the courts. While arbitrators and the courts each enjoy their respective spheres of competence and responsibility, mandatory arbitration clauses cannot be circumvented by claims that courts have concurrent jurisdiction.

Integration with the Legal System and the Charter

The third issue that confronted the courts in the second period of developing mutual respect was whether tribunals have the capacity to decide legal, statutory and constitutional questions.

It was clear that tribunals and labour arbitrators could consider issues of law arising from their home statute, for which their expertise made them uniquely qualified.

As time passed, it was also confirmed that labour arbitrators could consider and apply other legislation relevant to disputes arising out of a collective agreement, such as human rights codes and employment standards legislation.[16] This interpretation of other statutes often involves issues of jurisdictional boundaries between tribunals.

Depending on the legislative context, the legislature may have given this responsibility to arbitrators or may have given other tribunals overlapping, concurrent, or exclusive jurisdiction. As the Court held in *Quebec (Commission des droits de la personne et des droits*

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[13] [1986] 1 S.C.R. 704.
[14] *Ibid.* at para. 20.
[15] *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.
[16] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157.

de la jeunesse)[17] in 2004, the power of an arbitrator to apply other legislation ultimately turns on two questions: what jurisdiction did the legislature intend to confer on the arbitrator and, secondly, given the nature of the dispute, did the legislature intend to leave it exclusively to the arbitrator? The result was an increasingly integrated regulatory tapestry.

The most difficult issue, however, was whether the legislatures that appointed labour arbitrators and other administrative decision-makers intended to give them the power to decide the ambit of constitutional rights and responsibilities.

Opponents argued that recognizing *Charter* jurisdiction in labour arbitrators and other tribunals cuts against the purpose of these tribunals: specialization, simple rules of evidence and procedure, and speedy resolution of disputes. They pointed to the fact that many administrative adjudicators are not lawyers, and to the lack of guarantees of independence to make the case that tribunals were not the appropriate bodies to decide matters of general constitutional importance.

But, ultimately, these arguments could not overcome the clear advantages to recognizing *Charter* jurisdiction for labour arbitrators.

The most powerful argument was that labour arbitrators were resigned to make decisions in accordance with the law—a law that included the *Charter*. As Justice LaForest put it in *Douglas College,* "there cannot be a Constitution for arbitrators and another for the courts."[18] Or as I wrote in *Cooper v. Canada (Human Rights Commission)*, "The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. … If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of … tribunals."[19]

A second argument, developed in *Douglas College* in 1990 and again later in *Nova Scotia (Workers Compensation Board) v. Martin*[20] in 2003, was that citizens should be allowed to exert their *Charter* rights in the most accessible forum, without the need to bring a parallel claim in the courts. Exclusion of *Charter* issues from tribunals would mean that many *Charter* claims would go unheard.

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[17] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185.

[18] *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at 597.

[19] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 70.

[20] *Nova Scotia (Workers Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 29.

A third argument was that allowing tribunals to decide *Charter* issues would enhance *Charter* adjudication. *Charter* issues are best considered in the context of the facts from which they arise. The best way to decide *Charter* issues arising from labour disputes is to allow arbitrators to tease out all the facts and circumstances bearing on their resolution. Arbitrators have a unique understanding of the building blocks of *Charter* analysis—the scheme and purposes of the legislation at issue; the practical constraints on competing interpretations, and the consequences that may flow from the constitutional remedies sought. Even if the court is called upon to review the arbitrator's *Charter* decision, it will benefit from the expertise and experience the arbitrator has brought to bear on the question.

For these reasons, the Supreme Court concluded that the *Charter* is not "hands off" to labour arbitrators and other administrative decision-makers. Exceptions related to the nature of the tribunal may persist, either as a result of legislation or court rulings. But sophisticated decision-makers in administrative tribunals can and should consider *Charter* issues. Their obligation to work within the values of the constitution requires no less.[21]

In sum, holding that labour arbitrators and other adjudicators have the power to consider questions of law arising from related statutes and the *Charter*, the courts have affirmed their integration into the larger Canadian legal system and the important role they play in developing the fundamental law upon which our society rests.

Conclusion

We have moved from an initial period of mistrust and confrontation, to the present state of mutual respect. Taken together, the Supreme Court's decisions on judicial review, overlapping and concurrent jurisdiction, and the ability of tribunals to consider statues and indeed the *Charter,* confirm and consolidate the great gain of the second period of relations between the courts and tribunals—the development of a culture of mutual respect between labour arbitrators and the courts.

Tribunals, like the modern regulatory state from which they emanate, are front-line adjudicators with unique expertise and experience that attracts deep deference. At the same time, the

[21] *Douglas College, supra* at para. 59.

courts have not abandoned the field—their supervisory role remains vital to the justice and the rule of law. Both arbitrators and judges have roles to play, but they are different roles and complementary to each other.

As the former Chief Justice said in another context, "Let's face it; we are all here to stay."[22] Whatever the future may bring, our way forward is together, in mutual respect.

[22] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186.