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Résumé de l'article

Au cours des dernières années, les conflits entre les arbitres du travail et les tribunaux se sont accentués en Ontario. Il en est résulté un nombre croissant d'arrêtés judiciaires cassant les sentences arbitrales. Bien que ce phénomène soit relativement récent, les fondements juridiques sont beaucoup plus anciens. Dans cet article, nous en analysons les facteurs et nous étudions les décisions récentes afin de mettre en lumière les tendances de la pensée juridique en Ontario.

L'arbitrage des griefs a été institué en Ontario pendant la deuxième guerre mondiale, en particulier lorsque la législation fédérale extraordinaire était en vigueur. Après la guerre, la Loi sur les relations professionnelles (OLRA) a rendu le recours à l'arbitrage obligatoire pour régler les griefs restés sans solution. Ce fait a encouagé les tribunaux à contrôler les arbitrages de près, et a contribué, entre autres, à asseoir l'autorité des tribunaux de se prononcer sur les arbitrages.

Bien que la OLRA déclare les sentences arbitrales être des jugements définitifs, la loi reconnaît des moyens de recours pour renverser les sentences arbitrales par les tribunaux. Généralement, un tel renversement s'appuie sur le manque de juridiction de l'arbitre.

C'est en 1956 que les tribunaux d'Ontario ont, pour la première fois, affirmé leur pouvoir de réviser les sentences dans le cas de *International Nickel Company and Rivando*. La Cour d'appel a décidé qu'en raison de la nature obligatoire de l'arbitrage pour régler les griefs, elle n'avait d'autre solution que d'exercer une surveillance du processus. En déclarant être investie de pouvoir judiciaire, la Cour s'est basée sur des cas tirés de l'arbitrage commercial britannique. Cette institution est liée plus étroitement au droit que l'arbitrage des griefs ne l'est généralement en Amérique du Nord, et elle s'appuie sur l'interprétation littérale des termes du contrat.

Depuis le cas *Rivando*, les tribunaux se sont montrés réticents dans l'exercice de leur autorité. Dans quelques cas, des sentences ont été maintenues quand l'interprétation du contrat par l'arbitre a été jugée raisonnable. Par la suite, les cas ont été divisés en deux catégories : 1) les sentences arbitrales contenant des questions spécifiques de droit, par exemple l'interprétation de clause d'une convention, 2) celles concernant les questions matérielles de droit, par exemple lorsque l'arbitre décidait des questions de fait et de droit Selon les principes de droit commun exprimés dans un cas britannique, *Absalom v. Great Western (London) Garden Village Society*, seules les sentences arbitrales de la deuxième catégorie ont été considérées par les tribunaux. Au début, l'application de la décision d'Absalom a limité l'exercice du pouvoir judiciaire, mais la distinction n'a pu être appliquée à l'arbitrage canadien, processus bien différent de l'arbitrage commercial britannique dont celui-ci tire pourtant son origine. Du reste, la revendication même des droits des tribunaux dans le cas *Rivando* mit en question la convenance de considérer certains cas hors du domaine juridique.

Les deux facteurs : le droit commercial britannique et l'arbitrage obligatoire, se sont trouvés réunis dans le cas Regina v. Barber, qui a mis fin à l'application de la décision d'*Absalom*. La Cour d'appel n'a pas fixé clairement les critères qu'elle désirait adopter pour juger les sentences d'arbitrage, mais elle semblait accorder un large pouvoir de se prononcer sur l'arbitrage uniquement dans les cas où les sentences ne répondent pas aux questions soumises aux arbitres ou celles où l'interprétation du contrat semble être trop libre. Le cas Barber apporta un autre changement dans l'arbitrage d'Ontario : la formation de tribunaux d'arbitrage. Auparavant, la majorité des arbitres neutres étaient des juges des tribunaux de comté, mais en 1967 le Parlement a restreint les activités extra-judiciaires de ces juristes. Ce phénomène devait encourager la professionnalisation de l'arbitrage mais également accentuer les conflits entre les arbitres et les tribunaux.

En raison de la tendance des tribunaux à intervenir dans l'arbitrage des griefs, un examen des récentes décisions pourrait indiquer les lignes de la pensée juridique. Il y a quatre domaines dans lesquels les arbitres et les tribunaux n'ont pu parvenir à définir leur juridiction respective.

Les questions concernant les preuves d'intention ont peut-être été les plus difficiles. Les tribunaux admettent de considérer les preuves extrinsèques telles que les usages et coutumes indigènes seulement lorsque les termes du contrat ne sont pas clairs. Le cas *Barber* a accentué la nécessité de s'appuyer sur les textes mêmes des conventions plutôt que sur les preuves extrinsèques. Il en est résulté une réticence des tribunaux à accepter les conclusions des arbitres lorsque celles-ci sont tirées des termes ambigus de la convention et ainsi ils ont cassé une série de sentences arbitrales reposant sur « des preuves extrinsèques ».

Des infractions dans les formalités requises pour les clauses de grief et d'arbitrage ont été une deuxième source de difficultés. Avec l'accord de la Cour suprême du Canada, les tribunaux d'Ontario ont restreint les pouvoirs des arbitres dans les limites de la stricte interprétation littérale de ces clauses même si l'intérêt du plaignant a été compromis sans qu'il y ait faute de sa part.

Des clauses de contrat prévoyant le congédiement seulement pour « cause justifiée » qui sont courantes dans les conventions collectives en Amérique du Nord, ont été fréquemment l'occasion de désaccords entre les tribunaux et les arbitres. Les arbitres se trouvent souvent en accord avec l'employeur sur le fait que le travailleur a violé son contrat, mais ils ordonnent une réduction des sanctions prises surtout là où le renvoi d'un employé a été ordonné. Malgré le principe déclaré par la Cour suprême dans le cas de *Polymer* à savoir que les arbitres ont le pouvoir de régler ou d'ajuster les sanctions, ce tribunal a refusé aux arbitres d'Ontario le droit d'atténuer les sanctions disciplinaires si le contrat ne le prévoie pas spécifiquement.

Les tribunaux d'Ontario ont pris soin de protéger les droits des plaignants individuels en cas d'infractions au principe fondamental de justice naturelle. La Cour suprême du Canada a déclaré que tous les membres ayant un intérêt en cause, y compris ceux qui n'ont pas été signataires, devraient avoir la possibilité d'accéder à la procédure d'arbitrage.

Cet examen du développement du droit montre que l'élément d'obligation qu'on trouve dans l'OLRA a conduit les tribunaux à intervenir en matière d'arbitrage ; en plus, leur utilisation du droit britannique leur a donné la possibilité d'intervenir plus largement dans le processus d'arbitrage. Ceci met en lumière la difficulté d'appliquer au Canada une institution étrangère qui est aussi complexe et subtile que celle de l'arbitrage.

À cause des racines américaines du droit de l'Ontario, quelques arbitres auraient accordé une trop grande influence aux pratiques suivies aux États-Unis. Pour encourager le caractère professionnel de l'arbitrage au Canada, les signataires devraient préciser dans les conventions collectives les pouvoirs des arbitres.

DROIT DU TRAVAIL

JUDICIAL REVIEW OF LABOUR ARBITRATION IN ONTARIO

Mark Thompson

Courts in Ontario have been increasingly willing to quash grievance arbitration awards. This article analyses the services of this conflict between the judiciary and arbitrators, the role the courts have assumed because of the compulsory use of arbitration, and the judges' reliance on precedent established British commercial arbitration. Most Ontario cases have involved one of four issues — evidence of intent, procedural violations of grievance clauses, disciplinary penalties, and denial of natural justice. In the first three areas especially, the courts have favoured narrow interpretations of collective agreements, limiting arbitrators' jurisdiction. This problem illustrates the difficulty in attempting to legislate a complex institution like grievance arbitration based on foreign experience, i.e. the United States.

For almost thirty years, grievance arbitration has been an increasingly important feature of industrial relations in Ontario. Recently, however, the legal status of arbitration awards has become less certain than ever before. In a number of cases, Ontario courts (with support from the Supreme Court of Canada) have overturned arbitrators' decisions, established broader grounds for challenging them, and thus encouraged new suits to quash awards. After one Supreme Court of Canada decision in late 1968, a group of prominent arbitrators protested to the Provincial Minister of Labour that the judiciary's action had made arbitration more rigid than court proceedings, and vainly sought this support for changes in the law to eliminate some court-imposed restrictions on arbitration [1].

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Both the apparent involvement of the courts in arbitration and the evident opposition of many arbitrators to this development may force

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1 *The Globe and Mail* (Toronto), January 10, 1969.

labour, management, and arbitrators themselves to re-examine the legal bases of grievance arbitration. In such an analysis, it is necessary to ask first, which elements of Ontario labour relations law have led the courts to overturn awards. Secondly, if the courts retain their present position on arbitration, and the provincial government opposes statutory amendment, an examination of areas of conflict between arbitrators and the courts may indicate coming trends in judicial action. This paper will trace the development of judicial review of grievance arbitration in Ontario in an effort to deal with each of these questions. It will then discuss briefly the possible relationship between the interpretation of Ontario labour law and broader aspects of Canadian industrial relations.

CONTEXT OF ARBITRATION

Grievance arbitration was first used extensively in Ontario after the enactment of special legislation during World War II. In 1939, many enterprises in the province were not unionized or had been organized only a short time. A few industries, including garment manufacturing, railroads, and coal mining, had their own arbitration systems, but available evidence indicates these were exceptional cases [2]. Provincial labour laws, though comprehensive, had little effect on the parties prior to the implementation of emergency federal legislation during the war. The most important federal act, Privy Council Order (PC) 1003, governed all labour-management relations in the latter years of the war. Incorporating many features of the United States National Labor Relations Act, it also compelled resort to private arbitration as the last step of all grievance procedures and banned any work stoppages during the life of an agreement between labour and management. When the parties were unable to agree on their own procedures, the federal government provided facilities for grievance arbitration [3]. One effect of PC 1003 and other wartime legislation was the introduction of grievance arbitration into many enterprises in Ontario.

With the end of the war and the expiration of federal powers, the provincial government continued to favour arbitration. The *Ontario Labour Relations Act* (OLRA) [4], passed in 1948, retained many provisions of PC 1003, including sections to compel grievance arbitration and forbidding strikes during the life of an agreement. This provision has not been changed substantially, and it now imposes the following terms :

> Every collective agreement shall provide for the final and binding settlement by arbitration without stoppage of work, of all differences

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[2] C. H. CURTIS, *The Development and Enforcement of the Collective Bargaining Agreement,* Kingston : Industrial Relations Centre, Queen's University, 1966, pp. 49-50 ; H. D. WOODS, ed., *Patterns of Industrial Dispute Settlement in Five Canadian Industries,* Montreal : The Industrial Relations Centre, McGill University, 1958, pp. 48, 99.

[3] A. W. R. CARROTHERS, *Collective Bargaining Law in Canada,* Toronto : Butterworth's, 1965, pp. 53-55.

[4] *Revised Statutes of Ontario* (R.S.O.) 1960, c. 202.

> between the parties arising from the interpretation, application, administration, or alleged violation of the agreement, including any question as to whether a matter is arbitrable [5].

Should the parties fail to include a clause meeting the requirements of this section in a collective agreement, the law stipulates a clause which will apply, providing for a tripartite arbitration board. In all cases, if the parties' nominees to a board are unable to agree upon a third member, the Minister of Labour is empowered to name the chairman [6].

Support for the arbitral process and a concomitant desire to exclude the courts from arbitration are reflected in several provisions of the OLRA. Section 34(7), just cited, apparently gives arbitrators full authority to decide questions of arbitrability, thus eliminating a potential source of litigation. Elsewhere the law makes all awards binding on the parties and gives board chairmen broad powers to gather evidence and administer oaths [7]. The OLRA specifically excludes labour disputes from legislation governing commercial arbitration [8], which establishes grounds for judicial appeals of awards. Another statute protects unions and collective agreements from all civil suits except those provided for by the OLRA [9].

In many respects, grievance arbitration appears to be a creature of the law. Although labour and management might well have adopted the institution without any compulsion, the initial stimulus of PC 1003, and the requirement of the OLRA appears to have caused the courts to examine arbitration closely, despite legislative efforts to limit the role of the judiciary [10].

GROUNDS FOR JUDICIAL REVIEW

Although the OLRA declares arbitration awards to be « final and binding », this provision has not precluded review by the courts. A successful challenge to an award occurs when the High Court of Justice (a trial court) grants *certiorari* and quashes it. In general, the plaintiff may claim one of three grounds as the basis for *certiorari* : a defect in the jurisdiction of the tribunal, an error in law on the face of the award, or a lack of natural justice in the proceedings [11]. Traditionally, the courts have held that an arbitrator's error does not always nullify an award.

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5 *R.S.O.*, 1960, c. 202, s. 34 (1).

6 *R.S.O.*, 1960, c. 202, ss. 34 (2), 34 (4).

7 *R.S.O.*, 1960, c. 202, s. 34 (7).

8 *R.S.O.*, 1960, c. 202, s. 34 (10).

9 *The Rights of Labour Act*, R.S.O., 1960, c. 354, ss. 3 (2), 3 (4).

10 For analysis of the role of the law in establishing grievance arbitration, H. D. WOODS, « Public Policy and Grievance Arbitration in Canada », in *Developments in American and Foreign Arbitration*, ed. by Charles M. Rehmus, Washington : BNA, 1968, pp. 19-36.

11 A. W. R. CARROTHERS, *Labour Arbitration in Canada*, Toronto : Butterworths, 1961, p. 149 ; D. C. M. YARDLEY, « The Grounds for *Certiorari* and Prohibition », *The Canadian Bar Review*, Vol. 37, No. 2, May 1959, pp. 298-329.

But if an arbitrator exceeds his jurisdiction by deciding a question not put to him by the parties, or orders a remedy not in his power to grant, he has gone beyond the authority given him, and his award is invalid. Thus most successful suits to quash arbitration awards in Ontario have alleged that an arbitration board has exceeded its jurisdiction [12]. Lack of natural justice may invalidate any proceeding, but is relatively rare in labour arbitration cases [13].

In 1956 the Ontario courts first asserted their right to review arbitration awards, in *Re International Nickel Company and Rivando* [14], a decision that also introduced the elements of the law that were to lead to the growth in the judiciary's role in arbitration. The case arose from the dismissal of a worker for unauthorized absence after management had refused him unpaid leave to serve a jail sentence. Seeking to quash an arbitration award that ordered reinstatement, the company took its case to Ontario's highest tribunal, the Court of Appeal. The court ruled that it had jurisdiction to issue a writ of *certiorari,* relying on the legal requirement of the parties to use arbitration and the power of the courts to supervise « statutory tribunals ».

The *Rivando* decision emphasized that the OLRA imposed on labour and management the legal obligation to bargain and to « make every reasonable effort to make a collective agreement » [15]. As disputes arising from the interpretation of a contract are subject to final settlement only by arbitration, the court concluded that the parties had no alternative to arbitration of grievances, i.e. neither true collective bargaining with the right to strike, nor litigation. Because of this compulsion, the court ruled that it was obligated to supervise arbitration boards [16].

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12 A. W. R. CARROTHERS, *Labour Arbitration in Canada, op. cit.,* pp. 164-165.

13 See below, pp. 470-471.

14 [1956] O.R. 379, 1 D.L.R., 2d 775.

15 *R.S.O.,* 1960, c. 202, s. 12.

16 The importance of the element of compulsion in the law to the *Rivando* decision is emphasized by references to the case in other jurisdictions. In Regina v. Arthurs et al., ex parte Port Arthur Shipbuilding Company, [1969] S.C.R. 85, (1968) 70 D.L.R. 2d 693, the Supreme Court of Canada accepted the principles of *Rivando* and distinguished Ontario cases from similar suits arising under other statutes. The *Industrial Relations and Disputes Investigations Act* and several provincial laws provide for the settlement of grievances without strikes by « arbitration *or otherwise* » (emphasis added), and the courts have interpreted these provisions to mean that arbitration therefore is not mandatory. Where the use of arbitration is not required, the courts generally have held that they lack jurisdiction to quash awards. Cf, *Polymer Corp.* v. *Oil, Chemical and Atomic Workers' International Union,* [1962] S.C.R. 338, 33 D.L.R. 2d 124 (*sub nom. Imbleau* v. *Laskin*) ; *Howe Sound Co.* v. *Mine Workers' Union,* [1962] S.C.R. 318, 33 D.L.R. 2d 18 ; *Re Atlantic Sugar Rafineries Ltd.* v. *Bakery and Confectionery Workers' International Union,* (1961) 45 *Mar. Prov.* 115, 27 D.L.R. 2d 310, (N.B.S.C.) ; Re *Ewaschuk Western Plywood Ltd.* v. *International Woodworkers of America,* (1964) 47 W.W.R. 426, 44 D.L.R. 2d 700, (Alta, S.C.).

When asserting its authority, the Court relied on cases drawn from British arbitration, and particularly the law governing « statutory tribunals », bodies other than courts to whom Parliament has given the power of imposing obligations. These tribunals generally are administrative boards established to decide disputes between private citizens and public agencies over such matters as the value of property expropriated by the government, and the Court drew an analogy with the compulsory use of private arbitration in the OLRA. According to the Court of Appeal, strong precedent exists in British law for judicial supervision of statutory tribunals, thus adding a second rationale for reviewing arbitration awards [17].

Here it should be emphasized that the Court's declaration of its authority to supervise arbitration did not necessarily mean that it would intervene extensively in the process. For instance, the Court could have exercised its authority by supporting the judgment of arbitrators, on the grounds that the parties in a dispute who had chosen a particular arbitration board should be required to accept its decision. In fact, the Ontario judiciary did not adopt such a policy of limited supervision, due in large measure to the precedents used in *Rivando* and subsequent cases. Use of British commercial law proved to be a major factor in the eventual expansion in the scope of judicial review.

References to British cases in *Rivando* were not, of course, unusual in Canadian jurisprudence, but the nature of these precedents was to be important in the subsequent expansion of judicial review of arbitration. Lacking a substantial body of Canadian case law on labour arbitration, the Court looked to British precedent. Since grievance arbitration scarcely exists in Great Britain [18], however, the British decisions governed commercial arbitration, regulated by a special statute [19] comparable to the Ontario *Arbitrations Act,* from which the OLRA excludes labour arbitration. The present British law, based on common law principles, is a consolidation of earlier enactments, principally between 1889 and 1934, which gave rise to the cases used to interpret the OLRA. Clearly, the Court of Appeal saw problems in using British law in Canada and applying

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17 Although the Court's logic on this point is evident, British opinion appears less certain on the role of the courts in statutory arbitration. The most authoritative commentary on British arbitration states :

> It is of the essence of statutory arbitration of the normal sort, that the statute concerned makes a particular arbitral tribunal the only tribunal having jurisdiction over a particular class of dispute. It follows in particular, that the provision of the [Arbitration] Act which gives the court power to refuse a stay of concurrent legal proceedings, and in certain sorts of arbitration also those giving power to allow revocation of the arbitrator's authority and power to remove an arbitrator, will in general be found inapplicable to statutory arbitration.

T.A. Blanco WHITE and Anthony WALTON, *Russell on the Law of Arbitration,* 16th edition ; London : Stevens and Sons, 1957, pp. 90-91.

18 For example, MORRISON and Majorie HANDSAKER, « Arbitration in Great Britain », *Industrial Relations,* Vol. 1, No. 1, October 1961, pp. 117-136 ; Owen FAIRWEATHER, « A Comparison of British and American Grievance Handling », in *Developments in American and Foreign Arbitration, op. cit.,* pp. 1-18.

19 *The Arbitration Act,* 1950, 14 Geo. 6, c. 27.

precedents set under a dissimilar statute. But neither *Rivando* nor any succeeding Ontario decision examined the characteristics of British commercial arbitration that might distinguish it from labour arbitration in Ontario and the possible impact of these differences on the law of labour relations. A brief discussion of British practice may clarify later developments in the Ontario law.

The feature of British arbitration that became most significant for Ontario cases is the extensive influence of the law in private proceedings. In general, British commercial arbitrators emulate judicial decisions as much as possible [20]. The same rules of evidence bind private arbitrators and the courts, unless the parties to arbitration have agreed otherwise, and errors in the admission of evidence significant to a decision are cause for upsetting an award [21]. Both the common law and subsequent statutes regulate an arbitrator's obligations and establish the grounds for overturning arbitration awards [22]. Moreover, under the *Arbitration Act,* either party in an arbitration, at any stage of the proceedings prior to the award, may compel the arbitrator to submit a question of law arising in the case to the courts for an opinion (a « stated » or « special » case). Or the arbitrator may request such a ruling on his own initiative. On the other hand, the court has the power, without any application from either party, to remit an award for reconsideration by the arbitrator [23]. Judicial and arbitral proceedings may also take place in a single case, the courts deciding points of law, and arbitrators the factual elements of the dispute [24].

The practice of commercial arbitration also encourages reliance on the law. Most cases arise from relatively short-lived commercial relationships and contracts covering a limited range of subjects. There is little evidence of the protracted bargaining, with offers and concessions on many topics, or a « common law » of arbitration awards that mark semi-permanent labour-management relationships. Thus the bases for decisions of commercial arbitrators are more restricted than in North American grievance cases. As a consequence of the law and these traditions, British commercial arbitration appears more as a branch of the law than a process of private decision-making.

EXERCISE OF JUDICIAL AUTHORITY

After *Rivando* established the courts' right to overrule arbitration boards, the judiciary hesitated to exercise this power, beginning with the refusal by the Court of Appeal to quash the award in *Rivando.* In several subsequent cases, the Court examined the agreement under which a challenged award was made, and when it thought the contract language could « reasonably bear » the interpretation of the arbitration board, the

20 Ernest J. PARRY, *Commercial Arbitrations,* London : Pitman and Sons, n.d., p. 3.

21 WHITE and WALTON, *op. cit.,* pp. 168-169.

22 The Arbitration Act, *op. cit.,* ss. 21-25.

23 *Ibid.,* ss. 21-25.

24 WHITE and WALTON, *op. cit.,* pp. 78-79.

award was sustained, even if the Court might have made a different reading of the contract [25]. Having established this principle, however, the appellate court heard few cases. Instead the High Court of Justice formulated a set of rules to govern *certiorari,* and these rules limited its own powers.

In granting *certiorari,* the lower court followed the Court of Appeal in turning to British arbitration law for standards to use in classifying cases. Awards were divided into two categories : one in which an arbitrator ruled on a « specific question of law», and a second in which a « question of law became material » to an award. The Ontario Court of Appeal and the Supreme Court of Canada first accepted this distinction in a case arising from a dispute between a contractor and a mining company over the construction of a road, a rather typical example of a Canadian commercial arbitration case [26]. In turn, the Canadian courts based their decision on a prominent House of Lords case of a similar nature, *Absalom* v. *Great Western (London) Garden Village Society* [27].

As it was initially applied in Ontario, the *Absalom* rule severely restricted the power of the Courts to quash arbitration awards. The common law in both Great Britain and Canada did not permit the quashing of an arbitrator's decision on a « specific question of law », assuming absence of fraud or misconduct. Even when the courts disagreed with an award, they avoided intervention, on the grounds that the parties had foregone the right to appeal by their use of arbitration. In practice, the rule excluded a large percentage of arbitration awards from judicial review in the early years of its application [28].

However, the Ontario courts never defined precisely a « specific question of law », although it apparently was an interpretation of a contract clause where the parties agreed on the facts of a case. In *Absalom* the arbitrator determined what payments were due a contractor, a specific question of law in the eyes of the court. A similar conclusion

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25 *Re Canadian Westinghouse Co. and Draftsmen's Association of Ontario, Local 164,* [1962] O.R. 17, 30 D.L.R. 2d 673 ; *Sudbury Mine, Mill and Smelter Workers' Union, Local 598* v. *The International Nickel Co.,* [1962] O.R. 1089, 35 D.L.R. 2d 371 ; see also decisions of the High Court of Justice in : *Re Studebaker-Packard of Canada and International Union, United Automobile Workers,* (1957) 47 O.W.N. 584, 11 D.L.R. 2d 540 ; *Regina* v. *McDonald, ex parte John Inglis Co.,* [1965] 1 O.R. 511, 48 D.L.R. 2d 577 ; *Regina* v. *Hanrahan, ex parte Davidson,* 68 C.L.L.C. para. 14,119 ; *Re International Nickel Co. of Canada and United Steelworkers of America,* 68 C.L.L.C. para. 14,127.

26 *Faubert* v. *Temagami Mining Co.,* [1960] S.C.R. 235, (1959) 17 D.L.R. 2d 246.

27 (1933) A.C. 592.

28 Cf. *Re Canadian Westinghouse Company and United Electrical Radio and Machine Workers of America, Local 504,* [1962] O.R. 20, 30 D.L.R. 2d 676 ; *Texaco Canada Ltd.* v. *Oil, Chemical and Atomic Workers International Union, Local 16-599,* (1964) 44 D.L.R. 2d 199 ; *National Union of Public Employees, Local 814* v. *Ottawa Sanitation Services Ltd.,* (1963) 64 C.L.L.C. para. 15,490.

was reached in an Ontario labour dispute over the proper interpretation of a holiday pay provision [29].

A « question of law became material » when an arbitrator's award depended on determinations of both law and fact, and the common law permits courts to quash such decisions. Again there was difficulty in defining this category of cases. One authority on arbitration explained that a question of law became material when a board had to interpret an agreement before dealing with the facts presented. If the contract interpretation should be incorrect, an error of law would serve as the basis for a decision and thereby establish grounds for quashing an award [30]. Yet the courts have often ruled that questions of law are material in disciplinary cases, where arbitrators generally decide the veracity of charges against a worker and then apply a contract clause to the facts of the case.

This distinction was difficult to explain, and it proved to be artificial in its application to labour cases [31]. As Canadian labour arbitrators followed usual North American custom and often examined a variety of factors in arriving at their decisions, e.g. past practices, precontract negotiations, etc., matters of law and fact were inextricably mixed. When the courts tried to apply the *Absalom* rule, they began to find « material questions of law » more frequently, an almost inevitable consequence of the differences in the two arbitration systems. By the mid-1960's, the proportion of successuful challenges to awards appears to have risen sharply. The issues before the courts varied, and will be discussed in the second half of this paper, but the general result of the decisions was a substantial erosion of the restriction on judicial action implicit in the courts' original assertion of their authority to review arbitration.

As this trend grew more pronounced, another attack on the validity of the *Absalom* rule was made. The broad assertion of judicial authority in *Rivando* raised a question of the courts' right to reject petitions for *certiorari* on the general grounds that they answered specific questions of law. It was this problem of judicial responsibility that caused the Court of Appeal in 1968 to dismiss the distinction developed by the lower court.

Extending the logic of *Rivando,* the Court in *Regina v. Barber* explicitly rejected the division of arbitration cases based on *Absalom* [32]. The decision involved a part-time super-market clerk who claimed certain benefits provided in a collective agreement. An arbitration board denied the benefits, and when the union appealed the decision to the courts, the employer argued that the award was not subject to review because the

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29 *Re Sudbury Mine, Mill and Smelter Workers' Union, Local 598* v. *International Nickel Company of Canada, supra,* note 25.

30 CURTIS, *The Development and Enforcement of the Collective Agreement,* pp. 89-90.

31 For an example of the problems in using this distinction, see *Regina* v. *Bigelow, ex parte Sefton* (1965) 50 D.L.R. 2d 38.

32 *Regina* v. *Barber, ex parte Warehousemen and Miscellaneous Drivers' Union,* [1968] 2 O.R. 245, 62 D.L.R. 2d 682.

arbitrators had answered a specific question of law, i.e. the correct interpretation of a contract clause. But the Court of Appeal dismissed the argument, stating that the court's jurisdiction « is as full and complete where question of law are specifically referred as in a case where a question of law is only material to the issue to be arbitrated » [33]. The majority declared that the *Absalom* rule existed in consensual arbitration, and « the reason for the distinction made by the rule . . . does not exist in arbitrations under the *Labour Relations Act* because in such cases the resort to arbitration is compulsory » [34].

Although elimination of the *Absalom* rule opened the door to more extensive judicial review of the arbitral process, Mr. Justice Jessup, writing for the Court in *Barber,* did not outline clearly the dimensions of the doorway the Court saw before it. At one point, he said that an award will not be overruled for an error in law « simply because the Court considers some other interpretation more apt if the interpretation of the language is one it will reasonably bear » [35], an apparent return to the earlier practice of the Court in upholding awards [36]. Elsewhere, he cited with approval a British common law rule that bars review of awards in which the arbitrator decided the « very question » that the parties presented, but calling for *certiorari* where the arbitrator has relied on inadmissible evidence or misconstrued a contract [37].

It appears that Justice Jessup may have proposed a newer version of the *Absalom* rule [38], one according the courts broad authority to review awards, but giving them the power to nullify only those awards in which the arbitrators have not answered the « very question given them, or in which the contract will not « reasonably bear » the interpretation of an award. Clearly, the full impact of this decision will only become known as the courts apply these principles in future cases. In *Barber,* the Court quashed the award on the grounds that the contract would not reasonably bear the interpretation of the arbitration board.

The *Barber* decision is linked to another change in Ontario labour arbitration, the replacement of county court judges as chairmen of arbitration boards. In 1967 Parliament acted to restrict the non-judicial activities of county court judges, who had traditionally served as neutral members of arbitration boards in Ontario [39]. This amendment, designed to encourage the professionalization of labour arbitration, has apparently exacerbated the clash between North American practice and British law described

33 *Ibid.,* 68 D.L.R. 2d at 687.

34 *Ibid.,* at 685.

35 *Ibid.,* at 687.

36 This assumption is borne out by the High Court of Justice in *Falconbridge Nickel Mines* v. *Weatherill,* 69 C.L.L.C. para. 14,221.

37 *Kelanton Government* v. *Duff Development Co.* [1923] A.C. 395, at 409, in *ibid.,* at 688.

38 Cf. *National Union of Public Employees, Local 814* v. *Ottawa Sanitation Services Limited, supra,* note 28.

39 Judges Act, *Statutes of Canada,* 1967, c. 176.

above. Non-judicial board chairmen (who generally write awards), though frequently lawyers, seem to decide cases with greater attention to the principles of industrial relations than do judges, who look more closely to the law and the wording of the agreement. Thus the views of the arbitration process held by the courts and arbitrators are likely to diverge more widely in the future.

In light of the attitude of the courts, and the changes taking place within the arbitration profession, it is probable that new challenges to arbitration awards will be made in the courts. Moreover, after *Barber*, the courts have faced the necessity of formulating new policies towards arbitration. An examination of the existing body of case law suggests directions the courts may take. These decisions, generally less than four years old, resulted from cases, mentioned above, involving material questions of law decided before *Barber*. However, the principles they contain could easily be applied within the limits of *Barber*. They are concentrated in four areas of labour arbitration where arbitrators and the courts have failed most frequently to agree on the demarcation of their respective jurisdictions, and they illustrate the difficulty of applying the law of commercial arbitration to labour cases.

EVIDENCE OF INTENT

Perhaps the most difficult question has been the admissibility of evidence. Though the OLRA frees arbitration boards from the common law rules of evidence [40], the courts have restricted admission to arbitration of evidence of the parties' intent underlying contract clauses.

As the *Absalom* rule was applied in Canada, an arbitration board ruling on a specific question of law could go beyond a mere reading of the contract language only if the wording were ambiguous, while there were few restrictions on evidence in cases involving material questions of law. Though such a principle is almost inherent in arbitration, labour arbitration often occurs when the negotiators of a contract are unable to agree on a single interpretation of a provision, so arbitrators may look to evidence of intent, implicitly ruling that a contract is ambiguous. But the courts have readily ruled that agreements subject to arbitration were in fact unambiguous, quashing awards on the grounds that the arbitrators exceeded their jurisdiction by admitting « extrinsic » evidence, i.e. evidence of the parties' intent beyond the written agreement.

In one early case [41], the parties engaged three arbitrators who had served as a conciliation board in recent contract bargaining. The arbitrators based their decision on a reading of the agreement and a memorandum exchanged by the parties prior to negotiations. Despite the obvious advantage of the arbitration board in determining the intent of the parties in bargaining, or the lack of genuine agreement on the meaning of a contract

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40 *R.S.O.*, 1960, c. 202, s. 34 (7).

41 Civic Employees Union v. Municipality of Toronto, [1962] O.R. 970, 34 D.L.R. 2d 711.

clause, the Court of Appeal quashed the award on the grounds the wording was so unambiguous that it precluded the use of any evidence beyond the wording of the contract [42]. This decision was somewhat exceptional, however, as the courts were generally disposed to accept arbitrators' judgement as to the need for using extrinsic evidence [43].

This issue was faced squarely by the Court of Appeal in *Barber,* when it ruled that the agreement was so unambiguous that use of evidence of the parties' past practices was an error in law. In his decision, Justice Jessup emphasized that the intent of the parties should be « derived from their plain words rather than from extrinsic evidence » [44]. This aspect of *Barber* appears to have made the lower court increasingly reluctant to allow extrinsic evidence in arbitration. In a series of cases decided in 1968-1969, the courts haved quashed awards based on the conduct of the parties prior to negotiating a contract [45], conversations between management and labour [46], management's past practice [47], and the history of bargaining between the parties [48], always because the contract wording was so unambiguous that the arbitrators' use of such evidence exceeded their jurisdiction. In *De Laval,* the court disallowed the arbitrators' finding of ambiguity based on a reading of two contract clauses together, noting that each clause, if taken separately, was unambiguous.

Even this brief analysis reveals the courts' disposition to rely heavily on contract language, at the expense of other evidence, in the interpretation of agreements. The readiness of the judiciary to declare contract language unambiguous is also striking, as practioners often admit that such agreements are worded imprecisely [49].

PROCEDURAL VIOLATIONS

A second area of dispute between the courts and arbitrators is that of procedural irregularities in the filing og grievances. The issue first

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42 Similarly, in *International Chemical Workers' Union* v. *Krever,* 68 C.L.L.C. para. 14,086, the court refused to permit an arbitration board to base its decision on the Atomic Energy Control Act.

43 Cf. *Re Canadian Westinghouse and United Electrical Workers, Local 504, supra,* note 28 ; *International Molders and Allied Workers Union* v. *Maxwell* [1963] 2 O.R. 280, 39 D.L.R. 2d 232 ; *Regina* v. *Hanrahan, ex parte Davidson,* 68 C.L.L.C. para. 14,119.

44 *Regina* v. *Barber, supra,* note 32, 2 O.R. 245 at 253.

45 *Regina* v. *Reville, ex parte United Steelworkers of America,* [1968] 2 O.R. 92, 68 D.L.R. 2d 213.

46 *Regina* v. *Weatherill, ex parte International Chemical Workers' Union,* 68 C.L.L.C. para. 14,132.

47 *Niagara Wire Weaving* v. *United Steelworkers,* 69 C.L.L.C. para. 14,228.

48 *De Laval Co.* v. *International Association of Machinists and Aerospace Workers,* 69 C.L.L.C. para. 14,236.

49 See the remarks of William E. SIMKIN in the discussion « The Role of the Law in Arbitration », in *Arbitration and the Law,* ed. by Jean T. McKelvey, Washington : BNA, 1959, p. 79.

arose in late 1965, when a union sought *certiorari* to quash an arbitrator's decision not to hear a grievance on its merits because of an « unreasonable delay » (five months) in initiating arbitration [50]. As no specific time limit appeared in the contract, the board presumably had broad authority to rule on the question of timeliness, but the Court of Appeal quashed the award on the grounds that the arbitrators had failed to exercise their jurisdiction by refusing to hear explanations for the delay. Although the Court did acknowledge that the grievant's delay could have been sufficient reason to refuse him access to arbitration, it denied that the board's decision constituted such a ruling.

Initially, this decision indicated a willingness of the courts to support the evaluation of circumstances underlying technical violations of grievance procedures. This view received further support when the High Court of Justice denied *certiorari* against an arbitration award which rejected a claim of procedural irregularity the employer raised for the first time in the arbitration hearing [51]. The court accepted the principles behind the claim, but agreed that management's delay had vitiated the challenge.

Early in 1968 both the Court of Appeal and the Supreme Court of Canada took stricter views of procedural violations. In *Regina v. Weiler* [52], the Court of Appeal upheld an award which decided a grievance on its merits and disregarded a delay in the notice of arbitration. But the Supreme Court reversed the decision on appeal [53], on the grounds the arbitrators had exceeded their jurisdiction by not enforcing strict adherence to the grievance procedure.

While the *Weiler* case was pending before the Supreme Court, the Ontario judiciary adopted a less flexible position on procedural violations [54]. In a decision ultimately upheld by the Supreme Court [55], the Court of Appeal overruled an arbitration board that had decided to ignore a delay in the request for a hearing and had ruled on the merits of a grievance. The delay was caused by the union appointee to the board, who was uncertain if the grievance would be taken to arbitration and waited five weeks beyond the contractual time limit before asking the Minister of Labour to nominate a neutral member. When constituted, the arbitration board expressed doubts about the force of the time limits in the agreement, as well as observing that neither the grievant nor his agent had caused the delay, before ruling on the original grievance. The courts quashed the award because of the delay, denying the arbitrators' assertion that the

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50 *Ottawa Newspaper Guild, Local 205 and Bower* v. *The Ottawa Citizen,* [1967] O.R. 669, (1966) 55 D.L.R. 2d 26.

51 *Regina* v. *Lane, ex parte Green,* 66 C.L.L.C. para. 14,137.

52 [1968] 1 O.R. 59, (1967) 65 D.L.R. 2d 417.

53 *Regina* v. *Weiler, ex parte Union Carbide Canada Ltd.,* 68 C.L.L.C. para. 14,137.

54 *Regina v. General Truck Drivers' Union, ex parte Hoar Transport Ltd.,* [1968] 1 O.R. 705, 67 C.L.L.C. 2d 484.

55 *Regina* v. *General Truck Drivers' Union, ex parte Hoar Transport Ltd.,* 69 C.L.L.C. para. 14,180.

flaw was a « technical irregularity », and describing the union's nominee on the board as the grievant's agent.

The decision in *Hoar* represented a significant shift in the courts' attitude from the *Ottawa Newspaper Guild* decision. In the latter case, they seemed to encourage or even order arbitrators to examine the circumstances surrounding procedural violations, while the *Hoar* ruling indicated that arbitrators will have limited authority to go beyond a narrow interpretation on the clauses governing grievance procedures [56].

DISCIPLINARY PENALTIES

Contract clauses specifying discharge for « just cause », almost universal features in North American collective agreements, have been a frequent source of disagreement between the courts and arbitrators. In disciplinary cases, North American arbitrators often conclude that the penalty of discharge is too severe for the offense committed, though a grievant may have violated the agreement or rules established under it. In these circumstances, arbitrators frequently order a reduced penalty for the grievant [57], but the Ontario courts have refused to sustain such awards in the absence of explicit contractual authorization.

A series of High Court decisions in the past decade, never challenged in the Court of Appeal, established this principle. In *Regina v. Bigelow* [58], the earliest case, an arbitration board heard the appeal of an employee discharged for absenteeism and failure to report for work in a fit condition. A majority found that the grievant had not been punished at all for such offenses in several years, so the discharge, though justified, was unreasonable, and the employee was reinstated without back pay, equivalent to a seven-month suspension. The court quashed the award on the grounds that the board had exceeded its jurisdiction by going beyond a ruling on the truth of management's allegation of misconduct. Having found the employee guilty, the board had no power to alter his penalty. When the Court of Appeal dismissed an appeal of the ruling, the question of the arbitrators' authority in this area appeared settled in Ontario.

This assumption was upset, at least in the minds of some arbitrators, by the *Polymer* [59] decision, one of the early arbitration cases heard by the

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56 MORIN, *F.* « Les arbitres nommés par les parties sont-ils liés par les délais de procédures établis à la Convention Collective », *Relations Industrielles,* Vol. 24, No. 3, août 1969, pp. 589-597.

57 See A. Howard MEYERS, « Concepts of Industrial Discipline », in *Management Rights and the Arbitration Process,* ed. by Jean T. McKelvey, Washington : BNA, 1956, pp. 65-67.

58 *Re International Nickel Co. of Canada and International Union of Mine, Mill and Smelter Workers,* appeal dismissed by C.A., *sub nom, Regina* v. *Bigelow, ex parte International Nickel Co. Ltd.,* [1959] O.R. 527, 19 D.L.R. 2d 380.

59 *Polymer Corp. Ltd.* v. *Oil, Chemical and Atomic Workers' International Union, supra,* note 16. The employer is a crown corporation and therefore governed by federal statute.

Supreme Court of Canada. An appeal sought to quash an award that ordered a union to compensate the employer for losses caused by a wildcat strike. Despite the absence of any mention of damages in the contract and the Ontario ban on suits against unions, the Supreme Court upheld the right of arbitrators to fashion such a remedy. Many arbitrators, after reading *Polymer,* believed they had received power to assess other penalties, including remedies in disciplinary cases.

Arbitrators' expectations of greater authority were dispelled in 1966-1968 by the Ontario judiciary, with support from the Supreme Court. Initially, the High Court of Justice, relying on *Bigelow,* refused to permit any changes in disciplinary penalties [60], and then renied that such an award constituted the fashioning of a remedy analgous to damages in *Polymer* [61]. However, when the Court of Appeal again heard the issue, in *Regina v. Arthurs* [62], there was an apparent shift in opinion favouring greater autonomy for arbitrators, perhaps the result of the influence of Mr. Justice Bora Laskin, a former arbitrator, recently appointed to the Court.

The grievants in *Arthurs* were three senior workers, one the local union president, whom the employer discharged for taking temporary jobs with another firm. Although their action violated the contract, the employees acted in anticipation of seasonal layoffs, which did not occur. When an arbitration board reduced the penalties to suspensions, management sought *certiorari* to quash the award.

Justice Laskin, speaking for a divided court, saw two elements in the arbitrators' function. First they were obliged to determine the truth of the employer's charges. If they found against the grievants, the board had to decide whether their conduct was « proper cause » for their discharge under the terms of the agreement. The board in *Arthurs* supported the employer on the first question, but ruled that the grievants' action did not warrant discharge and ordered reinstatement. Laskin noted that in *Bigelow* the arbitrators ruled there was just cause for discharge, but still substituted suspension, whereas in *Arthurs* no grounds for discharge were found.

Briefly stated, Laskin's decision would give arbitrators the power to interpret disciplinary clauses with consideration to the equities involved and principles of industrial relations, a view of the arbitrator's role shared

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60 *Regina* v. *Lane, supra,* note 16.

61 *Regina* v. *Kennedy, ex parte Stanley Steel Co.,* 68 C.L.L.C. para. 14,102. However, arbitrators were permitted to review a penalty when the employer introduced evidence of an employee's past performance to justify a discharge. See *Regina* v. *Roberts, ex parte Goodyear Tire and Rubber Co.,* 67 C.L.L.C. para. 14,025.

62 [1967] 2 O.R. 49, 62 D.L.R. 2d 342.

by most American authorities [63], but less popular in Canada. A study of arbitration in Ontario made when most board chairmen were county court judges revealed that few arbitrators in the province would modify disciplinary penalties unless the contract explicitly granted them the authority [64]. It appears that some arbitrators in Ontario now favour a more liberal view of their power and thus came into conflict with the courts. After his opinion in *Arthurs*, Justice Laskin seemed to be in a position to persuade both the courts and arbitrators to give arbitration boards broader authority, at least in discharge cases.

This notion was dispelled by the Supreme Court of Canada decision over-ruling Laskin in *Arthurs* [65]. The Court held that the arbitration board had assumed managerial authority by ordering reinstatement and should have restricted its inquiry to the existence of proper cause for discharge. Since the facts clearly indicated a violation of the contract, the employer did have proper cause to dismiss the grievants. It was the *Arthurs* decision that prompted the appeal to the Labour Ministry mentioned earlier.

It is apparent that the courts will not sustain future awards changing disciplinary penalties unless an arbitration board is specifically given the necessary authority to do so in an agreement [66].

DENIAL OF NATURAL JUSTICE

Findings that natural justice has been denied in arbitration occasionally cause the courts to quash an award. Such cases, though rare, go to the heart of a labour-management relationship. Common law principles of natural justice refer to the rights of « parties » [67], without defining who is a « party » to a contract, as this issue seldom arises outside of labour-management agreements. Individual employees, who obviously are affected by an agreement, are not signatories to it, and hence may be denied access to arbitration, for instance. This restriction may be defended on a strict legal basis, and also on the grounds that individual workers may not promote the affective administration of a contract by participating in arbitration on their own behalf. Neither argument seems to have received serious attention in the Ontario courts or the Supreme Court.

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63 For a discussion of this issue in the United States, Frank ELKOURI and Edna Asper ELKOURI, *How Arbitration Works*, Rev. ed., Washington : BNA, 1960, pp. 419-433 ; or Paul PRASOW and Edward PETERS, *Arbitration and Collective Bargaining, Conflict Resolution in Labor Relations*, New York : McGraw-Hill, 1970, pp. 204-207.

64 Martin L. LEVINSON, *Discharge and Discipline in Ontario*, Toronto : Chromo Lithographing, 1959, pp. 23-26 ; CARROTHERS, *Labour Arbitration in Canada, op. cit.*, pp. 84-86, 94-96.

65 Regina v. Arthurs, et al., *supra*, note 16.

66 The Court of Appeal upheld the modification of a penalty by an arbitration board when a contract contained specific authorization for such action in *Regina* v. *McCulloch, ex parte Dowty Equipment*, 69 C.L.L.C. para. 14,173.

67 CARROTHERS, *Labour Arbitration in Canada, op. cit.*, pp. 159-161.

The judiciary has emphasized the rights of individual workers to be included in arbitration proceedings, especially where effective representation of their interests by a union is unlikely. A series of decisions in 1967-1968 spelled out the standards of natural justice necessary for arbitration proceedings. When two groups of unionized employees were competing for a single set of benefits under a collective agreement, the Ontario courts ruled that all workers concerned must be notified of the hearing [68]. The Supreme Court of Canada added criteria for the existence of natural justice in arbitration : that persons affected be informed of the nature of the case ; that these persons be allowed to present their case to the arbitrators ; and that the board act in good faith [69]. Later the Ontario courts quashed an award for denial of natural justice because the chairman had gathered evidence in the absence of other board members [70].

CONCLUSIONS

In answer to the questions raised at the outset of this paper, the factors in Ontario labour law giving rise to judicial intervention are clear — the compulsory use of grievance arbitration, and the use of British commercial law by the courts in shaping their policy towards labour arbitration. In recent years, the courts have overcome their initial reluctance to intervene and seem to be moving in the direction of closer scrutiny of arbitration awards. Almost equally obvious is the courts' preference for a legalistic philosophy of arbitration, with decisions based only on strict textual analyses of collective agreements, even where contract provisions may be vague. In fact, except for their treatment of natural justice, the courts appear to be encouraging a system that resembles British commercial arbitration for grievance settlement in Ontario. Though many employers, unions, and arbitrators favour legalism in collective bargaining, the protest by leading arbitrators to the Labour Minister indicates that this position is scarcely unanimous in Ontario. Moreover, few, if any, of the arbitrators who addressed the Minister were county court judges, so it is the protesters who should become more important to labour arbitration as a result of changes in the *Judges Act.*

Fundamental causes of judicial intervention may go beyond the legal philosophies of Ontario jurists. In enacting the OLRA the Provincial Legislature drew heavily on U.S. experience, as previously transplanted to Canada by PC 1003. In addition to adopting some elements of the National Labor Relations Act, Ontario legislated in favour of American-style grievance arbitration, an institution virtually unknown in labour-

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68 *Bradley* v. *Corporation of the City of Ottawa,* et al., [1967] 2 O.R. 311, 63 D.L.R. 2d 376. (This case was not governed by the OLRA, but the statute involved does not differ from the Labour Relations Act in its treatment of grievance arbitration).

69 *Hoogendoorn* v. *Greening Metal Products and Screening Equipment,* [1968] S.C.R. 30, (1967) 65 D.L.R. 2d 641.

70 *Regina* v. *Fine, ex parte Sheraton Ltd.,* [1968] 2 O.R. 490, 69 D.L.R. 2d 625.

management relations outside of North America. However, U.S. grievance arbitration began and matured with relatively statutory assistance (though it spread considerably as a result of the War Labor Board in World War II), a difference that may have been overlooked by Ontario arbitrators, who, lacking a substantial body of Canadian literature on arbitration, in the past have concentrated on American practices. This reliance on American experience probably accentuated arbitrators' differences with the courts. If any further evidence were needed, the judicial review of labour arbitration again illustrates the difficulties in transferring industrial relations practices from one nation to another.

Assuming no change in the law of arbitration is imminent, employers and unions wishing to avoid the effects of Ontario court decisions may be forced to re-word collective agreements to state explicitly the limits of arbitrators' authority. This would facilitate the development of arbitration without intervention by the courts and less influenced by the United States, as well as encouraging the professionalization of arbitration. Obviously, such action entail risks for both parties, but acceptance of these hazards may contribute to the creation of a new and more effective system for grievance settlement.

LES APPELS DES DÉCISIONS ARBITRALES DEVANT LES TRIBUNAUX EN ONTARIO

Au cours des dernières années, les conflits entre les arbitres du travail et les tribunaux se sont accentués en Ontario. Il en est résulté un nombre croissant d'arrêtés judiciaires cassant les sentences arbitrales. Bien que ce phénomène soit relativement récent, les fondements juridiques sont beaucoup plus anciens. Dans cet article, nous en analysons les facteurs et nous étudions les décisions récentes afin de mettre en lumière les tendances de la pensée juridique en Ontario.

L'arbitrage des griefs a été institué en Ontario pendant la deuxième guerre mondiale, en particulier lorsque la législation fédérale extraordinaire était en vigueur. Après la guerre, la Loi sur les relations professionnelles (OLRA) a rendu le recours à l'arbitrage obligatoire pour régler les griefs restés sans solution. Ce fait a encouagé les tribunaux à contrôler les arbitrages de près, et a contribué, entre autres, à asseoir l'autorité des tribunaux de se prononcer sur les arbitrages.

Bien que la OLRA déclare les sentences arbitrales être des jugements définitifs, la loi reconnaît des moyens de recours pour renverser les sentences arbitrales par les tribunaux. Généralement, un tel renversement s'appuie sur le manque de juridiction de l'arbitre.

C'est en 1956 que les tribunaux d'Ontario ont, pour la première fois, affirmé leur pouvoir de réviser les sentences dans le cas de *International Nickel Company and Rivando*. La Cour d'appel a décidé qu'en raison de la nature obligatoire de l'arbitrage pour régler les griefs, elle n'avait d'autre solution que d'exercer une surveillance du processus. En déclarant être investie de pouvoir judiciaire, la Cour s'est basée sur des cas tirés de l'arbitrage commercial britannique. Cette institution est liée plus étroitement au droit que l'arbitrage des griefs ne l'est généralement en Amérique du Nord, et elle s'appuie sur l'interprétation littérale des termes du contrat.

Depuis le cas *Rivando,* les tribunaux se sont montrés réticents dans l'exercice de leur autorité. Dans quelques cas, des sentences ont été maintenues quand l'interprétation du contrat par l'arbitre a été jugée raisonnable. Par la suite, les cas ont été divisés en deux catégories : 1) les sentences arbitrales contenant des questions spécifiques de droit, par exemple l'interprétation de clause d'une convention, 2) celles concernant les questions matérielles de droit, par exemple lorsque l'arbitre décidait des questions de fait et de droit. Selon les principes de droit commun exprimés dans un cas britannique, *Absalom* v. *Great Western* (*London*) *Garden Village Society,* seules les sentences arbitrales de la deuxième catégorie ont été considérées par les tribunaux. Au début, l'application de la décision d'*Absalom* a limité l'exercice du pouvoir judiciaire, mais la distinction n'a pu être appliquée à l'arbitrage canadien, processus bien différent de l'arbitrage commercial britannique dont celui-ci tire pourtant son origine. Du reste, la revendication même des droits des tribunaux dans le cas *Rivando* mit en question la convenance de considérer certains cas hors du domaine juridique.

Les deux facteurs : le droit commercial britannique et l'arbitrage obligatoire, se sont trouvés réunis dans le cas *Regina* v. *Barber,* qui a mis fin à l'application de la décision d'*Absalom.* La Cour d'appel n'a pas fixé clairement les critères qu'elle désirait adopter pour juger les sentences d'arbitrage, mais elle semblait accorder un large pouvoir de se prononcer sur l'arbitrage uniquement dans les cas où les sentences ne répondent pas aux questions soumises aux arbitres ou celles où l'interprétation du contrat semble être trop libre. Le cas *Barber* apporta un autre changement dans l'arbitrage d'Ontario : la formation de tribunaux d'arbitrage. Auparavant, la majorité des arbitres neutres étaient des juges des tribunaux de comté, mais en 1967 le Parlement a restreint les activités extra-judiciaires de ces juristes. Ce phénomène devait encourager la professionnalisation de l'arbitrage mais également accentuer les conflits entre les arbitres et les tribunaux.

En raison de la tendance des tribunaux à intervenir dans l'arbitrage des griefs, un examen des récentes décisions pourrait indiquer les lignes de la pensée juridique. Il y a quatre domaines dans lesquels les arbitres et les tribunaux n'ont pu parvenir à définir leur juridiction respective.

Les questions concernant les preuves d'intention ont peut-être été les plus difficiles. Les tribunaux admettent de considérer les preuves extrinsèques telles que les usages et coutumes indigènes seulement lorsque les termes du contrat ne sont pas clairs. Le cas *Barber* a accentué la nécessité de s'appuyer sur les textes mêmes des conventions plutôt que sur les preuves extrinsèques. Il en est résulté une réticence des tribunaux à accepter les conclusions des arbitres lorsque celles-ci sont tirées des termes ambigus de la convention et ainsi ils ont cassé une série de sentences arbitrales reposant sur « des preuves extrinsèques ».

Des infractions dans les formalités requises pour les clauses de grief et d'arbitrage ont été une deuxième source de difficultés. Avec l'accord de la Cour suprême du Canada, les tribunaux d'Ontario ont restreint les pouvoirs des arbitres dans les limites de la stricte interprétation littérale de ces clauses même si l'intérêt du plaignant a été compromis sans qu'il y ait faute de sa part.

Des clauses de contrat prévoyant le congédiement seulement pour « cause justifiée » qui sont courantes dans les conventions collectives en Amérique du Nord, ont été fréquemment l'occasion de désaccords entre les tribunaux et les arbitres.

Les arbitres se trouvent souvent en accord avec l'employeur sur le fait que le travailleur a violé son contrat, mais ils ordonnent une réduction des sanctions prises surtout là où le renvoi d'un employé a été ordonné. Malgré le principe déclaré par la Cour suprême dans le cas de *Polymer* à savoir que les arbitres ont le pouvoir de régler ou d'ajuster les sanctions, ce tribunal a refusé aux arbitres d'Ontario le droit d'atténuer les sanctions disciplinaires si le contrat ne le prévoie pas spécifiquement.

Les tribunaux d'Ontario ont pris soin de protéger les droits des plaignants individuels en cas d'infractions au principe fondamental de justice naturelle. La Cour suprême du Canada a déclaré que tous les membres ayant un intérêt en cause, y compris ceux qui n'ont pas été signataires, devraient avoir la possibilité d'accéder à la procédure d'arbitrage.

Cet examen du développement du droit montre que l'élément d'obligation qu'on trouve dans l'OLRA a conduit les tribunaux à intervenir en matière d'arbitrage ; en plus, leur utilisation du droit britannique leur a donné la possibilité d'intervenir plus largement dans le processus d'arbitrage. Ceci met en lumière la difficulté d'appliquer au Canada une institution étrangère qui est aussi complexe et subtile que celle de l'arbitrage.

À cause des racines américaines du droit de l'Ontario, quelques arbitres auraient accordé une trop grande influence aux pratiques suivies aux États-Unis. Pour encourager le caractère professionnel de l'arbitrage au Canada, les signataires devraient préciser dans les conventions collectives les pouvoirs des arbitres.