

## Relations industrielles / Industrial Relations



*Labour Arbitration in Canada*, By Morton Mitchnick and Brian Etherington (2018), 3rd edition, Toronto: Lancaster House, 730 pages. ISBN: 978-0-920450-66-6

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## Recensions / Book Reviews

### Labour Arbitration in Canada

By Morton Mitchnick and Brian Etherington (2018), 3<sup>rd</sup> edition, Toronto: Lancaster House, 730 pages. ISBN: 978-0-920450-66-6.

Since its publication in the 1970s, the “bible” of the English-speaking Canadian employment lawyer has been *Canadian Labour Arbitration* (generally referred to simply as “Brown and Beatty” from the name of its authors). In Quebec, its equivalent has been *Droit de l’arbitrage de grief* (again, simply “Blouin et Morin”). Whereas the former is a comprehensive but unwieldy summary of arbitral jurisprudence, the later can be faulted by the practitioner for its penchant for the theoretical. Completing this trifecta, one finds *Labour Arbitration in Canada* (now in its third edition) by Mitchnick and Etherington, a complete, accessible and practical treatise on the topic.

Morton Mitchnick is an arbitrator and mediator, and former Chair of the Ontario Labour Relations Board. Brian Etherington is an arbitrator and mediator, and former professor at the Faculty of Law of the University of Windsor.

From its division, the third edition of *Labour Arbitration in Canada* appeals to the practitioner. The relevant section can usually be found by a quick scan of the table of contents, which is divided by practical consideration. The book is divided into three sections of uneven length. The first is entitled “Evidence and Procedure”; the second, “Discharge and Discipline”; the third, “Contract Interpretation”. Part I focuses on rules of natural justice (Chapter 1), objections to arbitrability (Chapters 2 and 3), pre-hearing procedure (Chapter 4), procedure, proof, and the admissibility of evidence (Chapters 5 and 6), remedial powers and the enforcement of awards (Chapters 7 and 8). The union’s duty of fair representation is briefly discussed in a short

chapter (Chapter 9) at the end of this first section. Part II begins with a general presentation of the rules surrounding discipline (Chapter 10), before dealing with particular disciplinary issues in turn (dishonesty, illegal conduct, disloyalty, insubordination, violence, abuse). Part II closes with a chapter on privacy in the workplace (Chapter 14) and another on the duty to accommodate (Chapter 15). Part III is drafted in a similar fashion, beginning with general rules of interpretation (Chapter 17), before delving into specific issues related to interpreting collective bargaining agreements such as seniority rights (Chapter 19), promotion (Chapter 20), layoff and recall (Chapter 21), hours of work (Chapter 22), and the rights and responsibilities of trade unions (Chapter 25 and 26, respectively).

One can not emphasize enough the ease of reading and of reference of *Labour Arbitration in Canada*. If the general division makes it easy to find the relevant information, that information is then presented with no extraneous theorizing or historicizing (both of which have their places, though perhaps not in a practitioner’s reference such as this one). The rules are stated clearly along with the appropriate procedures and complete reference to caselaw. For example, if one questions how to raise an issue of bias, the authors instruct:

Where a party objects to the appointment of a member of an arbitration board on the basis of a reasonable apprehension of bias, it is obligated to make its position known immediately. The decision in *Vancouver Wharves Ltd. and I.L.W.U., Local 514* (1995), 47 L.A.C. (4<sup>th</sup>) 210 (Thompson) affirms that a party which has been fully apprised of the facts must bring its motion to disqualify prior to the commencement of the proceedings.

Similarly, if one wonders how to evaluate the propriety of a particular disciplinary penalty, the authors write:

Over the years, arbitrators have identified a variety of factors—some related to the conduct of the employer, other to the conduct or circumstances of the grievor—, which should be considered in deciding if the penalty imposed by the employer is just and reasonable. Some factors are of an aggravating nature, other mitigating. The case most frequently cited in this regard is *Steel Equipment Co. Ltd. and U.S.W.A., Local 3257* (1964), 14 L.A.C. 356 (Reville).

The factors are then clearly listed out for the reader.

The authors do not shy away, however from presenting differing approaches to a problem when labour arbitrators have presented divergent views of the same issue. For example, after succinctly presenting the rule on calling evidence to contradict a witness (commonly referred to as the *Browne v. Dunn* rule), the authors present its strict application by some arbitrators, a call for relaxing the rule by other arbitrators, before concluding that the “rule in *Browne v. Dunn* has come to be applied to the impeachment of a witness’ credibility through the calling of contradictory evidence. There is, however, no absolute requirement that a witness be cross-examined as a precondition to counsel’s right to impugn the witness’ credibility in final argument”. This analysis is presented over two pages.

As is made evident from the examples above, despite the scope of their professional practice, Mitchnick and Etherington do not limit their analysis to arbitral decisions from Ontario. Quebec, however, is largely ignored. Though the practitioner from Quebec may appreciate the breadth and quality of information in *Labour Arbitration in Canada*, representation may be better found in Blouin and Morin, mentioned above.

In short, *Labour Arbitration in Canada* is a comprehensive and convenient resource

for labour relation practitioners. The book is thorough, accessible, and easy to consult making it an ideal practitioner’s tool.

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### **Performants... et licenciés – Enquête sur la banalisation des licenciements**

Par Mélanie Guyonvarc’h (2017) Rennes :  
Presses Universitaires de Rennes, 263 pages.  
ISBN 978-2-7535-5385-9.

Les licenciements collectifs n’affectent plus seulement les travailleurs précaires et faiblement qualifiés des secteurs économiques en décroissance. Ils touchent, de nos jours, les travailleurs qualifiés les plus favorisés œuvrant dans des secteurs prometteurs, voire des cadres. Le vécu de ces travailleurs dits « *Performants... et licenciés* » est au cœur de l’ouvrage de Mélanie Guyonvarc’h. L’auteure ne se limite pas à l’étude de l’expérience personnelle de ces licenciements. Elle analyse les causes structurelles et collectives de ces derniers, passant en revue les pratiques des entreprises, ainsi que les contextes économiques et légaux qui les soutiennent.

D’entrée de jeu, Guyonvarc’h fait l’hypothèse d’une banalisation des licenciements, l’observant dans le discours managérial, la sphère politico-légale et, même parfois, chez les salariés. Ce discours, empreint d’une forte euphémisation minimisant les aspects négatifs des licenciements, les dépeint comme une nécessité économique contre laquelle il n’existe aucun remède, si ce n’est l’adaptation perpétuelle. Les licenciements sont devenus des événements ordinaires de la gestion des entreprises où l’on survalorise la mobilité professionnelle et l’on considère l’individu comme maître de sa carrière.

Or, l’enquête démontre « [qu’]il n’y a pas de banalisation du point de vue des salariés », même chez les plus « performants »