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Fairness and Managerial Rights in Canadian Arbitral Jurisprudence

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Article abstract

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Fairness and Managerial Rights in Canadian Arbitral Jurisprudence

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This paper examines the duty of fairness as applied to management's rights under collective agreements in common law jurisdictions and concludes from recent arbitral and judicial decisions that it is somewhat of a dead issue, although clarification may be required.

Historically, essentially two principal theories of management's rights were adhered to or espoused by arbitrators and the judiciary in Canada. The traditional theory, entitled the «residual» or «reserved» rights theory, held that residual rights were to be exercised at the sole discretion of management. Residual rights, of course, comprised those rights residing outside the confines of collective agreements and not restricted by or brought into the umbrage of collective agreements. This theory maintains that the traditional, exclusive rights and prerogatives of management existing prior to the advent of collective bargaining continue to do so after the negotiation of the collective agreement, unless abridged by or incorporated into the labour contract.

By contrast, according to the other leading theory, the «bargaining» or «shared» rights theory, residual rights are not necessarily earmarked to be exercised exclusively by management.[1] The extent to which the trade union can influence or fetter the exercise of management's rights, if at all, depends upon the construction placed on the collective agreement as a whole. Various broad principles may influence the arbitrator's interpretation of the

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1 K.P. SWAN, «Union Impact on Management of the Organization: A Legal Perspective,» in Anderson, J. and Gunderson, M. eds., *Union — Management Relations in Canada*, Addison-Wesley Publishers, 1982, at page 271.

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agreement. They include principles like «implied or mutual obligations,» avoiding «subverting the intents and purposes of collective bargaining» and «not impairing the integrity of the bargaining unit.»[2] With respect to the reserved rights theory the later two principles, especially the last one, typically are applied under the rubric of maintaining good faith where the employer is engaging in subcontracting or otherwise allocating bargaining unit work.[3] The current Chief Justice of the Supreme Court of Canada, as a professor and learned arbitrator then, propounded the shared rights theory in *Re Peterboro Lock Mfg. Co. Ltd.*, emphasis added:

> In this Board's view, it is *a very superficial generalization to contend that a collective agreement must be read as limiting an employer's pre-collective bargaining prerogatives only to the extent expressly stipulated.* Such a generalization ignores completely the climate of employer-employee relations under a Collective Agreement. *The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining.* Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist. Just as the period of individual bargaining had its own «common law» worked out empirically over many years, so does a Collective Bargaining regime have a common law to be invoked to give consistency and meaning to the Collective Agreement on which it is based.[4]

Thus, according to this view, the advent of collective bargaining should have heralded in a new era of arbitral jurisprudence concerning the exercise of traditional managerial rights and prerogatives. The *Peterboro Lock Mfg. Co. Ltd.* case certainly created waves among Canadian labour arbitrators. However, it also marked the high water mark in the ascendency of the shared rights theory. By the mid-1960's the arbitral and judicial community, although somewhat loath to unflinchingly and without due reflection apply the residual rights theory, clearly held this view in much higher esteem than the shared rights theory.

During the mid-1970's through the early 1980's ripples appeared on the erstwhile generally smooth waters of Canadian arbitral jurisprudence concerning the exercise of traditional managerial rights and prerogatives. The duty of fairness which contemporaneously was applied by the courts to the decision-making processes of statutorily established administrative bodies,

2 See, for instance, *Int'l. Brotherhood of Pulp, Sulphite, and Paper Mill Workers, Loc. 742* v. *Crown Zellerbach Canada*, (1971) 21 D.L.R. (3d) 347 (B.C.S.C.).

3 D. BROWN, and C. BEATTY, *Canadian Labour Arbitration*, Agincourt, Canadian Law Book Company Limited, 1977, at pages 169, 172, and 180-182.

4 (1953) 4 L.A.C. (Laskin), at page 1502.

such as police commissions and school boards, was applied by some arbitrators to the exercise of managerial discretion under management rights clauses in collective agreements.[5]

It is the use by arbitrators of the duty of fairness as a common law-type of principle that we shall focus on in this paper. In particular, we seek to draw upon recent court decisions to indicate the direction in which Canadian arbitral jurisprudence in this area is headed. It is our position that the most recent court decisions have adopted the appropriate point of departure, namely that a distinction be drawn between those managerial rights that truly reside outside collective agreements and those that reside within them. In our view, the former should be immune from arbitral review, even under the doctrine of fairness; whereas, the latter could be reviewed under the duty of fairness. However, there is no substitute for explicit language either in labour contracts or governing statutes, as to the scope of review.

THE DUTY OF FAIRNESS AND CANADIAN ARBITRAL JURISPRUDENCE: AN OVERVIEW

Professor E.E. Palmer, who was reviewed a number of the cases analyzed below — but not necessarily in the same depth — argues that the tide has ebbed with regards to arbitrators' adherence to or willingness to invoke the general duty of fairness:

> This duty has not been universally accepted. While some arbitrators deal with their reluctance to impose a duty to act fairly upon the employer by deciding that such a duty does not apply to certain determinations, such as competence, others expressly deny the existence of the duty, phrasing their disapproval in words similar to those used by the proponents of the traditional view of management's rights:
>
> > In our opinion, the management's rights clause gives management the exclusive right to determine how it shall exercise the powers conferred upon it by that clause unless those powers are otherwise circumscribed by express provisions of the collective agreement. The power to challenge a decision of management must be found in some provision of the collective agreement.
>
> Thus, in the light of these recent cases, it would seem that the introduction of the duty to act fairly in the exercise of management's rights may amount to only a brief imposition of this doctrine which is already coming to an end, and will be replaced by a return to the prior traditional view of management's rights.

The traditional view is one which placed extreme limitations on unions and often resulted in injustice. As well it was conducive to increasing the specificity (and hence size) of collective agreements to escape such results. As a collective agreement

5 *Supra*, footnote 1, at pages 271-272 and 284-285.

is meant to cover a wide variety of changing events over a long period of time, the deficiencies of the traditional approach are manifest, though no doubt satisfactory to employers in the short run.[6]

The case that Palmer quoted from above is *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association.*[7] Next, we shall review the major cases dealing with the application of the duty of fairness to management's rights to illustrate the expansion of this principle and what we feel is its present decline, as aptly expressed by Palmer above.

The Initial Importation of the Duty of Fairness

First came the Ontario case, *Re International Nickel Co. of Canada Ltd. and United Steelworkers, Lacal 6500,*[8] which concerned the granting of leave to serve a jail term, a matter falling within management's rights. The wording of the management's rights clause, which unfortunately was not reproduced in the case, stated that the Union agrees the «Company has the exclusive right and power to manage the Plants and Mines, to direct the working forces and to hire, promote, transfer, demote or lay off employees, and to suspend, discharge or otherwise discipline employees for just cause.» It also stated the following: «Provided, however, that the Company agrees that any exercise of these rights and powers in conflict with any of the provisions of this Agreement shall be subject to the provisions of the grievance procedure.»[9] Not relying on the latter caveat, the chairman of the arbitration board decided that the employer's discretion must be exercised on a reasonably objective basis. A major reason for this position was that collective agreements are not negotiated «so as to cover every conceivable situation that may arise during the life of the agreement.»[10] One board member disagreed with «the requirement for reasonable administration» and felt that the board lacked jurisdiction to review management's decision.[11]

Nevertheless, it was the chairman's binding decision to review not only the process by which the managerial decision was made but also the correctness of the decision to deny a leave of absence, arguably in the face of an

6 E.E. PALMER, *Collective Agreement Arbitration in Canada*, Butterworths, Second Edition, 1983, at pages 594-596.

7 (1981) 124 D.L.R. (3d) 684 (Ont. C.A.).

8 (1977) 14 L.A.C. (2d) 13 (Shime, Carriere, McNaughton).

9 Collective Agreement between The International Nickel Company of Canada, Limited and United Steel Workers of America (Local 6500), effective 19/07/75 and terminating 10/07/78, Article 4 — Management, as provided by Labour Canada's Collective Bargaining Division.

10 *Supra*, footnote 8, at page 17.

11 *Supra*, footnote 8, at page 22.

unfettered, exclusive management right.[12] In fact, the chairman relied on a previous unreported arbitration case on the same issue involving the same parties with another arbitrator. The earlier decision quoted with favour from an arbitration award written by the chairman in the instant case to the effect that «the employer's interest in having production free from disruption must be balanced against the employees' work record, the nature of the offence and the duration of the jail sentence.» The latter factors derived from case law and not from the express wording of the collective agreement.[13]

Next, a «reasonable employer» test was developed by the Nova Scotia Supreme Court in *Re Nova Scotia Government Employees Association et al. and The Queen in Right of Nova Scotia.*[14] In construing the collective agreement, it imposed a «justness» standard on the exercise of management's rights (at page 42), emphasis added:

An employee may take a grievance if he «feels he has been *treated unjustly* or considers himself aggrieved by any action or lack of action by the Employer» (art. 26.01). *This*, in my opinion, *imports a standard* of «just treatment» for arbitration *similar to the standard of «just and sufficient cause» for dismissal* under art. 24.01, a standard which has had to be applied in hundreds of labour arbitrations. The management rights clauses (arts. 6.01 and 6.03) preserving management's prerogative functions must be read *as protecting their exercise from scrutiny but not «unjust» action.*

The court determined that the agreements in the instant case were sufficiently like those in a previous case it had decided, *Re Canadian Keyes Fibre Co. Ltd. and United Paperworkers Int'l Union, Local 576,*[15] that it should adopt the reasoning it used there. It further stated that the test of what is «just» is an objective test. A subjective standard would be inappropriate because this would

...result in almost complete supervision by arbitration of management's exercise of its responsibility to manage the enterprise as it sees fit, a result the parties could not have intended and one entirely foreign to the adjudicative role of grievance arbitrators.[16]

The objective standard should be «just» and «reasonable» in the following sense (at page 42), emphasis added:

12 The denial of leave of absence while in jail meant that the grievor could be deemed to have quit pursuant to the agreement. *Supra*, footnote 8, at pages 14-16.

13 *Supra*, footnote 8, at pages 16-17. The award quoted from was *Re Alcan Products and U.S.W.*, (1974) 6 L.A.C. (2d) 386 (Shime).

14 (1978) 84 D.L.R. (3d) 29 (N.S.S.C.).

15 (1974) 44 D.L.R. (3d) 305 (N.S.S.C.).

16 *Supra*, footnote 11, at page 42.

...The test of justice relates to much more than mere difference of opinion as to administrative policy or as to the way in which the employer has dealt with a particular problem or person. *Action might be unjust if it contravened basic laws*, e.g., the Human Rights Act, 1969 (N.S.), c. 11, *or if it can be said that no reasonable employer would have acted that way.*

The reasonable employer standard seems to fall somewhat short of a «correctness» test of the employer's action, but it was not clear how short. An arbitrator is not to usurp managerial functions and second given management as to the correctness of its decision.[17] The arbitrator is to determine that no reasonable employer would have acted that way, which might involve the arbitrator in assessing whether or not the incorrectness of the managerial decision rendered that decision unreasonable.

The Hallmark Decision Metro Toronto

The most controversial decision in this area and the hallmark of the duty of fairness is the Ontario Divisional Court case, *Re Municipality of Metropolitan Toronto and Toronto Civic Employees' Union Local No. 43 et al.*[18], herinafter referred to as the «Marsh» case. The grievor in this case took a temporary position but was not informed that he thereby might jeopardize his former position during the interim, which eventually occurred. The management rights clause provided as follows (at page 250), emphasis added:

3.01 Local 43 and employees coming within the 43 Unit recognize and acknowledge that it is the *exclusive function* of the Metropolitan Corporation to:
(a) maintain, order, discipline and efficiency;
(b) hire, discharge, direct, classify, *transfer*, promote, demote and suspend or otherwise displine any employee coming within the 43 Unit provided that a claim for *discriminatory* promotion, demotion or *transfer* or a claim that an employee has been discharged or disciplined without reasonable cause, *may be the subject of a grievance* and dealt with as hereinafter provided; and
(c) generally to manage the operation and undertakings of the Metropolitan Corporation and without restricting the generality of the foregoing to select, install and require the operation of any equipment, plant and machinery which the

17 This was consistent with the reasoning adopted by the Supreme Court of Canada in the celebrated *Port Arthur Shipbuilding* case, whose decision prompted legislative assemblies across Canada as well as Parliament to enact provisions enabling arbitrators to exercise an «equitable jurisdiction» and substitute penalties for disciplinary action, including dismissal. In its decision in [1969] S.C.R. 85, the court stated at page 89 «the board had no power to substitute its own judgment in the circumstances of this case [referring to the substitution of suspension in place of dismissal]... if this kind of review is to be given to a board... it should be given in express terms...»

18 (1978) 79 D.L.R. (3d) 249 (Div. Ct.).

Metropolitan Corporation in its uncontrolled discretion deems necessary for the efficient and economical carrying out of the operations and undertakings of the Metropolitan Corporation.

3.02 The Metropolitan Corporation agrees that it will not exercise any of the functions set out in clause 3.01 in a manner inconsistent with the provisions of this agreement.

Consequently, artile 3.01 expressly provided that a grievance could be lodged if the transfer were alleged to be discriminatory.

Previously, there had been *certiorari* proceedings concerning an arbitration award involving the same management rights article, the same parties, but a different fact situation, namely whether or not an employee was entitled to a vacation on those days that he requested. The court in that case had said the following:

The scheduling of vacation time is thus left within the exclusive discretion of the employer. We cannot find anything in the agreement that justifies the board of arbitration in embarking upon the considerations that obviously led to their decision. We do not read art. 1.02 as opening up to challenge decisions of the municipality on matters that are not referable to some clause of the agreement. It does the reverse. Thus, whether management acted in an arbitrary manner or whether the request would interfere with the efficient operation of the municipality's incinerator to us are factors that are outside the proper purview of the board's consideration, and as such they are outside the jurisdiction of that board. They are irrelevant.[19]

The previous case was distinguished from the Marsh case on the basis of its fact situation, the arbitration board's reliance on art. 1.02 and (at page 251) the fact that a breach of the duty of fairness was not alleged in the previous case.

The court in the Marsh case upheld the decision of the majority of the arbitration board that, (at page 250) «although there was no discrimination practised as between Marsh and the employee who replaced him», the chief supervisor had failed to inform him of the consequences of the temporary transfer, namely the loss of his previous position, which constituted unfairness. In its view (at page 251), the following was determinative, emphasis added:

...In the present case, there is a finding, which we must accept, that the method by which Marsh was transferred was *unfair to him. If there is a duty on the employer to act fairly towards its employees in the administration of the agreement, a breach of that duty is surely referable to art. 3.01 (b).* An unfair transfer is surely a matter for grievance as a «difference relating to the administration of this agreement.»

19 *Re Municipality of Metropolitan Toronto and Toronto Civic Employees Union, Local 43 et al.*, (1976) 62 D.L.R. (3d) 53 (Div. Ct.)

On the basis of this reasoning, it is possible to infer that the court was equating a «discriminatory transfer» with unfair treatment in the administration of the collective agreement, and that, as such, it was arbitrable. A discriminatory or «unfair» transfer was arbitrable because it conformed with the definition of «grievance,» as including differences over agreement administration, and because it could «be the subject of a grievance and dealt with as hereinafter provided,» pursuant to art. 3.01 (b). Alternatively, the court simply substituted «unfair» for «discriminatory» in the management rights clause, even though the two words are not necessarily synonyms and «unfair» originally did not appear there. In any case, the court's reasoning did not stop here.

The court proceeded to discuss (at page 252) one case in which «an immigration official was required to act fairly... in performance of a statutory duty» and another case in which «the same general principles apply to domestic bodies as to statutary bodies.»[20] In applying the duty of administrative fairness, the court, through Weatherston, J. (at page 252), seemed to encompass within the duty of fairness the notion of non-discrimination, namely of not singling out employees:

> ...Any discretion to be exercised by the employer must be exercised in the knowledge that each employee is only one of many; no one of them should be singled out for special treatment. This obviously implies that the agreement should be administered fairly.

In the final analysis, the use of the word «discriminatory» in the management rights clause apparently justified applying the fairness standard to the exercise of managerial discretion.

Later cases supporting the duty to act fairly in exercising management's rights have relied heavily on the Marsh case. It is our view that Marsh was either decided incorrectly, in relying on the apparently convoluted reasoning outlined above, or applied incorrectly in subsequent decisions. In several subsequent decisions, as presented below, Marsh was broadened to import a general duty of fairness applicable to virtually every exercise of managerial discretion under a collective agreement.

With regard to the correctness of the Marsh decision, the transfer of an employee resided within the exclusive function of management, subject to a right to grieve discriminatory transfer. We maintain that once it had been determined that the transfer did not discriminate among employees, as was the case in Marsh, the board lacked jurisdiction to review the transfer deci-

20 *H.K. (An Infant)*, [1967] 2 Q.B. 617 and *Breen* v. *Amalgamated Engineering & Foundry Workers Union et al.*, [1971] 1 All E.R. 1148. The court quoted with approval Lord Denning in the latter at page 1154.

sion because that decision then was an exclusively managerial prerogative. In other words, with the exception of non-discrimination, management's discretion to transfer lay outside the agreement and therefore was inarbitrable.

Our view seems to be in concurrence with the dissent of Steele, J. (at page 255), emphasis added, that the «majority of the court attempted to substitute its own judgment for that of management by purporting to exercise a full appellate function *in the absence of any express or implied authority* in that behalf conferred on the board by the agreement.» Stell, J. also maintained (at page 255), that the

«... effect of the award and supplementary award was to add to, subtract from, alter, modify or amend the agreement and the rights of the parties thereunder, contrary to the express provisions of article 21.05, by the application of methods and principles of construction which the law does not countenance, thus giving the agreement an interpretation which it will not reasonably bear.»

The reasonable construction standard traditionally was applied to *certiorari* proceedings where it was alleged that an error of law had been committed.[21]

On the facts (stated at page 250), it appears that, if our view is proper, the best defence for Mr. Marsh would have been that the transfer was discriminatory because it subsequently singled out employees like himself who suffered from back problems for overly onorous work and that the employer should be estopped from such decisions:

Albert Marsh is employed as a truck driver with the applicant. He has a back problem, but his job in yard 1 involved only light work, which he was able to perform without difficulty. In August of 1975, his chief supervisor offered him the temporary job of chauffeur for the Chairman of Metropolitan Toronto, which promised overtime pay as well as obvious prestige. He accepted the job and, on his return, found that he had been posted to another yard where the work was much heavier. He had not been told that there was a price he would have to pay if he took the temporary job — he would lose his position in yard 1.

Significantly, it can be argued that the Marsh case did not make it clear whether or not the express right to grieve a discriminatory transfer left the door open to a right to grieve all other issues of management's rights. Of course, all subsequent cases attempted to delineate and, in some cases, to restrict the application of the duty of fairness as outlined in Marsh.

21 *Supra*, footnote 3, at page 33. The «reasonable construction» or «clearly wrong» standard of review has been narrowed by the Supreme Court of Canada to a «patently unreasonable» construction standard. (See, for instance, *Re Alberta Union of Provincial Employees* v. *Public Service Employee Relations Board of Alberta and Olds College Board of Governors*, (1982) 37 A.R. 281.).

Subsequent Cases

An arbitration board unanimously held in *Re Mississauga Hydro-Electric Commission and International Brotherhood of Electrical Workers, Local 636*,[22] following Marsh, that, although the transfer of an employee to upgrade skills came within the purview of the management rights clause which gave management an «exclusive right,» the manner of transfer could be reviewed.[23] The board stated (at page 4) that the rationale in the Marsh case «must be read with some care, and perhaps applied narrowly,» but it did not further elaborate. Significantly, it then applied the duty of fairness to the issue at hand. In all due respect, we take exception with this decision because the issue in question was a sole prerogative of management, thereby falling outside the collective agreement. This meant, in our view, that the board lacked jurisdiction.

In *Re Hunter Rose Co. Ltd. and Graphic Arts International Union, Local 288 et al.*, [24] the issue of employee classification was found by the Divisional Court of Ontario to be within the exclusive discretion of management pursuant to management's rights, and thus there was no jurisdiction for the board to hear the matter. On appeal, the Ontario Court of Appeal left the question of jurisdiction undetermined by declaring that it was too late to challenge the board's jurisdiction, since the parties had stipulated that the board possessed jurisdiction to hear the matter.

Hunter Rose Co. Ltd. was followed in *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43*, where the majority of the Board stated (at page 173) that,[25] emphasis added,

> ... the cases indicate that *the scope of review* of an employer's discretion by a board of arbitration *depends both on the wording of the collective agreement and the conduct of the parties*, i.e., whether by their conduct the parties may be taken as having conferred jurisdiction on the board of arbitration.

It was decided in this case that the board lacked jurisdiction, as the issue fell within exclusive management's rights and the employer had objected to the jurisdiction of the board at the first instance. The board stated in its conclusion (at page 173) that, even if it had possessed jurisdiction to review fairness, it would have found that the employer had acted fairly.

22 (1979) 24 L.A.C. (2d) 1 (Rayner, Heslinga, Stacey).

23 A similar conclusion was reached in *Re Young and The Crown in Right of Ontario (Ministry of Community and Social Services)*, (1979) 24 L.A.C. (2d) 145, where the matter at hand was subject to the unfettered discretion of management.

24 (1980) 99 D.L.R. (3d) 566 (Ont. C.A.).

25 (1979) 23 L.A.C. (2d) 165 (Picher, Tate, Perron).

At least two other cases dealt with the doctrine of fairness as applied to singling out employees for special treatment. In one case, the arbitrator expressed the view that the doctrine of fairness is restricted to situations where individual employees are singled out for differential treatment.[26] In the other case, the arbitrator stated that «... in the absence of specific language in the agreement, an arbitrator has no general jurisdiction to substitute his decision for that of the employer.[27] However, the arbitrator went on to say (at page 256) that, even though the agreement gives the employer an express discretion, the employer's decision

> ... must be honest, and unbiased, and not actuated by any malice or ill will directed at a particular employee; and must be one which a reasonable employer could have reached in the circumstances... The decision cannot be entirely arbitrary or irrational. Within these parameters, however, an employer is entitled to do as it sees fit.

This clearly represents one of the broadest interpretations and applications of the duty of fairness. In our opinion, the collective agreement in this case supported such a position on the instant issue because it contained a clause conferring managerial discretion which *explicitly* stated (at page 253) that the employer «... *may* pay moving expenses...» (emphasis added).

Thus, managerial discretion concerning moving expenses was expressly encompassed within the collective agreement and not solely reserved for the employer, thereby conferring jurisdiction on the arbitrator to apply a «fairness» standard, if deemed appropriate. To reiterate, it is our position that a finding to the contrary should be based on language expressly reserving this function exclusively for management.

The opposite line of reasoning to our position was found in *Re Milton District Hospital and Ontario Nurses Association*.[28] The management rights clause in that case gave an unfettered direction to management for the matter in issue, the imposition of non-disciplinary suspension. The employer argued that the absence from the collective agreement of a qualification on

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26 *Re Hiram Walker & Sons Ltd. and Canadian Union of Operating Engineers and General Workers, Local 100*, (1979) 24 L.A.C. (2d) 186 (Brent) Also see *Re York University and York University Faculty Association*, (1980) 26 L.A.C. (2d) 17 (Beatly, Goudge, Hassell), which supports the notion that the duty of fairness comprises an objective standard requiring a lack of discrimination and arbitrariness, as well as equal treatment among employees and that all relevant factors be considered in managerial decision making concerning managment's prerogatives. Concerning the singling out of employees, also see *Re Metropolitan Toronto Board of Commissioners of Police*, (1980) 26 L.A.C. (2d) 117 (Saltman).

27 *Re Provincial Schools Authority and Federation of Provincial Schools Authority Teachers*, (1980) 25 L.A.C. (2d) 248 (MacDowell) at page 258, referring to *Re Port Arthur Shipbuilding Co.* v. *Arthur's et al.*, (1968) 70 D.L.R. (2d) 693, [1969] S.C.R. 85, 68 C.L.L.C. 586 (S.C.C.).

28 (1980) 26 L.A.C. 201 (Brandt, Richards, Dixon).

its right to suspend precluded the board from reviewing its decision. By contrast, the majority of the board distinguished on their facts (at pages 208-209) the instant case from those limiting the jurisdiction of a board to review decisions rendered under a management rights clause and applied a standard of reasonableness and fairness to the process of the decision making.

With respect to the management rights clause in *Milton District Hospital*, the board stated the following (at page 209), referring to the qualification in the agreement on management's rights that they not be exercised in a manner» ... inconsistent with the provisions of this agreement...»:

... To our knowledge it had never been held that this qualification precludes arbitrators from having recourse to standards established in arbitral jurisprudence for the purposes of determining whether or not be the rights conferred have been properly exercised.

We would characterize this approach by which arbitration boards have seized jurisdiction in the face of explicit contrary contractual language as the «bootstraps approach.» In our view, it is not the qualification referred to above which «precludes» jurisdiction. Rather, it is the granting of exclusive authority to exercise managerial discretion in any area that eliminates review jurisdiction.

RECENT CASES RESTRICTING THE APPLICABILITY OF THE DUTY OF FAIRNESS STANDARD TO MANAGEMENT'S RIGHTS

One of the most recent court decisions, *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Police Association et al.*,[29] very clearly and congently spelled out the case for restricting the applicability of the duty of fairness standard to management's rights. There, the issue of the denial of overtime during annual inventory was a part of the exclusive function of management within the management rights clause. The Ontario Court of Appeal stated the following (at page 687):

... In our opinion, the management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause, unless those powers are otherwise circumscribed by express provisions of the collective agreement. The power to challenge a decision of management must be found in some provision of the collective agreement.

It further stated (at page 687):

29 (1981) 124 D.L.R. (3d) 684 (Ont. C.A.).

... we see no necessity in this case to imply a term that the management rights clause will be applied fairly and without discrimination. If such a term were to be implied, it would mean that every decision of management made under the exclusive authority of the management rights clause would be liable to challenge on the ground that it was exercised unfairly or discriminatively. In our opinion, this would be contrary to the spirit and intent of the collective agreement.

The court concluded that the arbitrator had no jurisdiction to deal with the dispute, a position with which we obviously agree.

In another recent case, *Re Falconbridge Nickel Mines Ltd. and Brunner et al.*,[30] the arbitration board decided on the grounds of unfairness to reinstate an employee who had been demoted, although the management rights clause gave exclusive discretion to the employer in this regard. The Ontario Court of Appeal heard the appeal from the Divisional Court shortly after the Ontario Court of Appeal had rendered its *Metropolitan Toronto Board of Commissioners of Police* decision, cited above. In *Falconbridge Nickel Mines Ltd.*, the Court of Appeal refused to overrule the previous judgment in *Metropolitan Toronto Board of Commissioners of Police.* It upheld the arbitration award on the basis that the parties had given jurisdiction to the arbitration board in the first instance, just as had occurred previously in *Hunter Rose Co., Ltd.*[31]

CONCLUSION

In order to ensure fairness and uniformity of treatment in arbitration cases and to avoid decisions where the final outcome seems at variance with contractual provisions, it is necessary to clarify the law concerning the duty of fairness and the exercise of managerial rights and prerogatives under a management rights clause. It is our position that the decision to follow is that of *Metropolitan Toronto Board of Commissioners of Police.*[32] The duty of fairness may operate within the parameters of the collective agreement, but where the management rights clause clearly confirms or confers on management an exclusive or unfettered right to determine certain matters, an arbitration board is without jurisdiction to review either the correctness of the decision or the process by which it was reached.

Management is neither a statutory board nor a domestic tribunal. Moreover, it is clear that an arbitration board's jurisdiction flows, first and foremost, from the terms of the collective agreement.[33] The one major ex-

30 (1982) 129 D.L.R. (3d) 561 (Ont. C.A.).

31 (1980) 99 D.L.R. (3d) 566 (Ont. C.A.).

32 (1981) 124 D.L.R. (3d) 684 (Ont. C.A.).

33 See *supra* footnote 3, at pages 44-48 and the cases cited therein.

ception to this takes place in British Columbia, which is distinguished by three key factors. Firstly, Section 27 of the British Columbia Labour Code explicitly states that the «furthering (of) harmonious relations between employers and employees» is a purpose of the Code. Secondly, the review of arbitral awards generally resides with the British Columbia Labour Relations Board. Thirdly, the Code «... also expressly directs arbitrators to have 'regard to the real substance of the matters in dispute' between the parties, and also provides arbitrators with expanded remedial powers to carry out this function.»[34] Our view is at odds with the popular view in British Columbia that «... the fairness doctrine can be a valuable and important tool in the arbitral context as well as in the area of administrative law,»[35] even if exclusive discretion is given to management under a management rights clause or even if no express contract language supports the importation of this concept from administrative law into the arbitral arena.

We maintain that, if the parties wish to introduce a duty of fairness with respect to management's exclusive discretion under a management rights provision, then such a duty should be expressly provided for in the collective agreement or governing legislation. Finally, parties wishing to dispute a matter within exclusive management rights must proceed to the proper forum, the courts, and not before an arbitration board.

34 P.A. GALL; «The Duty of Fairness,» in M.A. Hickling, ed., *Labour Arbitration 1981*, Vancouver, Continuing Legal Education, 1981, at page 10. Gall also pointed out on this page that the «... [Labour Relations] Board has repeatedly stressed that the Code is designed to free arbitrators from the common law restraints that bind arbitrators in other jurisdictions and that arbitrators in this Province are to fashion an approach to their task that recognizes the long term and generally unique nature of the relationships involved.»

Recent decisions in British Columbia have upheld the applicability of the duty of fairness to managerial discretion both in a procedural and a substantive sense. (Sell GALL, «The Duty of Fairness» at pages 14 and 16 regarding respectively, *Re MacLean and Powell Iron Works Ltd.*, then unreported, and *Re St. Paul's Hospital and the R.N.A.B.C.*, (1980) 28 L.A.C. (2d) 51 (Vickers, Leibik, Waldron).

35 *Supra* footnote 31, Gall, «The Duty of Fairness», at page 19.

L'équité et les droits de la direction dans la jurisprudence arbitrale

Cet article étudie le devoir d'équité lorsqu'il est appliqué aux clauses des droits de la direction des conventions collectives devant les cours civiles pour conclure, à partir de décisions arbitrales et judiciaires récentes, qu'il s'agit jusqu'à un certain point d'une affaire classée, même si elle peut exiger encore quelques clarifications. Le devoir d'équité, qui a été transposé du droit administratif dans la jurisprudence arbitrale, représentait une deuxième attaque contre la théorie des droits traditionnels ou résiduaires concernant l'exercice de la discrétion patronale. La pensée traditionnelle soutient que les arbitres ne peuvent pas réformer des décisions de l'employeur, à moins que cela ne soit prévu dans les conventions collectives. La première et plus importante attaque contre la théorie traditionelle s'incarna dans la théorie des «droits partagés», qui prit de l'ampleur vers le milieu des années 1950, mais déclina au cours de la décennie et demie suivante. Le deuxième défi se présenta quand le devoir d'équité s'est transposé dans la jurisprudence arbitrale vers la fin des années 1970.

L'article décrit la jurisprudence entourant cet emprunt du droit administratif ainsi que son abandon subséquent de plus en plus généralisé par beaucoup d'arbitres et de tribunaux. Après avoir analysé et critiqué ces décisions, l'auteur soutient qu'il devrait y avoir équité et uniformité de traitement dans les arbitrages et que la décision à suivre est celle de *Metropolitan Toronto Board of Commissioners of Police*, (1981) 124 D.L.R. (3d) 684. Ainsi, le devoir d'équité peut prendre place à l'intérieur des paramètres de la convention collective, mais là où la clause des droits de la direction confirme clairement ou confère à la direction le droit exclusif et sans entrave de décider certaines questions, un tribunal d'arbitrage est sans compétence pour réviser soit la justesse de la décision, soit le processus par lequel on y est arrivé.

Des textes explicites à l'effet contraire sont une condition préalable extrêmement importante pour qu'il y ait matière à réformation et les principes du droit administratif sont inappropriés. Au contraire, il faut suivre les règles de l'interprétation des contrats. De fait, la seule exception possible, soit en Colombie britannique, où quelques arbitres ont eu recours aux dispositions statutaires pour élargir leurs pouvoirs de réparation en cette matière, est rejetée par l'auteur. Enfin, si les parties désirent débattre une affaire dans les limites des droits exclusifs de la direction, ils doivent procéder devant le bon forum, c'est-à-dire les tribunaux et non devant un conseil d'arbitrage.