Court File No. 28396

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of the Province of Ontario)

B E T W E E N

THE MINISTRY OF LABOUR FOR ONTARIO

Appellant
(Respondent)

- and -

**CANADIAN UNION OF PUBLIC EMPLOYEES and
SERVICE EMPLOYEES INTERNATIONAL UNION**

Respondents
(Applicants)

- and –

**NATIONAL ACADEMY OF ARBITRATORS (CANADIAN REGION)
and CANADIAN BAR ASSOCIATION**

Interveners

FACTUM OF THE INTERVENOR, NATIONAL ACADEMY OF ARBITRATORS (CANADIAN REGION)

Michel G. Picher
2281 Yonge Street, #202
Toronto, ON M4P 2C6
Tel: (416) 483-6442
Fax: (416) 483-8929
**Counsel for and Member of
the National Academy of Arbitrators
(Canadian Region)**

McCarthy Tétrault LLP
Barristers & Solicitors
40 Elgin Street, 14th Floor
Ottawa, ON K1P 5K6

Barbara A. McIsaac, Q.C.
Tel. (613) 238-2000
Fax (613) 563-9386
**Agents for the Proposed Intervener,
the National Academy of Arbitrators**

FACTUM OF THE INTERVENOR, NATIONAL ACADEMY OF ARBITRATORS (CANADIAN REGION)

TO: The Registrar of this Court

Attorney General for Ontario
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1

Leslie M. McIntosh
Tel: (416) 326-4148
Fax: (416) 326-4181
Counsel for the Applicant

Burke-Robertson
Barristers and Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 233-4195
Ottawa Agent for the Applicant

Sack Goldblatt Mitchell
Barristers and Solicitors
20 Dundas Street West, Suite 1130
Toronto, ON M5G 2B8

Howard Goldblatt/Steven Barrett/Vanessa Payne
Tel: (416) 979-6422
Fax: (416) 591-7333
Counsel for the Respondents

Burke-Robertson
Barristers and Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 233-4195
Ottawa Agent for the Respondents

Koskie Minsky
Barristers and Solicitors
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Susan Philpott/Graham Williamson
Tel: (416) 977-8353
Fax: (416) 977-3316
Counsel for the Intervener: Canadian Bar Association

Lang Michener
Barristers and Solicitors
300-50 O'Connor Street
Ottawa, ON K1P 6L2

Jeff Beedell
Tel: (613) 232-7171
Fax: (613) 231-3191
Agent for the Intervener: Canadian Bar Association

FACTUM OF THE INTERVENOR, NATIONAL ACADEMY OF ARBITRATORS (CANADIAN REGION)

Weir Foulds
Barristers and Solicitors
The Exchange Tower, Suite 1600
P.O.Box 480, 130 King Street West
Toronto, ON M5X 1J5

Jeff G. Cowan/Gregory Richards
Tel.: (416) 365-1110
Fax: (416) 365-1876
Counsel for the Intervener: Canadian Bar Association

Lang Michener
Barristers and Solicitors
300-50 O'Connor Street
Ottawa, ON K1P 6L2

Jeff Beedell
Tel: (613) 232-7171
Fax: (613) 231-3191
Agent for the Intervener: Canadian Bar Association

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PART I - STATEMENT OF FACTS

1. The National Academy of Arbitrators (Canadian Region) (NAA) adopts the facts set out in the decision of the Ontario Court of Appeal.

PART II –THE ISSUE

2. The NAA accepts the points in issue set out in the Respondents' factum.

3. For the NAA the essential issue is the extent to which the Minister's discretion is circumscribed by the letter and purpose of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990. 1990 c. H.14 ("HLDAA"). To facilitate the arbitration mandated by section 4 of HLDAA where the parties do not agree on the selection of their arbitrator, section 6(5) stipulates that the Minister "… shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act". The NAA submits that the appointment of the arbitrator under section 6(5) must meet an objective minimal requirement of general acceptability to satisfy the intended meaning of "arbitration" within section 4 of the *Act*. By failing to appoint a person generally acceptable to both parties, the Minister failed to appoint a person who is "qualified to act" within the meaning of section 6(5) and thereby failed to appoint a person who would then preside over an "arbitration" within the meaning of section 4 of the *Act*.

4. The root issue is therefore whether the Minister's failure to appoint a generally acceptable arbitrator as "third member", to use the words of section 6(5) of HLDAA, was so fundamental an error as to take the process administered by the Minister outside the purview of "arbitration" as mandated by section 4 of HLDAA and as intended by the Legislature, and was therefore outside the scope of his implied duty under section 6(5).

5. A related issue is whether the Minister could, as found in the decision of the Ontario Court of Appeal, without consultation effectively eliminate all arbitrators generally acceptable to both trade unions and employers from possible appointment in any dispute under HLDAA and remain within the spirit, intent and requirements of the *Act.*

6. An issue intrinsic to this appeal is therefore the meaning of "arbitration" in section 4 of HLDAA. It is the meaning of "arbitration" that determines the scope of, and sets limits on, the Minister's discretion and duty to "appoint" under section 6(5), the exercise of which discretion gave rise to this dispute.

7. The NAA submits that it is not necessary for this Honourable Court to consider, as did the Ontario Court of Appeal, whether the Minister had an interest in the outcome and attempted to "seize control of the bargaining process". The more fundamental issue is whether, regardless of interest, motive or intent, the Minister violated his implicit duty to both parties to appoint an arbitrator from among persons generally acceptable to both unions and employers, as required by HLDAA, and therefore failed to properly constitute a board of arbitration within the meaning of the *Act*.

8. The NAA takes no position with respect to the issue of institutional independence. Even if it is concluded that labour arbitrators and retired judges have the same degree of institutional independence, the Minister's refusal to meet the minimal criterion of general acceptability in appointing arbitrators flies in the face of the core meaning of the word "arbitration" in the *Act*.

9. Nor does the NAA make any submission with respect to the doctrine of established and legitimate expectations as they relate to the particular respondent unions.

PART III – STATEMENT OF POSITION

10. HLDAA, like all Canadian labour relations statutes of general application, is itself neutral. It requires the equal treatment of both parties whether by a Minister, an administrator, a conciliator, a mediator or an arbitrator. It does not serve, and cannot be used or be seen to serve, the independent interest of either side in a labour dispute, or the interest of the government itself. The Minister is the trustee of the process established under the *Act*, and owes a corresponding duty to both employer and union parties governed by it.

11. HLDAA, like all labour relations statutes, recognizes agreement between the parties the most desirable, presumptive means of constituting boards of arbitration. The Ministerial

appointment of arbitrators is a "second best" default mechanism. As the record discloses, by openly barring from any possible appointment all experienced arbitrators acceptable to both trade unions and employers the Minister put an end to any possible agreements between parties in the Hospital sector, contrary to the first intention of the *Act*.

12. In Canadian law, the integrity and legitimacy of the labour arbitration system rests, as a matter of first principle, on the method by which qualified neutral chairs are appointed. Section 4 of HLDAA mandates "...arbitration in accordance with this Act" in the event of impasse in negotiations between a hospital and a union. An essential attribute of "arbitration" in that statutory context is the acceptability to both sides of the arbitrator selected, who then becomes vested with statutory authority to determine the rights and obligations of the parties.

13. It is the position of the NAA that the Minister acted in contravention of his statutory obligation, owed to both parties under section 4 of HLDAA, by failing to set in place an "arbitration" within the meaning of the *Act*.

14. As with virtually all labour relations statutes in Canada, the concept of consensuality or the general acceptability of the arbitrators statutorily appointed is at the core of HLDAA. Consensuality may be achieved by more than one mechanism. Mutual acceptability of the arbitrator is achieved where the parties specifically agree on the selection of their arbitrator. Where the parties themselves cannot mutually agree on the selection of a specific arbitrator, an acceptable form of consensuality, referred to as "general" consensuality, is to be attained through the default mechanism of Ministerial appointment as set out in section 6(5) of HLDAA.

15. In keeping with the requirement of consensuality that must necessarily be implied from the overall scheme and intention of HLDAA, the default mechanism of Ministerial appointment must strive to substitute the next best alternative to mutual or specific acceptability. Accordingly, the NAA submits that the Minister's discretion in section 6(5) is limited by the minimal standard of ensuring that the person appointed under section 6(5) as the third person, or arbitrator, meets the necessarily implied criterion of general acceptability or consensuality.

16. With Ministerial appointments under section 6(5), general acceptability is achieved by the appointment of a third person drawn from a well recognized pool of labour relations arbitrators generally acceptable to both unions and employers. It is not achieved if the Minister disregards minimal standards of acceptability to one of the parties, whether he does so inadvertently, or deliberately for partisan political ends. However motivated, an action such as occurred in the case at bar inevitably raises concerns of actual or apprehended bias, both in the appointment process and in the person appointed.

17. The Minister's discretion is not unfettered. It must be exercised fairly, in keeping with the Minister's duty to both parties. To preserve the integrity of the arbitration and Ministerial appointment process established in HLDAA and reflected in more than 60 labour relations statutes in Canada, the concept of general acceptability, inherent in the word "arbitration", constrains the exercise of the discretion of the Minister to appoint the chair of a board of arbitration under section 6(5) of HLDAA.

18. Regardless of whether his government has an interest in the arbitration outcomes, and regardless of whether he acted by ignorance or by design, the consequences of the Minister's policy taint the process of arbitration by bringing the appearance of bias and politicization to arbitration in a way that risks compromising the integrity of all labour arbitration in Canada, undermining the perceived neutrality of all arbitrators, and destabilizing public sector collective bargaining.

PART IV - ARGUMENT

A. IMPORTANCE OF THIS APPEAL

19. Although the instant appeal deals narrowly with the Ministerial power of arbitrator appointment under HLDAA, in fact the iceberg drifting before this Honourable Court is enormous. The NAA has identified more than 60 statutes in Canada, both federal and provincial, of specific and general application, which contemplate the appointment of labour arbitrators (in both interest arbitrations and rights arbitrations) by the exercise of Ministerial discretion or the discretion of an administrative authority. While the instant appeal is narrowly focused on

HLDAA, its consequences extend far beyond a single statute and beyond interest arbitration. Rights (or grievance) arbitrations can also result in awards that impact the significant expenditure of public funds.

20. Beyond traditional labour relations statutes, interest arbitration is now resorted to within the professions, including physicians in their relations with Provinces governed by the *Canada Health Act* R.S.C. 1985, c. C-6. It is also utilized in Ontario as a mechanism to establish the compensation of provincial judges, becoming to that extent an instrument for the protection of judicial independence. The protection of judicial independence cannot be served, or be seen to be served, if the method of arbitrator selection does not ensure transparency and general acceptability. Crown attorneys understandably insist on the same standard to protect their own rights. Counsel for the Ministry of Labour for Ontario in this appeal is herself the beneficiary of an interest arbitration salary award made by a mutually acceptable arbitrator drawn from the Minister's approved list of labour arbitrators in Ontario. HLDAA does not contemplate any lesser standard of arbitrator acceptability for hospital workers.

The Province of New Brunswick and the New Brunswick Medical Society (M.G. Picher) at National Academy of Arbitrator's Book of Authorities ("NB") Tab 10
The Queen in the Right of Ontario and the Ontario Judges' Association (S.M. Beck) at NB Tab 11
The Association of Law Officers of the Crown and the Crown in Right of Ontario (W. Kaplan) at NB Tab 3

21. The contemporary scope of arbitral jurisdiction further underscores the need for curial vigilance to protect the process of arbitrator appointment. Labour relations statutes now confer upon rights arbitrators the power to interpret and apply employment related statutes, including provincial and federal human rights codes. Following the decisions of this Honourable Court in *New Brunswick v. O'Leary* and *Weber v. Ontario Hydro*, arbitrators, including arbitrators who may be appointed by Ministerial discretion, are recognized to have the exclusive jurisdiction to deal with *Charter* rights and common law rights arising expressly or inferentially from the provisions of a collective agreement. In that context, with the jurisdiction of the courts ousted, it is still more important for this Honourable Court to exercise vigilance to protect a principled

system of arbitrator appointment. In the wake of *O'Leary* and *Weber*, the actual and perceived impartiality and acceptability of boards of arbitration has emerged as an element of still greater importance to the integrity of our legal system.

New Brunswick v. O'Leary, [1995] 2 S.C.R. 967 at NB Tab 9
Weber v. Ontario Hydro, [1995] 2 S.C.R. 929 at NB Tab 13

B. COLLECTIVE BARGAINING STATUTES IN CANADA PROMOTE CONSENSUALITY AND LABOUR PEACE

22. In parts of the public sector which provide essential services, such as hospitals under HLDAA, impasse in collective bargaining does not lead to a right to strike or lock out. The right to strike or lock out is suspended in the interest of the public good, and neutral third party interest arbitration is substituted. The general acceptability of an arbitrator appointed to conduct the quasi-judicial function of interest arbitration is therefore an essential element of an imposed public policy by which employers are denied the right to lock out and employees or unions are denied the right to strike.

23. The credibility and integrity of a principled interest arbitration process are factors that promote labour relations peace and enable the parties to accept the mandatory substitution of interest arbitration for the right to strike and lock out. The acceptance of that trade-off by the parties, for whom interest arbitrators make final and binding decisions, is essential to the sound functioning of the Canadian labour relations system. If arbitrators are, or are perceived to be, a surrogate of either party or of government, or appointed to serve the interests of either party or of government, the system loses the trust and confidence of the parties, elements essential to industrial relations peace and stability. Arbitration which is, or is seen to be, political rather than rigorously quasi-judicial is no longer arbitration. A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent.

24. Even if the Minister has no improper motive, in the case at bar the clear failure of the essential standard of general acceptability, a standard well understood by two respected former judges who withdrew from their appointments, has the potential to cause a resulting public

perception of the interest arbitrator as the "handmaiden of the government" of the day. That perception will discourage competent and honourable professional neutrals from becoming or continuing to be arbitrators. Established arbitrators will not serve within a system that is open to charges of corruption and government manipulation. The reputation of all arbitrators will suffer to the extent that such a system is publicly condoned.

McMaster University and McMaster University Faculty Association (Shime)
(Respondent's book of authorities, tab. 20)

25. A government, as an economic stakeholder, may legitimately seek to control wage settlements by legislative enactment and the appointment of wage commissioners, as has occurred under anti-inflation and social contract legislation. However it cannot achieve that same end by failing, either negligently or deliberately, to respect and uphold the arbitrator appointment process under a statute which mandates "arbitration", a concept which by its very definition imports principles of the general acceptability of the arbitrator and equal treatment of the parties.

C. AN ESSENTIAL INGREDIENT OF ARBITRATION – ACCEPTABILITY

26. Black's Law Dictionary 7th ed. defines "arbitration" as follows:

> A method of dispute resolution involving one or more neutral third parties who are [usually] agreed to by the disputing parties and whose decision is binding ...

27. Labour arbitration of both rights and interest disputes has been an essential element of industrial relations stability in Canada for over half a century. At the heart of the success of the labour arbitration system is the acceptance of both employers and trade unions of the arbitration mechanism and, most fundamentally, of the neutral arbitrators who determine their rights. Consensuality and the general acceptability of the arbitrator is at the root of the concept of "arbitration" enshrined in virtually all labour relations statutes in Canada.

28. Two elements which contribute primarily to the acceptability of an arbitrator are, firstly, the expertise of the arbitrator, a concept which underlies statutory privative clauses and curial deference to boards of arbitration, and secondly, the impartiality of the neutral arbitrator.

Reference Re Public Service Employee Relations Act (Alta.)
(per McIntyre J. at p.416) Respondent's book of authorities tab 32

Board of Education for the City of Toronto v. Ontario Secondary Teachers' Federation District 15, [1997] 1 S.C.R. 487 (per Cory J. at paras. 35-37) at NB Tab 4

29. The importance of the arbitrator's acceptability to the parties is well captured in the following passage from the recent book of John T. Dunlop and Arnold M. Zack, *Mediation and Arbitration of Employment Disputes*:

> Arbitration presumes the mutual selection of an individual authorized by the parties to resolve their dispute. It is assumed that the arbitrator is knowledgeable in the subject matter of the dispute and has no prehearing bias in favour of either party to the arbitration.
>
> Arbitrator neutrality is established by more than joint selection by the disputing parties. Neutrality is the independence to decide a case as readily for one side as for the other. In the union-management arena, neutrality is recognized and assumed in the cadre of the several hundred individuals who arbitrate the great majority of the grievances. They are known to the parties from distribution or publication of prior decisions and from their reputation among practitioners for fairness in the conduct of the hearing and in decisions. Their reputations for integrity and independence help them survive in a competitive market where thousands are available for the work. They are expected to follow a Code of Professional Responsibility for Arbitrators of Labour-Management Disputes. The most seasoned and most acceptable have achieved their status by "calling 'em as they see 'em."

Dunlop and Zack *Mediation and Arbitration of Employment Disputes* (San Francisco, 1997 at pp. 102-03) at NB Tab 14

30. The requirement of the knowledgeability of the arbitrator in labour relations matters was insightfully commented upon by NAA member Archibald Cox, speaking to the Academy at its 1959 Annual Meeting:

> The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies and the need for a rule even though the agreement is silent all require a creativeness in contract administration...

Professor Cox's comments, regarding the experience and acquired expertise of labour arbitrators, are particularly appropriate in reference to the highly sensitive role played by an interest arbitrator in fashioning the terms of a collective agreement that will bind hundreds, and sometimes thousands, of employees and their employer. The curial deference displayed by this Honourable Court and others towards arbitrators reflects the long standing recognition that labour

arbitration involves a specialized body of knowledge and experience, and skills that come only from experience.

> Cox, *"Reflections Upon Labour Arbitrations in the Light of the Lincoln Mills Case"*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1959), 24, 37.

31. The concept of acceptability and mutual trust of the arbitrator, expressed in the context of grievance arbitration, was also recognized by the Supreme Court of the United States in the following passage of Douglas J. in the *Steelworkers Trilogy*:

> The labour arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.
>
> *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574 at 582 (1960) at NB Tab 12

D. ACHIEVING CONSENSUALITY IN ARBITRATION

32. Consensuality in the appointment of an arbitrator may be achieved through a number of mechanisms. Mutual acceptability of the arbitrator can be specific and direct, as where the parties simply agree on the person to chair the arbitration of their dispute. Mutual acceptability can also be arrived at indirectly. For example, the parties may each select a nominee to a three person board of arbitration, with the nominees then agreeing on the person who will be the neutral chair. They then achieve a form of agreement "once removed".

33. Mutually acceptable arbitrators can be selected on either a pre-dispute or a post-dispute basis. In pre-dispute selection the parties agree, in advance, on the identity of the person who will arbitrate any dispute which may arise in the future. In post-dispute arbitration, the parties

proceed *ad hoc* to mutually select an arbitrator only once the need for arbitration has arisen because of an actual dispute or impasse.

34. In addition to attaining consensuality through the specific selection, either direct or indirect, of mutually acceptable arbitrators, consensuality may also be attained through a framework of more general acceptability. General acceptability is achieved when an objective mechanism is established for the selection of an acceptable arbitrator, either pre-dispute or post-dispute. For example, parties to a collective agreement may select a list of neutral arbitrators they deem acceptable, name them within their collective agreement and appoint them to cases on a rotating basis. Under that system, in a given dispute a particular party may not draw the arbitrator who would have been their first choice to hear the case, but general acceptability is nevertheless respected.

35. General acceptability, and the objective devices used to achieve it, can be varied and imaginative. The collective agreement which utilizes NAA members and governs interest arbitration for salary disputes between the National Hockey League and the National Hockey League Players' Association is a good example. The collective agreement establishes a pre-dispute panel of arbitrators mutually recognized for their experience and expertise, stipulating that they must be drawn from the membership of the National Academy of Arbitrators. When a club and a player with arbitration eligibility reach impasse in their salary negotiations, the League and the Players' Association provide each of them with the same list of three arbitrators selected rotationally from the roster of agreed arbitrators named in the NHL/NHLPA collective agreement. The club and the player are each required to select one of the three arbitrators put forward. If the club and the player select the same arbitrator, he or she becomes the sole arbitrator of their dispute. If they each choose different arbitrators, the third arbitrator, selected by neither of them, becomes the chair who will resolve their dispute. In either case, whether the arbitrator is the one they mutually selected, or the one from the list of three which neither of them chose, they are on equal ground. In either eventuality, the essential attributes of transparency, fairness and the general acceptability of the arbitrator are met.

36. The concept of general acceptability also encompasses the process at issue in the case at bar by which, in the event of disagreement, a third party, including a Minister, selects an arbitrator from among the ranks of persons recognized as generally acceptable to both parties. It is the importance of that process of Ministerial appointment which has prompted Ontario, as well as other provinces and the federal Labour Program of Human Resources Development Canada, to establish lists or inventories of labour arbitrators for appointment as needs arise. The Minister has destroyed the integrity of this well established process by acting in disregard of the essential criterion of general acceptability for the appointment of interest arbitrators under HLDAA.

E. CONSENSUALITY IS THE GOAL OF HLDAA

37. HLDAA recognizes the importance of consensuality. Consensuality is reflected, for example, in the provisions of section 9.1(1)2 of HLDAA, as in virtually all other labour relations statutes, whereby the parties to an arbitration share equally in the payment of the expenses and remuneration of the chair. The person appointed is "their arbitrator", and they therefore share equally in his or her remuneration. That understanding flows naturally from the expectation that any person named by the Minister will be generally acceptable to both parties. Consensuality is achieved by mandatory arbitration which ensures that the arbitrators selected are either mutually acceptable to the parties or generally acceptable to both unions and employers.

38. If the parties cannot achieve consensuality by specifically agreeing on the chair of their board of arbitration, section 6(5) provides for the appointment by the Minister of a third member, or arbitrator, who is "qualified to act". The exercise of the Minister's discretion in the appointment of an arbitrator must respect the purposes of the *Act* and seek to approximate the consensual outcome of mutual acceptability by substituting general acceptability.

39. General acceptability is achieved by naming as arbitrator under section 6(5) a person who has gained acceptability with both sides in the labour relations community by reason of his or her expertise and impartiality. Persons so recognized need not be on any particular Ministry list of arbitrators, although that may be an appropriate source. The NAA recognizes that generally accepted arbitrators can be identified more broadly and may include retired judges, such as NAA

member retired Chief Justice Alan Gold, retired Justice George Adams, or others, be they from Ontario or elsewhere.

F. THE MINISTER'S POLICY DESTROYS CONSENSUALITY AND VIOLATES HLDAA

40. The unprecedented actions of the Minister resulted in the denial of "arbitration" as mandated under section 4 of HLDAA. His appointments under section 6(5) violate the scheme, intention and requirements of HLDAA. That is so regardless of whether he and his government had an interest in the outcome. That is so regardless of his motive, be it innocent or improper.

41. The policy adopted by the Minister turned the statute on its head. HLDAA contemplates the consensual selection of mutually acceptable arbitrators as the presumptive method of arbitrator appointment, with Ministerial selection as a default mechanism, an exceptional stop gap, in the event that the parties are unable to agree. The Minister's actions destroyed the framework for any possible agreement between parties on the appointment of their arbitrator, thereby defeating the presumptive and preferred method of arbitrator appointment intended by the *Act.*

42. As guardian of the appointment process, a Minister is in a quasi-fiduciary relationship to both parties, and must seek to achieve a result which is as close as possible to their own agreement, in a manner analogous to the application of the "cy-près" doctrine in trusts. Whatever his motives, the policy adopted by the Minister in this matter could not be farther from that goal.

43. Knowledge of the Minister's new policy gave hospitals every reason to avoid consensual appointment. That was achieved by excluding, as a class, all mutually or generally acceptable arbitrators from any possibility of Ministerial appointment. The disregard of even the most rudimentary notion of consensuality in the exercise of the Minister's discretion to appoint arbitrators clearly departed from the meaning of "arbitration" as intended within HLDAA. The Minister's policy runs directly against consensuality, the fundamental purpose of HLDAA and its underlying framework.

44. By striking from consideration all experienced arbitrators acceptable to both trade unions and employers, the Minister's policy effectively destroyed any possibility of mutual agreement by any parties on the selection of their arbitrator. That is plainly reflected in the factual record concerning the arbitrations in which the Canadian Union of Public Employees was involved. Where arbitrator appointments had been made by agreement, following Bill 136 they were all nullified and no further appointments were agreed to. That result is plainly contrary to the fundamental scheme and intent of the *Act*, which views acceptability by agreement as the presumptive operating principle. The Minister's discretion to appoint an arbitrator is exceptional and must be exercised in a manner that promotes agreement and respects the standard of general acceptability where specific acceptability is not possible.

45. To exercise the power and duty to appoint under section 6(5) of HLDAA so as to ignore or destroy the statute's fundamental purpose to promote consensuality is to establish a policy contrary to the scheme and purpose of the *Act.* To disregard the essential standard of general acceptability violates the Minister's duty of equal treatment of the parties and is antithetical to establishing an "arbitration" as contemplated under section 4 of the *Act.*

G. THE MINISTER'S POLICY FURTHERS A TREND IN NORTH AMERICA TOWARD EMPLOYER CONTROL OF ARBITRATION

46. Governments, whether left-leaning or right-leaning, can be expected to wish to influence the labour arbitration process. The Ministerial initiative which is the subject of this appeal is not an isolated event. Even if it was innocently motivated, it is to all appearances consistent with efforts on the part of employers elsewhere in North America to control the arbitration process to their advantage, particularly among non-unionized employees. Such schemes have been struck down by the courts for their violation of the rules of natural justice and for unconscionability.

47. The last decade has seen a dramatic rise in the popularity of Alternative Dispute Resolution (ADR). Within that movement, arbitration has been "discovered" as a sometimes cheaper and more efficient means of dispute resolution, a development which has received the encouragement of the courts, as in the decisions of this Honourable Court in *New Brunswick v. O'Leary* and *Weber v. Ontario Hydro.*

48. In the United States in *Gilmer v. Interstate/Johnson Lane Corp.,* the U.S. Supreme Court held that when individual contracts of employment provide for arbitration as the mechanism to settle disputes between employers and employees, arbitration becomes the exclusive forum for the enforcement of employment related statutory rights, to the exclusion of the federal and state courts. Mandatory pre-dispute arbitration agreements in the non-union employment sector in the United States have given rise to substantial litigation, particularly as sometimes unscrupulous employers have sought to manipulate the arbitration process to their own advantage.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) at NB Tab 7

49. Employer promulgated arbitration schemes such as that in *Gilmer* have been challenged in the courts for a variety of excesses. The list of excesses includes employer control of the appointment of the arbitrator, employer control of the procedural and evidentiary rules of arbitration, employer control of the remedial powers of the arbitrator and employer control foreclosing written reasons for the arbitrator's award. The NAA's concern for the negative impact of such employer dominated arrangements on all arbitration and all arbitrators prompted the intervention of the NAA at the Circuit Court level in litigation involving schemes both subtle (the *Duffield* case) and egregious (*Hooters of America*).

Duffield v. Robertson, Stephens & Company, 144 F.3d 1182 (9th Cir. 1998), certiorari denied Aug. 4, 1998 at NB Tab 5
Hooters of America, Inc. v. Phillips, 39 F. Sup. 2d 582 (D.S.C. 1996, aff'd 173 F 3d 933 (4th Cir. 1999) at NB Tab 8

50. In the wake of *Gilmer* and a heated academic debate concerning the role of arbitration as the exclusive forum for the determination of statutory rights, the NAA participated with other non-governmental as well as governmental organisms to develop and promulgate a document entitled "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" on May 9, 1995.

Due Process Protocol

Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners at NB Tab 15

Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum,* 13 HOFSTRA LAB. L.J. 381383, 397, 406-432 (1996); Walter J. Gershenfeld, *Pre-Employment Dispute Arbitration Agreements: Yes, No, and Maybe,* 14 HOFSTRA L. REV. 245, 251-59, 261-62 (1996); Stephen L. Hayford & Michel J. Evers, *The Interaction Between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practice Claims: Difficult Choices for At-Will Employers,* 73 N.C. L. REV. 443, 489-491 (1995); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer;* 40 ST. LOUIS U.L. J. 77, 95-99 (1996); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's – Access, Adjudication, and Acceptability,* 31 WAKE FOREST L. REV. 231, 285-95 (1996); Comment, Michele M. Buse, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award,* 22 PEPP. L. REV. 1485, 1508-10, 1513-14, 1528-37 (1995).

51. Additionally, at its 50th Annual Meeting on May 21, 1997 the Academy adopted a set of guidelines for Academy members designed, among other things, to ensure respect for the rules of natural justice in any post-*Gilmer* arbitration which involves the disposition of an individual's statutory rights. The dangers inherent in the pro ADR post-*Gilmer* era, and the need for curial vigilance to ensure the integrity of employment arbitration are well chronicled in the recent book of NAA members James L. Stern and Joyce M. Najita, *Labour Arbitration Under Fire.* The scale and urgency of the problem in employment law were stressed in the presidential address of George Nicolau at the 1997 annual general meeting of the Academy:

> Fairness is our business and the absence of fairness, where it occurs, should be our concern. We cannot ignore the fact that ours is a small world and that there are 100 million members of the work force who have no access to arbitration and that many of those who are being given access (or having such access forced upon them) are being subjected to unfair and biased procedures.

NAA Guidelines for the Arbitration of Statutory Rights in Employment Disputes at NB Tab 16

Stern and Najita, *Labour Arbitration Under Fire* (1997 Cornell University Press)

Nicolau, "*Presidential Address: The Challenge and the Prize"* in Arbitration 1997, the Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998) 1, 7

52. In Canada, under a neutral public labour relations statute which establishes arbitration as the mandatory dispute settling process, it can be no more open to a Minister than it is to a private employer to disregard essential standards of consensuality and acceptability in the appointment of arbitrators. That is so regardless of whether the government has an interest, regardless of whether the government is of the left, the center or the right, and it is so whether the government has erred by ignorance or by design.

53. This Honourable Court should also be aware that the mischief of abusive arbitration transcends employment law. Recently, in the wake of the ADR movement, state and federal courts in the United States have also been called upon to review arbitration clauses involving product liability. They have had occasion to find that arbitration clauses which give to a manufacturer or a vendor exclusive control over the appointment of the arbitrator in a consumer dispute are unconscionable and therefore ineffective to oust the jurisdiction of the courts to hear the products liability action.

> *Harold Allen's Mobile Home Factory Outlet, Inc. v. Patrick C. Butler,* [2002] AL-QL 22 (S.C.), online: QL (AL-QL) at NB Tab 6

H. CONCLUSION

54. The NAA's concern regarding the consequences of the Minister's disregard of the essential standards of consensuality and acceptability in the appointment of arbitrators under section 6(5) of HLDAA is shared by the Conférence des Arbitres du Québec and the Ontario Labour-Management Arbitrators Association, which have both provided written endorsements in support of this intervention on behalf of the more than two hundred labour arbitrators they represent.

> Letter of Endorsement from the Conférence des Arbitres du Québec, dated October 24, 2001 at NB Tab 17
> Letter of Endorsement from the Ontario Labour-Management Arbitrators Association dated November 23, 2001 at NB Tab 18

55. The ramifications of this appeal are substantial for the administration of both rights and interest arbitration provisions involving a Ministerial discretion of arbitrator appointment as found in over 60 labour relations statutes in Canada.

56. To allow this appeal risks irrevocably undermining the Canadian labour arbitration system, built over the years by Canadian arbitrators who were and are both members and non-members of the NAA. Prominent among them is the late Chief Justice of this Honourable Court, the Rt. Hon. Bora Laskin, who was a member of the NAA from 1963 and continuing through the years of his service on this Court, until his death in 1984.

57. Consensuality is at the core of the labour relations regime established under labour relations statutes in Canada, including HLDAA. The Minister's power of appointment is quasi-fiduciary, and must be exercised in a manner that respects the rights of both parties to equal treatment under any labour relations law. It must be exercised to foster the presumptive goal of agreement on arbitrators, and not to guarantee disagreement. In the case at bar the Minister destroyed the framework for any consensual appointments, thereby undermining the fundamental scheme and purpose of HLDAA.

58. In the appointment of an arbitrator where specific or mutual acceptability has not been achieved, a Minister cannot innocently ignore the statute's requirement for substituted general acceptability. Nor can he or she deliberately hijack the statute to achieve his or her personal view, or his or her political party's view, of labour relations justice. The Minister must remain true to the purposes of the *Act.* He or she must strive to achieve the general acceptability of the interest arbitration process by seeking to approximate what might have been the parties' own agreement. That can only be done by appointing the chair of a board of interest arbitration under section 6(5) of HLDAA from among a class of persons well recognized as having the expertise and impartiality to be generally acceptable among employers and trade unions as arbitrators of labour relations disputes. To appoint a "third member" or arbitrator under section 6(5) who does not have general acceptability is to fail to exercise duly and properly the Ministerial discretion under section 6(5) of the *Act*.

59. Whether, as the respondent unions allege, the Minister's policy was "calculated to interfere with the outcome of interest arbitration" is irrelevant. Whether his government has an interest in the arbitration outcomes, and whether the Minister is ill motivated are not matters which need concern this Court to dispose of this appeal. This Honourable Court need only find,

as the NAA submits it must, that the inevitable consequence of the Minister's actions is, of itself and without more, a denial of the quasi-judicial process of statutory arbitration mandated by HLDAA. However motivated, his actions undermine the actual and perceived impartiality of all arbitrations and all arbitrators as well as the public perception of the administration of the law itself.

60. In the case at bar, the Minister disregarded the interests of the trade unions by refusing to consider for appointment any arbitrator acceptable to both unions and employers. In so doing he exceeded the constraints on his discretion under section 6(5) of HLDAA, "to appoint as a third member a person who is, in the opinion of the Minister, qualified to act".

61. The Minister's appointment under section 6(5) of HLDAA was fundamentally flawed in that he failed to consider and meet the minimum requirements of consensuality and general acceptability in the appointment process. Accordingly, he did not appoint a person who was "qualified to act" within the meaning of section 6(5) of the *Act.* In the result, in each case the Minister failed to establish an "arbitration" as mandated by section 4 of HLDAA.

PART V - ORDER REQUESTED

62. For these reasons, the National Academy of Arbitrators (Canadian Region) respectfully submits that this appeal should be dismissed.

63. The NAA respectfully requests leave to make a 15 minute oral presentation upon the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 3, 2002

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Michel G. Picher
Counsel for and Member of the National Academy of Arbitrators (Canadian Region)