

## WORKING DRAFT

### “INDUSTRIAL PLURALISM, RESERVED RIGHTS AND *WEBER*”

“[Arbitration] is a means of making collective bargaining work and thus preserving private enterprise in a free government.”

*Harry Shulman, “Reason, Contract and Law in Labor Relations”,  
(1954-1955) 68 Harv. L.Rev. 999 at 1024*

## INTRODUCTION

The conventional reading of the Supreme Court’s decision in *Weber v Ontario Hydro*<sup>1</sup> is that it forced arbitrators to take jurisdiction over issues never intended to be subject to arbitration, including common law rights. If arbitration is a good thing – and it is generally viewed by the labour law community as a good thing – the expansion of its scope might appear to be an unmitigated benefit. Instead, the decision was greeted by a storm of condemnation. Raymond Brown and Brian Etherington led off by arguing that “*Weber* appears to raise significant barriers to access to justice, including Charter justice, for the organized employee”.<sup>2</sup> Michel Picher expressed concern “that the good intentions and ‘pro-arbitration’ bent of [*Weber*] may prove to be a Pandora’s box of unforeseen negative consequences for individual rights, as well as for labour arbitration and collective bargaining itself”.<sup>3</sup> Critics who in other contexts stoutly defended the expertise of arbitrators questioned the capacity of non-judges – as well as the institutional capacity of arbitration – to deal with these new tasks. They pointed to new pressures on unions to fund the arbitration of complex tort claims, and lamented the broader range of individual rights disputes that would now be subject to union gate-keeping. Scholars, adjudicators and practitioners alike accused *Weber* of creating jurisdictional confusion in the resolution of workplace disputes, and exacerbating an already existing problem of duplicative proceedings and forum shopping.

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<sup>1</sup> *Weber v Ontario Hydro* [1995] 2 SCR 929

<sup>2</sup> Raymond Brown & Brian Etherington. “*Weber v Ontario Hydro: A Denial of Access to Justice for the Organized Employee*” (1996) 4 CLELJ 183

<sup>3</sup> Michel G. Picher, “Defining the Scope of Arbitration: The Impact of *Weber*: an Arbitrator’s Perspective” (1999-2000) 1 Lab Arb YB148.

In this paper, I argue that the idea of arbitration embraced by *Weber* is not in fact new. *Weber*'s vision of the scope of arbitration instructs arbitrators to determine the essential character of workplace disputes, and to resolve those disputes if they fall within the ambit of the collective agreement either explicitly or implicitly. This vision closely resembles the view of arbitration of the early industrial pluralist school of arbitrator-scholars, who saw unionized workplaces as enclaves of industrial self-government regulated by private law. This private law was established by employers and unions through collective bargaining, and consisting of collective agreements interpreted and applied by arbitrators against the backdrop of a "common law of the shop" constituted from multiple normative sources. The American statutory framework for collective bargaining which grounded the pluralist vision was borrowed and adapted by Canadian legislatures. But that vision itself was undermined by a generation of Canadian arbitrators who crafted for themselves a narrow role in which they confined their task to literal and legalistic "readings" of collective agreements. Their key tool was a theory nowhere articulated in the statutes – the theory of "reserved rights", which holds that employers retain plenary common law power to control and direct the workforce *except* to the extent that the union is able to fetter that power through limitations reflected in the collective agreement. Reserved right theory played a critical role in brokering the distribution of power within unionized workplaces by shrinking the perimeter of "arbitrability" and broadening the range of employer unilateral action. I argue that *Weber*'s more liberal approach to arbitrability restores the perimeter intended by the legislature, returning us to a world in which rights disputes involving terms and conditions of employment are resolved within the framework contemplated by labour statutes. Understood in this way, *Weber* does not challenge the coherence of arbitration; on the contrary, it goes a considerable way towards restoring it.

I develop this argument as follows. Part 1 examines the pluralist idea of industrial self-government and the role of the arbitrator as it initially evolved under the Wagner Act. Part 2 looks at what happened to this idea when it was imported into Canada within a legal framework modelled on the basic structure of the Wagner Act, but with modification that gave arbitration a more central role in Canadian labour law. Part 3 explores the emergence of a "reserved rights" school of arbitration which competed with the ideal of industrial self-government at the theoretical core of pluralism. It examines how reserved rights theory became entrenched in Canada despite legislative differences which might have produced the opposite result. Part 4

examines some of the contradictions which reserved rights theory generates within the Canadian collective bargaining model. Part 5 then turns to *Weber* and its progeny, arguing that Weber's "essential character of the dispute" test reestablishes a comprehensive idea of role of arbitration which is close kin to the old pluralist vision. Part 6 sums up my conclusions on the meaning of *Weber*. It then raises some normative and practical questions about continuing reliance on a dispute resolution model grounded on the notion of workplace law as private law, in a world in which the boundary between the public and private law of the workplace rights is increasingly difficult to locate. My focus throughout is on relationship between collective agreements and common law rights, to principle issues dealt with in *Weber*; the other issue involved in *Weber*, the issue of *Charter*/constitutional rights, raises questions of public law, which are very different. I have discussed the public law issue elsewhere and touch on it only briefly here in Part 6.<sup>4</sup>

## **1. INDUSTRIAL SELF-GOVERNMENT AND THE ROLE OF THE ARBITRATOR: US VERSION**

Collective agreements pre-date legal frameworks for collective bargaining by several decades.<sup>5</sup> Early collective agreements consisted of rudimentary wage schedules and trade agreements which bore little resemblance to the thick and detailed documents we now call by that name. They addressed only a few issues, and where disputes arose with respect to matters not dealt with in the agreement, the parties had a variety of tools for resolving them. The union might strike to enforce its position. Employer and union might sit down and bargain *ad hoc* or permanent solutions. Or they might agree to take the dispute to a third party arbitrator, either a permanent umpire or someone chosen to resolve a single dispute. There was no sharp line between rights and interest disputes; the parties had access to the full array of dispute resolution tools in either case. As industries became more bureaucratized and unions began to organize on an industry rather than a craft basis, collective agreements became more complex and arbitration gradually became a more attractive option. By 1934, just prior to the passage of the *Wagner Act*, 66 percent of US collective agreements contained some form of arbitration clause.<sup>6</sup>

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<sup>4</sup> Elizabeth Shilton, "Labour Arbitration and Public Rights: Would a Public Tribunal Model Work Better?", submitted to the Queen's Law Journal for publication in the Adell commemorative issue.

<sup>5</sup> Dennis R. Nolan & Roger I. Abrams, "American Labor Arbitration: The Early Years", (1983) 35 Univ. Fla. L. Rev. 373

<sup>6</sup> *Ibid.* at 411.

The *Wagner Act* imposed a duty on employers to recognize a majority union and to bargain with that union “in respect to rates of pay, wages, hours of employment, or other conditions of employment”.<sup>7</sup> But its legislative history reveals that “[t]he Wagner Act was not concerned, except incidentally, with what took place after the proper union had been recognized by the employer and negotiations got underway”.<sup>8</sup> The Act was silent on such questions as whether and how collective agreements would be enforced. Issues of dispute resolution were left to be addressed through collective bargaining, with the parties free to choose from the same menu of tools which had been available to them prior to the passage of the Act, regardless of whether the dispute involved rights or interests.

Out of this laissez-faire approach evolved an even stronger preference for the use of arbitration for the resolution of rights disputes.<sup>9</sup> There was no statutory job description for arbitrators, however, and as employers, unions and arbitrators made their way within the new world of regulated collective bargaining, the proper role of arbitrators was a matter of continuing debate. That debate was strongly influenced by a school of industrial relations that has become known as industrial pluralism,<sup>10</sup> exemplified in the influential writings of scholar-arbitrators Harry Shulman, Archibald Cox and John T. Dunlop.<sup>11</sup> In “Reason, Contract and Law in Labor Relations”, published in 1955 in the *Harvard Law Review*,<sup>12</sup> Shulman expounded the core

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<sup>7</sup> *Wagner Act (National Labour Relations Act)*, s.9.

<sup>8</sup> Archibald Cox & John T. Dunlop, “Regulation of Collective Bargaining by the National Labour Relations Board”, (1949-1950) 63 *Harv. L. Rev.* 389 at 389

<sup>9</sup>By 1942, 76 percent of US agreements had arbitration clauses: Nolan & Abrams, *supra* note 5 at 411. **Current figures?**

<sup>10</sup> Katherine Van Wezel Stone is often credited with coining this label. In her iconic critique of industrial pluralism, “The Post-War Paradigm in American Labor Law”, (1981) 90 *Yale Law Review* 1509, she defines industrial pluralism as follows:

Industrial pluralism is the view that collective bargaining is self-government by management and labor; management and labor are considered to be equal parties who jointly determine the conditions of the sale of labor power. The collective bargaining process is said to function like a legislature in which management and labor, both sides representing their separate constituencies, engage in debate and compromise, and together legislate the rules under which the workplace will be governed. The set of rules that results is alternatively called a statute or a constitution – the basic industrial pluralist metaphors for the collective bargaining agreement (1511).

<sup>11</sup> Archibald Cox & John T. Dunlop, “Regulation of Collective Bargaining by the National Labour Relations Board”, *supra* note 8; -- “The Duty to Bargain Collectively During the Term of an Existing Agreement” (1949-1950) 63 *Harv. L. Rev.* 1097; Harry Shulman, “Reason, Contract and Law in Labor Relations”, (1954-1955) 68 *Harv. L. Rev.* 999; Archibald Cox, “Rights under a Collective Agreement” (1956) 69 *Harv. L. Rev.* 601; --- “Reflections Upon Labor Arbitration” (1956), 69 *Harv. Law Rev.* 601; --- “Individual Enforcement of Collective Bargaining Agreements” (1957) 8 *Lab. L.J.* 850; --- “The Legal Nature of Collective Agreements” (1958) 57 *Mich. L. Rev.* 1; -- “Current Problems in the Law of Grievance Arbitration” (1958) 30 *Rocky Mountain Law Review* 247.

<sup>12</sup> Shulman, *supra* note 11.

pluralist idea of collective bargaining as “industrial self-government” – a system in which individual unionized workplaces are governed by a private “rule of law and reason” established by the parties. Industrial pluralists argued that the *Wagner Act* provided a framework which contemplated that unionized workplaces would function as autonomous zones in which the parties made and enforced their own governing law with minimal interference from the state. Arbitration was “part of a system of self-government created by and confined to the parties”,<sup>13</sup> roughly analogous to the judicial branch of public democratic government.

The pluralists did not insist that arbitrators should decide all workplace disputes. Since arbitration clauses were optional in US agreements, the parties could bargain about what issues would be submitted to an arbitrator and what issues would remain subject to other forms of dispute resolution. Arbitration clauses could be custom-designed to be as broad or as narrow as the parties chose to make them. But where issues were arbitrable, the pluralists took a very liberal view of the role of the arbitrator. They saw the negotiation and the administration of the agreement as simply points on a continuum whereby the parties continuously defined and refined their governing law; collective agreements were frameworks for an on-going relationship rather than compendia of discrete rights.<sup>14</sup> Arbitrators did not function like common law judges, despite the analogy to the judicial branch. They answered to the parties rather than to external law, and their job was to resolve the dispute which had been put before them. They were expected to eschew formalism, and to respond flexibly and pragmatically to a variety of disputes for which legal rules could not be explicitly laid down in the collective agreement, given the practical limitations of the bargaining process and the dynamism of the workplace. Their job required them not only to apply the language of the agreement, but also to draw upon what Cox called the “common law of the shop”, an inchoate set of rules imbedded in the parties’ private law which were “not judge-made principles of the common law, but the practices, assumptions, understandings, and aspirations of the going industrial concern.” Cox provided a non-exhaustive list of some of the sources of this “common law”: “legal doctrines, a sense of fairness, the national labor policy, past practice at the plant and perhaps industrial practice generally.”<sup>15</sup> The parties remained in control, because they could tie the arbitrator’s hands with specific language if

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<sup>13</sup> *Ibid.* at 1016

<sup>14</sup> Shulman, *ibid*; Cox, “Rights Under a Collective Agreement”, *supra* note 11 at 625.

<sup>15</sup> Cox, “Reflections Upon Labor Arbitration”, *supra* note 11 at 1500.

they chose. But where they left gaps and ambiguities (perhaps deliberately because of pressures to sign an agreement even in the absence of consensus) or where they employed general language (such as “just cause”), an arbitrator must nonetheless solve the problem before him.<sup>16</sup> As Cox put it, “the labor arbitrator necessarily pours meaning into the general phrases and interstices of a document written somewhat in the generalities of basic regulatory legislation”.<sup>17</sup> This flexible conception of the role of the arbitrator alarmed some distinguished labour scholars of the day. For example, both Clyde Summers and Alfred Blumrosen argued for a more judicial and rights-based approach to labour arbitration and a more prominent role for courts in acknowledging and enforcing individual employee entitlements.<sup>18</sup> But it was the pluralist view that carried the day in the US courts. In a set of cases decided in 1960 which has become known as the *Steelworkers Trilogy*,<sup>19</sup> the US Supreme Court endorsed labour arbitration as the preferred mechanism for dispute settlement in unionized workplaces. Even more to the point, it embraced the metaphor of “industrial self-government” and the Shulman/Cox view of the role of the arbitrator. The Court eulogized arbitration as “part and parcel of the collective bargaining process itself”,<sup>20</sup> and accepted that “[t]he processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective agreement.”<sup>21</sup> As the Supreme Court put it, a collective agreement is “more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate”.<sup>22</sup> Arbitrators charged with enforcing collective agreements must do more than simply “read” contract language: “The labor arbitrator’s source of law is not confined to the express provisions

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<sup>16</sup> I use the gendered pronoun advisedly. In the pluralist writings, the ideal arbitrator is unquestionably a “wise man”, a phrase which appears with some regularity.

<sup>17</sup> Cox, *The Legal Nature of Collective Agreements*, *supra* note 11 at 23

<sup>18</sup> E.g. Clyde Summers, “Union Powers and Workers’ Rights” (1951) 49 Mich. LR 805 [“Union Power”]; --- “Individual Rights in Collective Agreements and Arbitration” (1962) 37 NYULRev. 362; Alfred Blumrosen, “Group Interests in Labor Law” (1958-1959) 13 Rutgers L.Rev. 432; --- “Legal Protection for Critical Job Interests: Union-Management Authority versus Employee Autonomy” (1959) 13 Rutgers L.Rev. 631.

<sup>19</sup> *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The *Trilogy* established that where there is an arbitration clause in a collective agreement, the role of the courts under §301 of the NLRA was to issue an order compelling the parties to arbitrate, rather than deal with the dispute on the merits. The cases are discussed in Stone, “The Post-War Paradigm in American Labor Law”, *supra* note 10; --- “The Steelworkers’ Trilogy: The Evolution of Labor Arbitration” in Laura Cooper and Catherine Fisk, eds., *Labour Law Stories* (Foundation Press, 2005); David Feller, “A General Theory of the Collective Bargaining Agreement” (1973) California L. Rev. 663

<sup>20</sup> *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* note 19 at 578

<sup>21</sup> *Ibid.* at 581

<sup>22</sup> *Ibid.* at 578

of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.”<sup>23</sup> While this role puts pressure on arbitrators, the court observed that “[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.”<sup>24</sup> If the arbitrator did not have such knowledge and judgment to bring to his task, the parties had only themselves to blame, since they chose him in the first place and could dismiss him if he did not meet their needs.

## **2. INDUSTRIAL SELF-GOVERNMENT AND THE ROLE OF THE ARBITRATOR: CANADIAN VERSION**

As we have seen, under US law, arbitration was simply one of a number of mechanisms available to the parties for the resolution of rights disputes. Parties could custom-design their arbitration clauses to cover some, all or none these disputes. Disputes which were not arbitrable could be resolved by industrial action. Collective agreements often placed limitations on the right to strike while the agreement was in effect, but such limitation were created through collective bargaining; they were not imposed by the statute.<sup>25</sup> The parties could also bargain a resolution at any time. Unions could bring employers to the bargaining table using industrial action, and the *Wagner Act* added a new tool, the statutory duty to bargain. US courts gave that duty very broad reach, ruling that it applied not just when the agreement was being formally negotiated, but also during its the term, at least with respect to matters not already covered.<sup>26</sup>

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<sup>23</sup> *Ibid.* at 581 – 2.

<sup>24</sup> *Ibid.*

<sup>25</sup> This is generally true with two qualifications. First, 1947 amendments to the Wagner Act imposed statutory restrictions on some types of strikes, although they did not purport to regulate recognition strikes or mid-contract strikes protesting unilateral management action. Second, courts tended to read no-strike commitments into collective agreements with broad arbitration clauses: see *Teamsters, Local 174 v Lucas Flour*, 369 U.S. (1962) and Stone, “The Post-War Paradigm in American Labor Law”, *supra* note 10 at 1538 – 1541.

<sup>26</sup> See Cox & Dunlop, “The Duty to Bargain Collectively During the Term of an Existing Agreement”, *supra* note 11.

In Canada, the legal framework for collective bargaining gave the parties much less control over dispute resolution. There were three critical differences.<sup>27</sup> First, the arbitration of rights disputes was (and is) effectively compulsory in Canada. Post-war Canadian labour statutes required the parties to provide mechanisms in their collective agreements for the resolution of rights disputes. Some statutes specifically mandated arbitration; while others appeared to leave more options by requiring "arbitration or otherwise", arbitration was almost invariably chosen.<sup>28</sup> Statutes backed up these mandates with either arbitration clauses "deemed" to be included in collective agreements that failed to provide for comprehensive dispute settlement, or power in the labour board to order such clauses.<sup>29</sup> Ontario's *Labour Relations Act* mandated that arbitration deal with "all differences 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"; other provinces used similar language.<sup>30</sup> The scope of arbitration was therefore effectively

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<sup>27</sup> These differences are discussed in detail in James K. Hayes, *Perspectives on Management Rights: The Curious Logic of the Argument for Reducing Industrial Discord by Removing the Mid-term Strike Bar from Labour Relations Legislation* (Don Mills: Ontario Federation of Labour, 1974) at 39 – 52. Hayes was a law student at the time he wrote this wide-ranging and sophisticated paper.

<sup>28</sup>For a detailed review of early statutory provisions dealing with rights dispute resolution in Canada, see A.W.R. Carrothers, *Labour Arbitration in Canada: A Study of the Law and Practice Relating to the Arbitration of Grievance Disputes in Industrial Relations in Common Law Canada* (Toronto: Butterworths, 1961) at 18 – 36. See also Bora Laskin, "Problems of Procedure and Proof in Labour Arbitration" (1962) 5 Can. Pub. Admin 76 at 77 – 79. Laskin dates the introduction of compulsory arbitration in Canada to PC 1003, the federal war-time Order in Council which set the stage for Wagner Act-type collective bargaining in Canada (77).

<sup>29</sup> Carrothers, *ibid.* at 26. Typical of these "deeming" provisions is the detailed language now found in s.48 of *Ontario's Labour Relations Act, 1995*:

(2) If a collective agreement does not contain a provision that is mentioned in subsection (1), it shall be deemed to contain a provision to the following effect:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appointment of the second of them, appoint a third person who shall be the chair. If the recipient of the notice fails to appoint an arbitrator, or if the two appointees fail to agree upon a chair within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it. The decision of a majority is the decision of the arbitration board, but if there is no majority the decision of the chair governs.

<sup>30</sup> Carrothers, *ibid.* at 25.



defined by statute. Subsequent case law made it clear that the parties were not permitted to bargain to exclude any such “differences” from the scope of arbitration.<sup>31</sup>

The second critical difference relates to the role of strikes. Even in jurisdictions which did not formally require the parties to employ arbitration as their dispute resolution mechanism, Canadian labour statutes made it clear that rights disputes must be resolved “without stoppage of work”; the strike was not a permissible option. To make this even clearer, the requirement to provide for dispute resolution “without stoppage of work” was explicitly backed up by deemed “no strike” clauses in collective agreements and statutory provisions prohibiting strike action during the term of an agreement.<sup>32</sup> In sharp contrast, as we have seen, the *Wagner Act* contained no such prohibition; both the existence and the scope of no-strike clauses were negotiable in US collective agreements.

Third, there were critical differences in the scope and application of the duty to bargain. In Canada, the duty to bargain was both broader and narrower than in the US. Ontario’s statute, which was reasonably typical, required bargaining over all “terms and conditions of employment”, including “the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees”; other provinces adopted similar provisions.<sup>33</sup> Based on this broad language, Canadian law has never adopted the US distinction between mandatory and permissive topics for bargaining, which means that unlike in the US, Canadian employers can be required to bargain over any topic that may lawfully be included in a collective agreement, including issues which are permissive only in the US.<sup>34</sup> However, unlike under US

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<sup>31</sup> This principle was confirmed by Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42 at para. 35. The principle had been recognized much earlier by arbitrators and lower courts: see, for example *Toronto Hydro-Electric System and CUPE, Local 1 (Re)*(1980), 29 O.R. (2d) 18, 111 D.L.R. (3d) 693 (Div. Ct.), affd 30 O.R. (2d) 64n, 113 D.L.R. (3d) 512n (C.A.), leave to appeal to S.C.C. refused 35 N.R. 210n.

<sup>32</sup> There is a cross-Canada review of the provisions of provincial and federal labour codes related to the strike ban in Hayes, *Perspectives on Management Rights*, supra note 27 at 66 – 79. At that time, Saskatchewan did not have a statutory strike ban; Saskatchewan has since fallen into line with other provinces on that issue. The OFL paper discusses the availability of general re-openers and statutory provisions requiring bargaining over technological change. See also *Woods Report*.

<sup>33</sup> This language comes from the definition of “collective agreement” in Ontario’s *Labour Relations Act*; case law took this definition as establishing the required scope of bargaining. For a review of relevant language in other Canadian jurisdictions, see The Hon. George W. Adams, *Canadian Labour Law*, 2d ed (Carswell, loose leaf), 10:1640 – 50.

<sup>34</sup> In the US, parties may not be forced to bargain over “permissive” topics, although such topics may be addressed in collective agreements: *N.L.R.B. vs. Borg-Warner Corp.* (1958) 356 U.S. 342. In the “permissive” category are

law, under Canadian law the duty to bargain operates only during periods when the contract is open: i.e. at the commencement of a bargaining relationship, and again when the agreement comes up for renewal. It does *not* continue during the life of the agreement; subject to overriding statutory obligations, the parties must live with whatever deal they made as long as the collective agreement continues in effect. They may, of course, change provisions of the agreement by mutual consent, but the statute does not lend any aid if one party or other refuses to come to the table.

These differences are significant in regulating the distribution of power between union and management, since they limit the tools available to Canadian unions for influencing employer decision-making during the life of the agreement. In the US, parties bargain about how much of their working lives will be governed by the collective agreement, and how much will not. If the parties have agreed to leave certain issues outside the scope of their collective agreements, there are options for resolving disputes about those issues which are compatible with the *Wagner Act* and the concept of industrial self-government. If management engages in unacceptable conduct in an area in which there is a genuine lacuna in the agreement, the union can bring the employer to the bargaining table to discuss the matter or mount a strike if the matter is not resolved. Neither of these options is available in Canada. If disputes prove to be inarbitrable, the union has no lawful recourse until the agreement opens again for bargaining. The stakes around the scope of arbitration and concept of arbitrability are therefore very high in Canada. In the next part, I discuss how arbitrators typically approached that question.

### **3. THE CONCEPT OF ARBITRABILITY AND POWER OF MANAGEMENT**

#### **a) “Reserved Rights” Theory v. “Joint Sovereignty” Theory**

The *Trilogy* did not put an end to the US debate about the proper role of the arbitrator. In 1963, legal philosopher Lon Fuller weighed into the fray with an article contrasting two opposing conceptions of the arbitrator: the arbitrator as “judge”, and the arbitrator as “labour relations physician”, a thin disguise for the pluralist arbitrator embraced by the *Trilogy*, of whom he clearly disapproved.<sup>35</sup> (He described key passages of the Court’s judgments as relieving “by a single stroke .... the arbitrator-physician...both of the restraints of judicial office and of any

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matters regarded as inherent prerogatives of management. See James Atleson, *Values and Assumptions in American Labor Law* (Amherst: U.Mass Press, 1983) at 111 – 135.

<sup>35</sup> Lon F. Fuller, “Collective Bargaining and the Arbitrator” 1963 Wisconsin L. Rev. 3.

undue concern to find justification for what he does in the words of the agreement”.<sup>36</sup>) Fuller accepted – indeed lauded – the concept of industrial self-government,<sup>37</sup> but he also adhered to a quite traditional view of the rule of law. For that reason, he rejected key elements of the pluralist arbitration model, including what we would now call med-arb, and “the indiscriminate use of tripartism”.<sup>38</sup> He did not advocate rigid formalism; he saw adjudication as a “*social* process of decision”<sup>39</sup> and rejected the “stiffly literal judge” along with “[t]he mediating form-free arbitrator”.<sup>40</sup> Ultimately, however, he believed that “[t]he morality of arbitration lies in a decision according to the law of the contract.”<sup>41</sup>

But abstract pronouncements such as these did not go far towards resolving the problem of how arbitrators should tackle workplace disputes. As Fuller himself pointed out, the debate between pluralists and more conservative scholars and arbitrators lay not just in opposing conceptions of the arbitral role, but also in opposing conceptions of how to determine “the law of the contract” within the collective bargaining context. At the core of this debate was the question of what arbitrators should do when faced with matters which were not explicitly governed by rules set out in the agreement. Were such matters arbitrable or inarbitrable under conventional arbitration clauses requiring arbitrators to deal with matters involving the interpretation, application or alleged violation of the agreement? Even pluralists acknowledged that there were limits to arbitrability. The *Steelworkers Trilogy* established a presumption in favour of arbitrability: “An order to arbitrate a grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favour of coverage.”<sup>42</sup> But a presumption is only a presumption; the Court also firmly asserted that “an arbitrator is confined to interpretation and application of the collective agreement. He does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only as it draws its essence from the collective bargaining agreement.”<sup>43</sup> At least after the *Trilogy*, US courts took a

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<sup>36</sup> *Ibid.* at 6.

<sup>37</sup> Fuller described “our system of industrial self-government is one of the finest expressions of the American genius for political arrangements”: *ibid.* at 45.

<sup>38</sup> *Ibid.* at 38.

<sup>39</sup> *Ibid.* at 41 [emph. in original].

<sup>40</sup> *Ibid.* at 44.

<sup>41</sup> *Ibid.* at 24.

<sup>42</sup> *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* note 19. at 587 – 8.

<sup>43</sup> *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra* note 19 at 597.

relatively hands-off approach to determining questions of arbitrability. It then fell primarily to arbitrators to develop principles for determining whether grievances fell within the scope of arbitration clauses. Inevitably, whether they were “arbitrator-judges”, “labour relations physicians” or something in between, they brought to their task certain preconceptions and assumptions about the broader meaning of collective bargaining frameworks and the distribution of power under collective bargaining regimes which influenced their treatment of that issue.

These assumptions and preconceptions can be grouped into two very broad categories: the “reserved rights” school, and the “joint sovereignty” school.<sup>44</sup> Hard-line reserved rights theorists saw collective bargaining as an encroachment on management’s inherent powers. They took a narrow and literal view of their authority (their “jurisdiction”) to intervene in management decisions in order to adjust workplace disputes. They placed the burden on unions to demonstrate – typically by pointing to express terms in the collective agreement – that the employer had intended to cede any of its rights before they would find restrictions on management conduct. Both before and after the *Trilogy*, reserved rights theory was widely applied and stoutly defended by many US arbitrators.

By contrast, “joint sovereignty” theory placed unions on a level playing field with employers for the purposes of establishing the rules governing the workplace. This was the view of the pluralists, consistent with their general concept of collective bargaining as a process of self-government.<sup>45</sup> However, it is important to understand that “joint sovereignty” did not mean that union and employer had equal *power* in the workplace; it meant only that how power would be shared was an issue to be determined by the parties through collective bargaining. It was up to the parties to agree on whether and what matters would lie exclusively in the hands of the employer, and what matters would lie within the realm of joint responsibility. Each agreement might draw that boundary differently; part of the task of the arbitrator was to locate it and

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<sup>44</sup> For a discussion of these general arbitral philosophies, see Brian Langille, “Equal Partnership in Canadian Labour Law” (1983) 21 Osgoode Hall L.J. 496; David Beatty, “The Role of the Arbitrator: A Liberal Version” (1984) 34 U Toronto LJ 136; David Beatty & Brian Langille, “Bora Laskin and Labour Law: From Vision to Legacy” (1985) 35 U.T.L.J. 672; and Andrew Goldsmith, “The Management-Control Collective Bargaining Relationship: Three Models” (1986) 24 Osgoode Hall L.J. 775. Arbitral philosophies exist on a continuum, and some scholars identify the middle ground as a third school.

<sup>45</sup> Pluralist literature uses the phrases “joint sovereignty”, “joint government” and “joint responsibility” apparently interchangeably. The pluralist approach is also known as “equal partnership” theory, although that term is not used in pluralist writing.

determine on which side of the boundary the issue before him fell.<sup>46</sup> As Cox put it, arbitrators must examine the collective agreement and determine what model of governance the parties had chosen: “Is it a monarchy except insofar as the employer has assumed the obligations explicitly stated or fairly implied from the contract? Or has the whole realm of matters of mutual concern to employer and employees been brought under the joint authority of the company and the union...?”<sup>47</sup> Or did it fall somewhere in between, perhaps creating a “constitutional monarchy”?

The difference between reserved rights and pluralist approaches is well illustrated by how they viewed “silence” in a collective agreement. As Canadian pluralist Bora Laskin put it, “[w]ords of an agreement which speak loudly and liberally to one arbitrator may be palls of silence to another.”<sup>48</sup> For reserved rights arbitrators, “silence” was deafening; at least, it deafened them to union grievances. If the agreement did not explicitly address the issue, the grievance was dismissed as inarbitrable. Pluralist arbitrators took a more nuanced approach. First, they were less likely to find “silence” in an agreement, since their method permitted them to find meaning where reserved rights theorists would find none. They were more attuned to meanings implied by the collective bargaining framework. This was particularly evident in their views on how arbitrators should treat existing benefits and practices. Cox and Dunlop argued for a rule that “[a] collective agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment which prevailed when the agreement was executed.”<sup>49</sup> Reserved rights theorists, by contrast, insisted that terms and conditions not directly reflected in the language of the agreement remained within the realm of management prerogative, making unilateral change unchallengeable by a union and unreviewable by an arbitrator.

In practice, there was less difference between the two schools than would appear on the surface. Like other arbitrators, the pluralists brought interpretive assumptions to bear on their case-by-case determination of where parties had placed the boundary between shared and exclusive responsibility. Some of those assumptions bear more than a family resemblance to reserved right theory. Cox and Dunlop saw potential topics for bargaining as falling into conventional

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<sup>46</sup> Cox, “The Legal Nature of the Collective Agreement”, *supra* note 11 at 25 – 36.

<sup>47</sup> *Ibid.* at 30.

<sup>48</sup> Bora Laskin, “Problems of Procedure and Proof in Labour Arbitration” (1962) 5 Can. Pub. Admin 76 at 85

<sup>49</sup> Cox & Dunlop, “The Duty to Bargain”, *supra* note 11 at 1116 – 1120.

categories which included some understood to be “matters for joint-union management determination”, but also some about which “it is generally agreed that management shall have exclusive responsibility”, such as type of product, pricing policies, the location of plants, and somewhat puzzlingly, “the assignment of workers”.<sup>50</sup> They accepted that the boundaries between these categories were “being continuously defined by the give-and-take of collective bargaining”,<sup>51</sup> and would vary from shop to shop and industry to industry. But they also accepted that where the parties had cabined off an area for management prerogative, the arbitrator’s writ did not run. In areas marked off by the collective agreement for joint determination, arbitrators were free to draw on “the common law of the shop” to resolve disputes. But the “common law of the shop” played no role in regulating exercises of management rights within its prerogative area. It also played no role in determining how big or how small that area was. Cox conceded that “[i]n this sense, the management-rights theory seems sound”.<sup>52</sup>

In its purest form, reserved rights theory posited that management rights as inherent in the employment relationship; neither their existence nor their range depended on the inclusion of a management rights clause in a collective agreement. Arbitrators who took this view acknowledged, however, that was open to the parties to agree that matters “naturally” located among the prerogatives of management were subject to the collective agreement; indeed, this was the essence of the theory. For both schools, then, the language of the agreement was important. In response to evolving arbitral jurisprudence, parties often attempted to define the boundaries between employee rights and management prerogatives with some precision in management rights clauses. They sometimes added so-called “zipper clauses” for good measure, which declared that the written agreement constituted the full agreement between the parties. Armed with explicit language in the collective agreement, US arbitrators of both schools could find and enforce areas of reserved management rights without abandoning their very different theoretical postulates.

## **b) The Entrenchment of Reserved Rights Theory In Canada**

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<sup>50</sup> Cox & Dunlop, “Regulation of Collective Bargaining”, *supra* note 8 at 401 – 2. They also posited a third category, “matters within the exclusive control of the union”, which included internal union membership issues.

<sup>51</sup> *Ibid.* at 406.

<sup>52</sup> Cox & Dunlop, “The Duty to Bargain Collectively”, *supra* note 11 at 34-5.

Reserved rights theory was not smoothly portable to Canada. In the US, it protected room for unilateral employer action in managing the workforce. But it was hedged in by the continuing duty to bargain and the right – perhaps more apparent than real, but important as a safety-valve nonetheless – to strike over issues not dealt with in the collective agreement. In Canada, it played a more significant role, since the consequences of a finding of inarbitrability left unions and their members high and dry at least until the next round of bargaining. The implications for the distribution of workplace power of importing a reserved rights approach into Canada’s legal framework did not go entirely unnoticed. Paul Weiler denounced Canada’s current legal rules on these issues as “radically deficient because they do not allow the interests of union and employees a fair access to the decision-making process.”<sup>53</sup> Those rules, Weiler argued, “forced [arbitrators] to uphold the management claim to unilateral, residual rights”. This in turn disadvantaged unions in bargaining; when rights are consecrated as inherently belonging to management, it is “harder, psychologically, for management to agree to limitations on those rights.”<sup>54</sup> Weiler favoured Fuller’s model of arbitration, but packaged his apologia for that model with a strong plea for law reform measures in Canada which would make the duty to bargain continuous, and relieve unions of the no-strike bar during the life of the agreement if the parties could not negotiate solutions for problems not currently addressed in the agreement. As we know, Canada did not get law reform, but the majority of Canadian arbitrators accepted reserved rights theory as the correct interpretive stance nonetheless.

Canada did have distinguished arbitrators who pushed back against reserved rights theory. Most prominent among them was Bora Laskin, law professor, arbitrator and ultimately Chief Justice of the Supreme Court of Canada. Laskin was a student at Harvard Law School at the same time as Archibald Cox, and had clearly absorbed a similar philosophy of collective bargaining. His debt to the US pluralists is visible in the 1953 decision in *International Chemical Workers Union, Local 279, in re Rexall Drug Co. Ltd.*,<sup>55</sup> where he chaired the board of arbitration. *Rexall* involved a set of four termination grievances which challenged the employer’s mandatory retirement policy. That policy was part of the workplace pension plan, which like many such plans had not been made part of the collective agreement, although the union had tried to “draw

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<sup>53</sup> Paul Weiler, “The Role of the Labour Arbitrator: Alternative Versions” (1969) 19 U Toronto LJ 16 at 44.

<sup>54</sup> *Ibid.* at 44.

<sup>55</sup> (1953), 4 L.A.C.1468 (Laskin)

[it] into the orbit of collective relations through suggested improvements in benefits”.<sup>56</sup> Two of the terminated employees qualified for pension, and two did not because they had not been employed long enough to be eligible for plan membership. The union argued that the forced retirements violated the seniority and just cause provisions of the agreement.<sup>57</sup>

An issue very like *Rexall*'s had earlier been analysed by Cox and Dunlop. In a 1949 article, they hypothesized a situation in which the collective agreement is silent with respect to the workplace pension plan, and discussed from a variety of theoretical perspectives the question of whether the employer could unilaterally establish a new pension plan or change an existing plan. Reserved rights theorists, they argued, would see this as a situation in which “an employer would be free to establish a pension plan during the term of a collective agreement without consulting the union; if there was an existing plan, not covered by the agreement, he might modify it or terminate it at will”.<sup>58</sup> Those who favoured joint sovereignty at the extreme end of the spectrum – the view that terms and conditions of employment were open to continuous collective bargaining – would hold that the employer could not act without putting the issue on the bargaining table or sending it to interest arbitration without regard to the status quo. The authors rejected both positions and espoused what they characterized as a middle ground: “the parties to a comprehensive collective agreement, in the absence of contrary evidence, are to be presumed to have executed the agreement upon the understanding that major conditions of employment not covered by the agreement will continue ‘as they were’ unless changed by mutual agreement.”<sup>59</sup> Applying this approach to the pension problem, they argued that an existing pension plan could continue even though it had been unilaterally established, but any such plan could neither be terminated nor changed except through collective bargaining. If the parties had limited their arbitration clause to exclude pension issues, they emphasized that the union would have recourse to an unfair labour practice complaint if the employer acted unilaterally.

Laskin's *Rexall* decision follows the Cox and Dunlop approach to the letter. His arbitration board held that although the pension plan had been unilaterally established by the employer, it could not be disregarded. Since it was “known to the employees and to the Union prior to the execution

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<sup>56</sup> *Ibid.* at 1469

<sup>57</sup> The decision makes no reference to the management rights clause except to note that the agreement contained “the usual provisions respecting Management rights”: *ibid.* at 1468.

<sup>58</sup> Cox & Dunlop, “The Duty to Bargain Collectively”, *supra* note 11 at 1117 – 8.

<sup>59</sup> *Ibid.*, 1118



of the first Collective Agreement between the Union and the Company”<sup>60</sup>, it should be presumed that the collective agreement was intended to allow for its terms, provided those terms were not inconsistent with the terms of the agreement.<sup>61</sup> The decision made it clear, however, that this presumption applied only to plans that *pre-dated* collective bargaining. No such presumption would protect employer unilateral action once the union acquired bargaining rights; “[i]f the company had sought to introduce a compulsory retirement policy unilaterally after the advent of the Union, then clearly no force could be given to it.”<sup>62</sup> In the result, Laskin and his fellow arbitrators found the mandatory retirement policy consistent with the job security provisions of the agreement for employees able to retire on pension, but *not* for those who were not part of the plan. This meant that the pensionless employees were entitled to reinstatement.<sup>63</sup> The board noted that if there had been evidence of unjust or unreasonable treatment of those who got pensions, they too would have been entitled to reinstatement.

Laskin labored doggedly to sell this pluralist approach to Canadian arbitrators. In *Peterboro Lock*, a case challenging an employer’s decision to pay for certain work at a straight hourly rate rather than at the incentive rate established for the job, he articulated an arbitral philosophy closely resembling that of the US pluralist scholars: “[I]t 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”. He insisted that “[t]he 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”. It was not appropriate, Laskin argued, to transpose the old rules of the common law into the new world of collective bargaining: “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

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<sup>60</sup> *Rexall*, *supra* note 55 at 1468.

<sup>61</sup> *Ibid.* at 1468-9.

<sup>62</sup> *Ibid.* at 1470.

<sup>63</sup> *Ibid.* at 1469.

meaning to the Collective Agreement on which it is based”.<sup>64</sup> Applying this philosophy to the problem before him, Laskin concluded that the employer could not ignore an incentive rate which had been worked out in accordance with a negotiated procedure, even though the agreement itself did not establish the rate. Five years later in *Falconbridge*, a contracting out case, he reiterated his *Peterboro Lock* philosophy and went on to emphasize that collective agreements must be interpreted in light of their purposes, in the context both of the statutory framework for collective bargaining (which he described as “the policy umbrella sheltering collective agreements”), and the common law of the shop.<sup>65</sup>

Laskin’s efforts to stem the tide of reserved rights theory in Canadian arbitration practice ran up against some powerful adversaries, including the editors of the *Labour Arbitration Cases*, at that time the only reporter of arbitration decisions in Canada. Although the early case law by no means unequivocally favour reserved rights, LAC editors did not hesitate to headnote published decisions with editorial notes containing such sweeping pronouncements as “[g]enerally speaking management rights which must extend to delimiting the duties of the various classes of employees are paramount and only to be restricted in so far as the collective agreement effectively cuts them out”<sup>66</sup>; “contracting out is a normal and customary management function in operating and managing a business and, therefore, to take it out of that category an exception must be shown to exist in the terms of the bargaining agreements”;<sup>67</sup> and “[w]here management rights are restricted in a collective agreement the words of limitation must be unequivocal”.<sup>68</sup> Laskin’s decisions attracted particularly acerbic “editor’s notes” which emphasized how far out of line his views were thought to be. Typical is the note to *Falconbridge*, in which the editor’s exasperation is palpable beneath the somewhat turgid prose:

The elaborate philosophical dissertation, entirely obiter, on the theories upon which these contracting-out situations have been worked out in awards which, despite careful analysis, still seem to be irreconcilable, is no doubt interesting. Nevertheless this obiter still seems to be merely another voice supporting what appears to be a minority position. Perhaps what appears to be an apologia for an abortive attempt to introduce nebulous

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<sup>64</sup> *United Electrical, Radio & Machine Workers of America, Local 527, In re Peterboro Lock Mfg. Co. Ltd.*, (1954) 4 L.A.C. 1499 at 1502.

<sup>65</sup> *Re Sudbury Mine, Mill and Smelter Workers, Local 598 & Falconbridge Nickel Mines Ltd.*, (1958) 8 L.A.C. 276 (Laskin) at 252 – 3.

<sup>66</sup> *Re Oil, Chemical & Atomic Workers, Local 16-351 & Fiberglas Ltd.*, (196) 6 L.A.C.322 (Laskin)

<sup>67</sup> *Re United Automobile Workers, Local 222 & General Motors Ltd.*, (1958) 8 L.A.C. 90 (Cross)

<sup>68</sup> *Re United Automobile Workers, Local 676 & Hayes Steel Products Ltd.*, (1958) 8 L.A.C. 149 (Cross)

principles such as the climate of labour-management relations and a common law of labour arbitration awards, may afford a reason for the elaboration of the obiter. We doubt, however, whether it will win many converts among the chairmen who, by their awards, have demonstrated dissentient views.<sup>69</sup>

Ultimately Laskin could not sell the pluralist approach to the cadre of established arbitrators in Canada. The decision of an arbitration board chaired by Harry Arthurs, *Re United Steelworkers of America and Russelsteel Ltd.*<sup>70</sup> marked the watershed. *Russelsteel* dealt what was by then a recurring issue: a union challenge to contracting out under a collective agreement which contained no express provision barring the practice. The decision laid out the two poles of the debate on how arbitrators should approach this problem: the “reserved rights” school “which permits contracting-out in the absence of some express prohibition in the collective agreement” and the Laskin/pluralist school which mandates that the issue must be determined by reference to the climate of collective bargaining.<sup>71</sup> The Arthurs board begins its own analysis by reproaching arbitrators for bringing philosophical perspectives to bear on arbitration problems, an approach “which may preclude the pragmatic and realistic solutions to particular problems which would be of most assistance to labour and management in a given bargaining relationship”.<sup>72</sup>

Notwithstanding its repudiation of philosophy, however, the board does not immediately embark on an assessment of the concrete problem in the *Russelsteel* workplace. Instead, it declares the arbitral debate on the contracting out issue now closed, and announces a winner: the “reserved rights” approach. The board reaches that conclusion by deftly turning Laskin’s famous phrase, “the climate of collective bargaining”, against the pluralist position. Tabulating prior arbitration decisions, it found that the tide had turned so decisively against Laskin’s position on contracting out that the reserved rights view must now be regarded as part of “the climate of collective bargaining”. Accordingly, parties must be deemed to negotiate in the knowledge that as a practical matter, arbitrators would permit contracting out unless there was express language in the agreement to the contrary. The arbitration board then analysed the issue before it from a reserved rights perspective; unsurprisingly, the grievance was dismissed.<sup>73</sup>

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<sup>69</sup> *Falconbridge*, *supra* note 64 at 276.

<sup>70</sup> *Re United Steelworkers of America and Russelsteel Ltd.*, (1966) 17 L.A.C. 253 (Arthurs)

<sup>71</sup> *Ibid.* at 255. The decision acknowledged that the Laskin view was “widely accepted in labour arbitration in the United States”

<sup>72</sup> *Ibid.* at 254 – 5.

<sup>73</sup> The decision concluded on the cautious note that “no argument was advanced to us that the violation might consist in failing to bargain with the union beforehand, rather than is the very act of contracting out, cf. *Fibreboard Paper*

Although *Russelsteel* itself was never formally endorsed by the Supreme Court, it met a highly receptive audience among Canadian arbitrators. In a 1985 article, Gordon Simmons credited the decision with entrenching reserved rights theory in Canadian law, asserting with only slight exaggeration that after *Russelsteel*, “[a]rbitrators, without exception, apply the management rights theory notwithstanding frequent attempts by union counsel and representatives to have it sidetracked in favour of equal rights theory.”<sup>74</sup> Brown & Beatty’s *Canadian Labour Arbitration*, the arbitrators’ *vade mecum*, confirms this point of view.<sup>75</sup>

#### 4. SOME CONTRADICTIONS WITHIN THE CANADIAN MODEL

A number of contradictions have resulted from the embrace by Canadian arbitrators of reserved rights theory. The first is a doctrinal inconsistency between arbitrators’ treatment of substantive and remedial issues. When applied to substantive rights and responsibilities, arbitrators generally rejected Laskin’s philosophy that lacunae in a collective agreement should be interpreted in accordance with “the climate of collective bargaining”. They were much more amenable to taking up his purposive and contextual approach to developing remedies. In a much-cited decision in *Re Oil, Chemical & Atomic Workers & Polymer Corp. Ltd. Polymer*<sup>76</sup>, an arbitration board chaired by Laskin rejected the argument that arbitrators could not award damages unless specifically empowered to do so by the collective agreement. That argument – ironically made by union counsel, since the case involved a claim for damages against the union resulting from an unlawful strike – was a classic reserved rights argument which framed the issue are

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*Products v N.L.R.B.* (1964), 379 U.S. 203”: *ibid* at 260. The reference is to a decision of the US Supreme Court holding that contracting out was a mandatory subject of bargaining and under that country’s continuous duty to bargain, unilateral contracting out violated the duty to bargain. There is, of course, no such continuous duty to bargain in Canada.

<sup>74</sup> Gordon Simmons, “Arbitral Stare Decisis: An Unheralded but Important Doctrine in Canadian Arbitral Jurisprudence” (1985-1986) 11 QLJ 347 at 347. Interesting, the *Russelsteel* decision itself somewhat disingenuously claims to “take no general position on the “reserved rights” controversy”: *supra* note 70 at 259.

<sup>75</sup>“Indeed, it is now generally conceded that whether or not an express provision giving management the power to initiate such changes is included in the agreement, management nevertheless possesses this power or ability to initiate such changes. Very simply, arbitrators have recognized that such authority flows from management’s responsibility to manage the enterprise”: Donald Brown & David Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> ed. (Carswell, 2006, looseleaf) at 5:0000.

<sup>76</sup> *Re Oil, Chemical & Atomic Workers & Polymer Corp. Ltd.* (1959), 10 L.A.C. 51 (Laskin); *aff’d Re Polymer and Oil, Chemical and Atomic Workers’ Union, Local 16-14* [Polymer HC], [1961] O.J. No. 526 (H.C.); *aff’d Re Polymer and Oil, Chemical and Atomic Workers’ Union, Local 16-14*, [1961] O.J. No. 554 (C.A.); *aff’d Imbleau v Laskin*, [1962] S.C.R. 338. Laskin’s arbitration decision has been described as “one of the most powerful opinions in the history of Canadian labour arbitration”: Paul Weiler, “The Remedial Authority of the Labour Arbitrator: Revised Judicial Version” (1974), 52 Can Bar Rev 29 at 31. See also *Heustis v. N.B. Elect. Power Commis.*, [1979] 2 SCR 768, 1979 CanLII 26 (SCC)

jurisdictional issue. As the board explained, “Counsel emphasized that the collective agreement is a product of voluntary action, and the parties cannot be deemed to have committed themselves beyond that which they expressed in their contractual undertakings.” Laskin refused to characterize the question of remedial authority as jurisdictional; as long as the dispute was properly before the board on its merits, his view was that “[t]he assessment of damages consequent on a finding of a breach of obligation resulting in compensable loss is a matter of the board’s powers. The silence of the collective agreement on a board’s remedial authority can no more be taken as excluding such authority than can its silence on procedure be taken to thwart the board in proceeding with a hearing on the merits of the case committed for its determination”.<sup>77</sup> As he saw it, an arbitrator’s power to award remedies, like an arbitrator’s power to conduct a hearing, was inherent in the statutory framework, which contemplated that arbitration would efficaciously and completely resolve disputes. Importantly, Laskin insisted that the statutory framework endowed arbitrators with full remedial power *irrespective of the intention of the parties*; parties could not lawfully qualify that authority through collective bargaining even if they wished to do so.<sup>78</sup> On judicial review, the court, including the Supreme Court of Canada, upheld this decision. The High Court relied heavily, as had the arbitration board, on the statutory framework in concluding that remedial power was implied.<sup>79</sup> The Court of Appeal likewise went out of its way to emphasize the “compulsory” nature of the statutory framework within which arbitrators functioned.

Courts who appeared quite comfortable with implied terms when it came to matters of remedy nevertheless accepted reserved rights theory on issues of substantive rights. This dichotomy, never explained in the jurisprudence, created even more fundamental contradictions.<sup>80</sup> Reserved rights theory is not easy to reconcile with the fundamental statutory requirement that employers

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<sup>77</sup> *Ibid.* at 54

<sup>78</sup> *Ibid.* at 59.

<sup>79</sup> *Polymer HC*, *supra* note 76 at para. 22. To be sure, it also agreed with the union that arbitral jurisdiction depended on the language of the agreement and the intention of the parties, a conclusion inconsistent with Laskin’s reasoning.

<sup>80</sup> Paul Weiler attempted an explanation of this dichotomy in “The Remedial Authority of the Labour Arbitrator”, *supra* note 76 at 32 – 36. He argued that what he called arbitral “creativity” was justified in relation to remedies (and procedural issues) because most agreements were silent on these issues, there were ready sources of analogy in the common law, and the issues were “neutral”, in that creativity had equal impact on unions and employers. While his argument may explain why a creative approach on remedial and procedural issues is more acceptable to management, it is unpersuasive as a justification for placing remedial and procedural issues on different conceptual ground than substantive issues.

must recognize the union as bargaining agent, a requirement I have elsewhere called the “recognition rule”.<sup>81</sup> Whether or not all terms and conditions of employment are comprehensively governed by the collective agreement at any given time, they are always governed by the recognition rule. In principle, then, where new terms and conditions have not already been addressed in collective bargaining, an employer should be obliged to deal with the union before imposing them.<sup>82</sup> But reserved rights arbitrators did not see it that way.

The difference between pluralist and reserved rights approaches to recognition rule problems is well illustrated by differing arbitral approaches to the issue of unilaterally established workplace pension plans which were not expressly acknowledged in the collective agreement. As we have seen, Laskin’s view was that once a union had acquired bargaining rights, new plans or plan changes could be implemented only through collective bargaining. A similar view is reflected in *Re Steinberg Inc., Miracle Food Mart Division and Teamsters, Local 419*,<sup>83</sup> an arbitration board chaired by George Adams addressed a challenge to the employer’s alteration of two existing pension plans which had been unilaterally established as voluntary plans with an employee contribution based on a percentage of earnings. Without bargaining with (or even advising) the union, the employer amended the plans to make membership compulsory for new employees. The collective agreement was silent on pension issues and the employer argued that the grievance was not arbitrable. In addition, it argued that requiring new employees to join the plan was not a term or condition of employment, but a “condition of hiring” and therefore not a matter over which the union had exclusive bargaining authority. The arbitration board began its analysis by observing that “[a] certified or voluntarily recognized trade union has the exclusive authority to negotiate terms and conditions of employment and therefore the collective agreement so negotiated, as a general matter, sets out all the terms and conditions of employment to which employee, trade union and employer are bound.”<sup>84</sup> Accordingly, “there can be no term or condition of employment, by contract of hiring or otherwise, existing outside the collective

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<sup>81</sup> See Elizabeth Shilton, “Enforcing Workplace Pension Rights for Unionized Employees: Is There a ‘Weber Gap’?” (2015) 19 CLELJ [forthcoming].

<sup>82</sup> See *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 at paras. 23 – 28; *Isidore Garon Ltée v. Tremblay*, [2006] 1 S.C.R. 27 at paras. 9 – 16.

<sup>83</sup> *Re Steinberg Inc., Miracle Food Mart Division and Teamsters, Local 419*, [1982] O.L.A.A. No. 105, 7 L.A.C. (3d) 289 (Adams)

<sup>84</sup> *Ibid.* at para. 33.

agreement to which the union has not agreed.”<sup>85</sup> The board could “see no justification for implying a management rights to make pay-roll deductions from employee wages for benefits management has unilaterally introduced”. Accordingly, it granted a declaration that the compulsory pension contributions violated the collective agreement.<sup>86</sup>

A very few other arbitrators have taken a similar approach.<sup>87</sup> Much more common, however, was the approach of the board of arbitration in *Re Palm Dairies and Retail, Wholesale and Department Store Union, Local 580*<sup>88</sup>, a case also dealing with a challenge to the employer’s right to impose mandatory membership in a contributory pension plan. Since membership in the plan had always been mandatory, the grievance raised a more fundamental issue than the *Steinberg* grievance – not simply whether the employer had the right to make unilateral changes in plan rules, but whether it had the right to establish a unilateral mandatory contributory plan in the first place. The board of arbitration dismissed the grievance. While it accepted the basic proposition that collective bargaining statutes did not permit employers to *negotiate* with individual employees, it held that the statutes did not bar them from *imposing* new terms and conditions of employment. The board did not rule out the possibility that the union might have a remedy at the labour board for violation of its recognition rights, but any such violation would not, in the board’s view, bring the issue within the purview of an arbitrator.<sup>89</sup> The board registered some discomfort at this conclusion, but claimed to have no choice: “the Supreme Court of Canada has decreed that employers retain certain residual rights that can be lost or compromised only through collective bargaining itself”, making residual rights theory the “law of the land”.<sup>90</sup>

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<sup>85</sup> *Ibid.* at para. 44.

<sup>86</sup> *Ibid.* at para. 45. It also held, however, the union was estopped from enforcing the declaration until the expiry of the current collective agreement because it had failed to grieve the unilateral imposition of the compulsory plan until several years after its implementation: *ibid.* at para. 53.

<sup>87</sup> E.g. see *Re Gray Forging & Stampings Ltd. and International Union of Electrical, Radio & Machine Workers Union, Local 557* (1978), 20 LAC (2d) 278 (Gorsky); *Re Consolidated-Bathurst Packaging Ltd. (Hamilton Plant) and Int’l Woodworkers of America, Local 6-29* (1980) 28 L.A.C. (2d) 230 (Brunner).

<sup>88</sup> *Re Palm Dairies and Retail, Wholesale and Department Store Union, Local 580*, [1980] BCCAAA No. 10; 26 LAC (2d) 414

<sup>89</sup> *Ibid.*, para. 89.

<sup>90</sup> *Ibid.* at paras. 109 - 13. The arbitration board relied on *Canadian Car & Foundry Company Limited v. Dinham and Brotherhood of Railway Carmen of America*, [1960] S.C.R. 3 and *Bell Canada v. Office and Professional Employees’ International Union, Local 131*, [1974] S.C.R. 335, both cases dealing with mandatory retirement. It might also have cited *Union Carbide Canada Ltd. v. Weiler et al.*, [1968] SCR 966, 1968 CanLII 26 (SCC) and *Port Arthur Shipbuilding Co. v. Arthurs et al.*, [1969] SCR 85, 1968 CanLII 29 (SCC).

In addition to the recognition problem, the existence of terms and conditions of employment outside the collective agreement – of which workplace pension plans are perhaps the most ubiquitous example – raises another important conceptual and practical issue: what legal status do such “orphan” rights have, and how can they be enforced? For employees who are not unionized, such terms would be regarded as terms of the individual contract of employment and enforced as a matter of contract law in the civil courts. But for unionized employees, there is no operating individual contract of employment as long as the union continues to hold bargaining rights. As the Supreme Court has made very clear in *Isidore Garon Ltée v. Tremblay*, any individual contract of employment is suspended as long as the union holds bargaining rights.<sup>91</sup> Deschamps J., speaking for the majority, held that the individual contract “cannot be relied on as a source of rights” as long as a union is the bargaining agent.<sup>92</sup> She expressly linked the suspension of the individual contract not simply to the existence of a collective agreement but more fundamentally, to the union’s exclusive bargaining rights: “[i]f the right claimed can be characterized as a condition of employment, it cannot be negotiated individually by the employer and the employee. The union alone performs this task, and it must do so for the employees collectively.”<sup>93</sup>

The Supreme Court’s rejection of the common law and the individual contract of employment leaves terms and conditions of employment created by employer fiat in legal limbo. If arbitrators applying reserved rights theory find disputes which involve terms and conditions of employment inarbitrable, courts cannot logically take jurisdiction to interpret and enforce them as a matter of the common law of contract. With respect to pension disputes, for decades courts simply ignored this problem, dealing with disputes involving unionized workplaces in much the same way as they dealt with such disputes in non-unionized workplaces. However, *Weber* and its progeny have now cast serious doubt on their jurisdiction to do so.<sup>94</sup> In the next part, I will discuss this issue together with the *Weber* case itself.

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<sup>91</sup> *Isidore Garon Ltée v. Tremblay*, [2006] 1 S.C.R. 27 at para. 27. For a discussion of this case, see Renee-Claude Drouin & Gilles Trudeau, “What Does *Isidore Garon* Mean for Arbitral Jurisprudence in Quebec?” (2006-2007) 13 CLELJ 347.

<sup>92</sup> *Isidore Garon*, *ibid.*

<sup>93</sup> *Ibid.* at para 25.

<sup>94</sup> This issue as it applies to pension plans is discussed in more detail in Shilton, “Enforcing Workplace Pension Rights for Unionized Employees”, *supra* note 81.



## 5. WEBER AND THE “ESSENTIAL CHARACTER OF THE DISPUTE”

When looking at collective bargaining from an abstract height, the Supreme Court has always known that Canada’s collective bargaining statutes were intended to make unionized workplaces enclaves of “industrial of self-government” in which terms and conditions of employment are no longer governed by common law, but by collective bargaining. This is the essence of *Syndicat Catholique des Employés de Magasins de Québec Inc. v. Compagnie Paquet Ltée.*, in which Judson J. rejected a challenge to the union’s authority to bargain a dues check-off unless individually authorized by employees. He held that where there is a union, “[t]here is no room left for private negotiation between employer and employee”.<sup>95</sup> It is the essence of Laskin C.J.’s holding in *McGavin Toastmaster Ltd. v. Ainscough et al* that concepts of fundamental breach and repudiation do not apply to collective agreements: “the common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement....”.<sup>96</sup> It is inherent in Estey J.’s reasons in *Ste Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union* for rejecting court jurisdiction over an employer claim for damages resulting from an unlawful strike, despite ample precedent for such civil suits; in his view, “[t]he more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations.”<sup>97</sup> It lies behind the Court’s refusal in *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.* to accept that common law individual contracts continue to provide the substratum of the employment relationship, ready to “pop up” on the expiry of the collective agreement. In *Paccar*, La Forest J glossed *McGavin Toastmaster* as holding that “employer- employee relations governed by a collective agreement displaced the common law of individual employment”. In his view, there is “no reason why this finding should be restricted to those cases where the collective agreement continues in existence. The operative factor, it seems to me, is the ongoing duty on the parties to bargain collectively and in good faith. So long as that obligation remains, then the tripartite relationship of union, employer and employee brought about by the Code displaces common law concepts.”<sup>98</sup>

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<sup>95</sup> [1959] S.C.R. 206 at 212.

<sup>96</sup> *McGavin Toastmaster Ltd. v. Ainscough et al*, [1976] 1 S.C.R.718 at ....

<sup>97</sup> *St. Anne Nackawic Pulp & Paper Co. Ltd. v Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 at para. 16.

<sup>98</sup> [1989] 2 S.C.R. 983 at 1007 – 8.

At the same time as the Court was making these pronouncements, of course, and sometimes even in the same cases, it was focusing narrowly on the language of collective agreements, upholding arbitration decisions that took a reserved rights approach to arbitrability, and quashing others that applied more liberal principles.<sup>99</sup> It was inevitable that at some point, the Supreme Court would have to tackle the problems created by the gap between the abstract notion that collective bargaining statutes supplant the common law of employment, and the very concrete reality that narrow concepts of arbitrability placed some employment-based rights and issues outside the reach of enforcement under those statutes. *Weber* and its companion case *New Brunswick v. O'Leary*<sup>100</sup> were the Court's attempt to resolve the contradiction between these two ideas. In interestingly symmetrical decisions, the Supreme Court of Canada found that both employee and employer attempts to bring common law tort claims before the courts were inconsistent with the statutory collective bargaining framework, Canadian labour policy and the evolving jurisprudence promoting arbitration as the preferred mechanism for resolving disputes in unionized workplace. The Court held that the disputes belonged within the exclusive jurisdiction of an arbitrator. While the decisions were careful to preserve some space for free-standing rights within unionized employment relationships, they come very close to eliminating any such space for claims based on the assertion of continuing common law rights.

Other symposium papers will no doubt provide detailed histories of the *Weber* and *O'Leary* cases and I will not replough that ground. For my purposes, I want to make three relatively straightforward points about what the Supreme Court did and did not do in these decisions. First, in framing the problem it was attempting to resolve, the Court's core focus was not on the substantive content of the rights asserted, but simply on forms of action. McLachlin J. commenced her *Weber* decision with these words: "When may parties who have agreed to settle their differences by arbitration under a collective agreement sue in tort? That is the issue raised by this appeal, and its companion case, *New Brunswick v O'Leary*...."<sup>101</sup> In responding to that question, McLachlin J. held that neither employee nor employer may evade the dispute resolution procedures established under collective bargaining statutes simply by filing pleadings which characterize the disputes as common law causes of action. As Lebel J. put it in a later

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<sup>99</sup> See, for example, Weiler's discussion in "The Remedial Authority of the Arbitrator", *supra* note 76.

<sup>100</sup> [1995] 2 S.C.R. 967.

<sup>101</sup> *Weber*, *supra* note 1 at para. 32

decision, McLachlin J. held in *Weber* that jurisdictional issue must be addressed using a “flexible and contextual method which seeks to avoid formalistic classifications”.<sup>102</sup>

Second, in terms of outcome, the Court held only that the disputes raised issues that should be dealt with by an arbitrator. Nowhere in either decision does the Court hint at what the outcome of such an arbitration might be. Many *Weber* critics have expressed legitimate concerns about the potential for outcomes in which employers are held liable for defamation and trespass under collective agreements that do not appear to provide employees with such rights. They are dismayed at the prospect that individual employees might be held liable for significant damages for behavior that has traditionally been treated in unionized workplaces as a disciplinary matter. But neither of those results flows from the Supreme Court’s conclusion that these disputes fall within the exclusive jurisdiction of an arbitrator. In both cases, an arbitrator could and probably would dismiss the grievances on the ground that the agreements do not confer the rights the plaintiffs claim. In other words, the plaintiffs would likely lose their cases, a not-uncommon outcome in arbitrations in which there is no controversy about arbitrability.

Third, in neither case does the Court hold or suggest that arbitrators have the jurisdiction to enforce the common law of torts. The decisions are very clear that it is the *disputes* or “differences” which the Court locates within the exclusive jurisdiction of an arbitrator. What happens to those disputes will depend on what legal rules the arbitrator applies to them. The decisions themselves do not purport to expand the range of arbitral authority or add to the powers arbitrators have been given by the statutory frameworks and the agreements they are asked to enforce.

Against that backdrop, can we can make sense of these decisions? If the plaintiffs in *Weber* and *O’Leary* had packaged their claims as contract claims – as they well could have, considering the nature of the claims – we would have had considerably less difficulty accepting the Court’s conclusion that the disputes should be dealt with by an arbitrator, regardless of whether the plaintiffs had attempted to root them in common law. In principle, we accept that for unionized employees, the collective agreement occupies the space that would otherwise be occupied by the terms of individual contracts of employment – not just some of that space, but all that space. As

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<sup>102</sup> *Allen v Alberta*, [2003] 1 S.C.R. 128 at para. 14.

we have seen on Part 4, that proposition creates some problems for reserved rights doctrine, but it is nonetheless “the law of the land”. Because bilateral negotiations between employers and employees are not permitted outside the framework of collective bargaining, and individual contracts of employment are suspended, rights of the sort which would have been called contract rights at common law must now be located in the collective agreement if they are to be enforceable.

What we find more difficult to accept is that the same rule should apply to tort rights. But this should not surprise us. Tort and contract are really two sides of the same coin. Both are sets of legal rules which have evolved within the common law to regulate relationships. Tort principles and contract principles constantly overlap and merge, and within contractual relationships they are often very difficult to distinguish. In the mid-1970s, commercial law scholar Grant Gilmore famously announced “the death of contract”, arguing that contract law was in the process of being subsumed by tort law, and proposing somewhat facetiously that instead of torts and contracts, law schools should now teach their first year students a new subject, “contorts”.<sup>103</sup> Gilmore wrote before the law and economics movement gained serious momentum; many now would argue that the trend he identified has been reversed, with contract law now swallowing tort law at least within contractual relationships. The point is the same, however; while these two bodies of law are distinct in the abstract, clear boundaries are difficult to locate in practice. Within common law employment relationships, courts maintain constant vigilance to avoid duplication and overlap with respect to contract and tort remedies. The Supreme Court of Canada has shown extreme reluctance to develop novel tort remedies for employees, preferring to do remedial justice on the safer and better-trodden ground of contract law.<sup>104</sup> In *Piresferreira v Ayotte*,<sup>105</sup> the Ontario Court of Appeal declined to recognize a general tort duty of care on the part of employers to avoid the infliction of mental suffering. Applying the conventional two-part test for identifying a legal duty of care, the Court held that the employment relationship was proximate enough to give rise to a duty. But it also held that there were strong countervailing policy reasons to refuse to recognize any such duty. The Court expressed concern that a duty to

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<sup>103</sup> Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974)

<sup>104</sup> See *Wallace v United Grain Growers Ltd.*, [1997] S.C.R. 701, [1997] S.C.J. No. 94 at paras. 75 – 7, where the Court rejected a tort of “breach of a good faith and fair dealing obligation with regard to dismissals”. See also *Honda Canada Inc. v. Keays*, 2008 SCC 39.

<sup>105</sup> *Piresferreira v Ayotte*, 2010 ONCA 384, leave to appeal refused [2010] SCCA 283

avoid the infliction of mental suffering would largely duplicate the law governing constructive dismissal, and would disrupt settled principles of employment law. It would also involve courts in monitoring employee performance and supervision. To quote the judgment, “It is unnecessary and undesirable to expand the court’s involvement in such questions. It is unnecessary because if the employees are sufficiently aggrieved, they can claim constructive dismissal. It is undesirable because it would be a considerable intrusion by the courts into the workplace, it has a real potential to constrain efforts to achieve increased efficiencies, and the postulated duty of care is so general and broad it could apply indeterminately.”<sup>106</sup>

The bottom line is that both tort and contract claims relating to terms and conditions of employment flow directly from the legal relationship between employer and employee, a relationship almost entirely subsumed by collective bargaining in the unionized workplace. It is impractical to attempt to separate tort and contract claims and deal with them in different fora. *Weber* quite logically directs decision-makers to ignore how the common law has characterized legal rights arising within the employment relationship and focus instead on the “essential character of the dispute” – not on whether it would be a contract dispute or a tort dispute if the employment relationship were not unionized, but on whether “the dispute in its essential character arises from the interpretation, application, administration or violation of the collective agreement”. The inescapable conclusion is that if the parties have enforceable rights and responsibilities as against each other, it is in the collective agreement that they will be found. *Weber* did not go quite so far as to say that unionized relationships are *entirely* subsumed in the collective agreement. In fact, the Court insisted that the “fact that the parties are employer and employee may not be determinative” of the jurisdictional question,<sup>107</sup> and that its new approach “does not preclude all actions in the courts between employer and employee”<sup>108</sup>. Disputes fall

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<sup>106</sup> *Ibid.* at para. 62.

<sup>107</sup> *Ibid.* at para. 52.

<sup>108</sup> *Ibid.* at para. 53. The Court does not spell out with any precision what types of such cases it has in mind. Two of the cases cited in support of this proposition are entirely unhelpful: *Butt v United Steelworkers* (1993), 106 Nfld. And P.E.I.R. 181 (Nfld. T.D.), which was essentially a DFR claim against the union, and *Bourne v Otis Elevator* (1984), 45 O.R. (2d) 321, in which the court dismissed the plaintiff’s wrongful dismissal claim for lack of jurisdiction, concluding that “the weight of the authorities referred to ... supports the Company’s position that the collective agreement supersedes all individual contracts of employment, so that they cannot thereafter be the basis of an action for wrongful dismissal by a member of the bargaining unit”. A third, *Ste Anne Nackawic Pulp & Paper Co. Ltd. v Canadian Paper Workers Union, Local 219*, *supra* note 97, dismissed an employer’s damages suit (in part a tort claim) for lack of jurisdiction, leaving only a residual jurisdiction in the courts based their “special” remedial powers. Only *Elliott v DeHavilland Aircraft Co. of Canada Ltd.* (1989), 32 O.A.C. 20 (Div. Ct.) actually concerned

within the exclusive jurisdiction of an arbitrator only where the “difference between the parties arises from the collective agreement”. That in turns depends on both the “nature of the dispute” and the “ambit of the collective agreement”.

“Ambit” is a highly ambiguous word in this context, signaling a capacious approach that goes beyond the plain wording of the agreement. The *Weber* test demands *some* link between the dispute and the agreement. Based on the outcomes in the cases, however, it is difficult to find a clear line between issues involving terms and conditions of employment that fall within the ambit of the agreement and those that do not.<sup>109</sup> Finding that line has become even more difficult after the 2006 decision of the Supreme Court in *Bisailon v. Concordia University*.<sup>110</sup> That case involved a defined benefit plan covering employees at the university, including members of nine different bargaining units. The plan was unilaterally sponsored by the university. While it was not expressly incorporated in any of the agreements, it was contemplated by them as described in the Court’s majority judgment:

Each of these collective agreements refers in one way or another to the Pension Plan. Seven of them specifically provide that the employees they cover are entitled to participate in Concordia's pension plan in accordance with the terms set out in the plan. In the collective agreement between Concordia and one union, CUPFA, Concordia agrees to maintain the existing Pension Plan for employees in its bargaining unit. Finally, the collective agreement applicable to another union, CULEU-Vanier, refers indirectly to the Pension Plan by specifying the ages at which employees become eligible for full retirement benefits or for early retirement.<sup>111</sup>

The plan began to accumulate a significant surplus, which Concordia accessed to take contribution holidays, pay plan expenses and fund early retirement packages, unilaterally amending the plan text to authorize its use of the funds, and to spell out that any surplus would revert to the university on plan termination.<sup>112</sup> Eight out of the nine Concordia unions collaborated to launch a class action to challenge this unilateral action. The ninth union, the

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a decision in which a court took jurisdiction over an employee claim against an employer, a claim framed in bailment concerning the employer’s loss of the employee’s tools. Ironically, post-*Weber* this case would almost certainly be found within the exclusive jurisdiction of an arbitrator.

<sup>109</sup> Experienced arbitrators who have examined the provisions of the agreements at issue in *Weber* and *O’Leary* more closely than the Court have identified fairly elementary errors of interpretation in the Court’s decisions and expressed serious skepticism that the links identified reflect any intention on the part of the bargaining parties to open arbitration to these types of claims: see Picher, *supra* note 3 at 108 – 118; Richard MacDowell, “Labour Arbitration – The New Labour Court?” (2000) 8 CLELJ 121 at 150 – 1.

<sup>110</sup> *Supra* note 82.

<sup>111</sup> *Ibid.* at para.5.

<sup>112</sup> *Ibid* at para. 8

faculty association, moved (with Concordia's backing) to have the action dismissed, claiming that pension matters belonged within the exclusive jurisdiction of an arbitrator. The Supreme Court of Canada agreed.

Prior to *Bisaillon*, Canadian arbitrators had consistently and virtually unanimously held that language such as that found in the Concordia agreements leaves the pension plan in the realm of reserved right, and makes pension grievances inarbitrable.<sup>113</sup> In *Bisaillon*, the Supreme Court construed that language quite differently. The majority decision was authored by Lebel J.. Much of his analysis focused on the irreconcilability between reserved rights theory and the recognition rule. He began by observing that permitting a class action to proceed in this case would be “incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of certified unions.”<sup>114</sup> He described the collective agreement as “the regulatory framework governing relations between the union and the employer, as well as the individual relationships between the employer and employees”.<sup>115</sup> Importantly, he stressed that the union's bargaining authority is “not limited to the context of the collective agreement; it extends to all aspects of the employee-employer relationship..... [A]ny negotiations regarding conditions of employment that are not mentioned in the current collective agreement must be conducted by the certified union.”<sup>116</sup>

He then directly linked what he described as the union's “monopoly of representation”<sup>117</sup> with the scope of the exclusive jurisdiction of an arbitrator as determined by the *Weber* test. He noted that in *Weber* and subsequent cases, the Court “has clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement”.<sup>118</sup> He pointed to Quebec jurisprudence holding that “maintenance of benefit” language in collective agreements gives arbitrators full jurisdiction to enforce pension plans. He also identified case law holding the pension plan was “an integral part

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<sup>113</sup> See Brown & Beatty, *supra* note 75 at 4:1440.

<sup>114</sup> *Ibid.*. Lebel J. wrote for himself as well as Deschamps, Abella and Charron JJ.. The dissenting opinion was written by Bastarache J., joined by McLachlin C.J. and Binnie J..

<sup>115</sup> *Ibid.* at para 25.

<sup>116</sup> *Ibid.* at para. 28.

<sup>117</sup> *Ibid.* at paras. 23-28

<sup>118</sup> *Ibid.* at para. 33.

of the collective agreement” simply on the basis that it “formed part of the employees’ remuneration and conditions of employment”.<sup>119</sup> He was clearly attracted to this approach, which would make the scope of arbitration co-extensive with the scope of bargaining. However, since all the agreements covering plan members at Concordia made at least some reference to the pension plan, he preferred to resolve the case on the narrower but still unorthodox ground that references to the plan in the Concordia agreements were sufficient to bring the plan within the ambit of the agreement for jurisdictional purposes.<sup>120</sup> Importantly, he also held that jurisdiction acquired on this basis would give an arbitrator power to address the employee allegations on their merits, and to award an appropriate remedy.<sup>121</sup>

## 6. SOME CONCLUDING THOUGHTS

*Weber* and *O’Leary* mark an important moment of epiphany in the Supreme Court’s labour law jurisprudence. While the Court could clearly have done a better job at explaining itself, it was not radically altering the original conception of the role of arbitration; instead, it was simply reinstating arbitration as the “judicial branch” of industrial self-government. The real lesson of these cases is not that arbitrators have jurisdiction over the common law, but that the common law has little relevance to disputes involving terms and conditions of employment in unionized workplaces. These decisions rightly insist that the fruit of collective bargaining consists not only of the express terms of the agreement, but also the rights and responsibilities that are implied by the terms of the agreement and the policy framework within which both collective bargaining and labour arbitration take place. They reestablish the proposition that collective agreements are intended to function as the governing law of unionized workplaces, or as Lebel J. put it in *Bisailon*, as “the regulatory framework governing relations between the union and the employer, as well as the individual relationships between the employer and employees”.<sup>122</sup> *Weber* tells us that at long last, the Supreme Court has understood that if collective bargaining regimes are a substitute for common law employment relationships, there must be a liberal approach to arbitrability.

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<sup>119</sup> *Ibid.* at para. 38.

<sup>120</sup> *Ibid.* at para. 50-51. The orthodox position is that maintenance of benefit provisions do not effect “incorporation by reference: see *Brown & Beatty*, *supra* note 76 at 4: 1440.

<sup>121</sup> *Ibid.* at para. 55.

<sup>122</sup> *Bisailon*, *supra* note \* at para 25.



In ruling that the common law claims raised in *Weber* and *O'Leary* belong within the exclusive jurisdiction of an arbitrator, the Court is not telling arbitrators that they must tie themselves in knots trying to figure out how to apply tort law within the confines of the collective agreement. Instead, the Court is instructing arbitrators to do what they have always understood to be their job – to interpret and apply the law the parties have established for themselves. But the Court is also instructing them to broaden their thinking about the “essential character” of workplace disputes and the true “ambit” of collective agreements. This broader approach permits them to look to the common law, as they always could and often did, for analogies and persuasive policy reasons for importing or rejecting concepts and approaches to problem-solving in applying collective agreements. But it does not permit them to enforce the common law, or to adjudicate common law claims; it is the “common law of the shop” derived from the “climate of collective bargaining” that must be applied to put flesh on the bones of collective agreements.

This approach to workplace rights is clearly inconsistent with the “strict constructionist” approach that characterizes reserved rights theory – an approach based on 19<sup>th</sup> century preconceptions about the “natural” distribution of power in the workplace. It is even more inconsistent with the post-*Weber* approach to the construction of collective agreements adopted in *OPSEU v Seneca College*, notwithstanding that the Court of Appeal found that decision not patently unreasonable.<sup>123</sup> *OPSEU v Seneca College* was the sequel to a lengthy arbitration in which a terminated employee was fully exonerated and reinstated. In a follow-up decision, the arbitration board dealt with a claim that the employee was also entitled to aggravated/ punitive damages.<sup>124</sup> In a lengthy denunciation of *Weber*, the board held that it had no jurisdiction to make such an award. The problem was not clearly a *Weber* issue; as the Divisional Court correctly held, and the Court of Appeal lost sight of in its anxiety to identify the appropriate standard of review, the problem was a *remedies* issue. Since the arbitration board clearly had jurisdiction to deal with the termination, the residual issue was simply a problem of determining the appropriate remedy. The board nevertheless insisted that before an arbitrator

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<sup>123</sup> *Seneca College v Ontario Public Service Employees Union (Olivo Grievance)* [*Seneca Arbitration Decision*], [2001] O.L.A.A. No. 853, 102 L.A.C. (4<sup>th</sup>) 298 (P. Picher); rev'd *Ontario Public Service Employees Union v Seneca College of Applied Arts and Technology*, [2004] O.J. No. 4440 (Div. Ct.); rev'd *Ontario Public Service Employees Union v Seneca College*, [2006] O.J. No. 1756 (C.A.); leave to appeal refused [2006] S.C.C.A. No. 281. For a discussion of some of the issues raised by this case, see Brian Etherington, “OPSEU v. Seneca College: Deference as a Two-Edged Sword – A Missed Opportunity to Address the ‘Weber Gap’” (2006-7) 13 C.L.E.L.J. 301.

<sup>124</sup> *Seneca Arbitration Decision*, *supra* note 123 at para. 26

would have jurisdiction to award such damages, it would be necessary to find *express* language in the collective agreement authorizing it to do so.<sup>125</sup> Indeed, it went so far as to adopt a strong presumption *against* claims of this type: “Absent clear and compelling language in the collective agreement that would give rise to the inference, or absent express legislative authority, the parties should be presumed to intend that such tortious disputes will be resolved, as they have been for centuries, in the courts of common law, not at arbitration.”<sup>126</sup> In my view, this is clearly wrong for two reasons: it wrongly assumes that power to enforce the law of torts is required in order to award extended damages, and its classic reserved rights reasoning flies directly in the face of Weber’s liberal mandate to arbitrators.

The good news for employees is that Weber instructs arbitrators to back away from narrow approaches to arbitrability, which ensures that unionized employees should now have a forum for resolving disputes that might otherwise have fallen into reserved rights limbo. But here’s the bad news. The Supreme Court is also saying that for unionized employees, arbitration is likely the only port of call. By rejecting a narrow conception of arbitrability, the Court has also dispelled the easy myth that arbitrability is only an issue of forum – that employees and unions in Canada can take issues found to be inarbitrable to other forums for dispute resolution. The *Weber* approach leaves very little room if any for employees to approach the courts claiming rights arising out of the employment relationship based on the common law. Certainly it leaves no room for the suggestion made by the arbitration board in *Seneca College* that its decision “does not leave [the grievor] without a remedy”, and that a grievor denied aggravated/punitive damages by an arbitration board as a remedy for a termination that violated the collective agreement could still “pursue his claims in tort in the appropriate civil forum”.<sup>127</sup> It is inconceivable that this would be the case, even if an employee whose employment rights are governed by the common law would be entitled to such damages.

The comprehensive approach reflected in the *Weber/O’Leary/Bisailon* decisions resolves most of the contradictions identified in Part 4 which flow from importing reserved rights doctrine into the Canadian collective bargaining model. It applies a purposive and contextual approach to determinations of *all* issues, regardless of whether they involve remedies or substantive terms

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<sup>125</sup> *Ibid.* at paras. 11, 52 – 3, 77, 98 – 99, 107.

<sup>126</sup> *Ibid.* at para. 52.

<sup>127</sup> *Ibid.* at para. 61.

and conditions of employment. It forces arbitrators in cases like *Palm Dairies* to squarely address the question of whether the labour law framework permits the unilateral implementation of a pension plan in the circumstances of the particular case, instead of punting that issue to the labour board. In other words, whether or not it change outcomes, it brings potential violations of the recognition rule inside the frame of the collective agreement, leaving it to arbitrators to determine whether unilateral exercises of management rights are contemplated by particular agreements made by particular parties. The suspension of the individual contract of employment no longer threatens a loss of rights, since all disputes about matters touched upon in the collective agreement can be adjudicated at arbitration. “Weber gaps” – situations in which rights exist but no forum will take jurisdiction to enforce them – should be minimized or eliminated.<sup>128</sup> Grievances will succeed, of course, only if the rights claimed are actually part of the “law” of individual workplaces generated through collective bargaining. The strength or weakness of that workplace “law” will depend, as it always has, on the relative strength of the parties’ bargaining power. But reserved rights approaches designed to create enclaves of inarbitrability, including anti-Weber presumptions, will have no place in the arbitrator’s arsenal.

While this reading of *Weber* resolves the conceptual contradictions identified in Part 4, I do not claim that it eliminates all jurisdictional problems from the Canadian labour arbitration landscape. There remain important loose ends which cannot be resolved simply by calling upon arbitrators to take a broader view of their role in applying the private law of the individual workplace. One such problem involves issues relating to terms and conditions of employment sometimes have serious implications for third party rights and interest; these cases cannot be confined within the boundaries of industrial self-government. Third party interests are at issue with respect to genuinely insured benefit plans, where the insurer rather than the employer makes benefit decisions and is directly liable for the benefit. Third party rights and interests also arise in cases involving claims of workplace discrimination and harassment which involve fellow employees, including supervisors, who are not members of the bargaining unit. The fact that arbitrators do not have jurisdiction over these third parties is only one part of the problem; at least as troublesome is that fact within the structure of arbitration third parties may be seriously

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<sup>128</sup> For an analysis of emerging “Weber Gaps”, see Etherington, “OPSEU v. Seneca College: Deference as a Two-Edged Sword – A Missed Opportunity to Address the ‘Weber Gap’”, *supra* note 123; “Enforcing Workplace Pension Rights for Unionized Employees: Is There a ‘Weber Gap’?”, *supra* note 81.

affected by decisions in which they cannot defend their rights and interests. “Accommodation” claims which cross bargaining unit boundaries also challenges the legitimacy of autonomous dispute resolution as between the parties to collective bargaining.

Loose ends like these are not the only challenge to the claims of labour arbitration to function as a “labour court”, as Rick MacDowell suggested in his thought-provoking article in the issue of the CLELJ commemorating the fifth anniversary of the Supreme Court’s decision.<sup>129</sup> This paper has focused on *Weber*’s treatment of common law rights. But we cannot lose sight of the fact that the majority judgment in *Weber* also dismissed the plaintiff’s constitutional law claims, holding that they too arose from the collective agreement and therefore belonged within the exclusive jurisdiction of an arbitrator. That holding underscores a very important reality of modern labour arbitration; as a consequence both of statutory changes and evolving jurisprudence, labour arbitrators in Canada now have jurisdiction – sometimes concurrent with other tribunals, but sometimes exclusive – to interpret and apply rights locate in a wide range of other employment-related statutes, in addition to their core jurisdiction to adjudicate the private law of the workplace. The Supreme Court has made it very clear that these public aspects of arbitral jurisdiction are an entirely public responsibility; arbitrators must enforce statutory rights in appropriate cases, *even if* the parties have made attempted to exclude such jurisdiction through the wording of their collective agreements.<sup>130</sup> In carrying out these public functions, arbitrators have clearly stepped outside the autonomous world of the industrial pluralists.

*Weber* has undone much of the damage done by reserved rights theory to the scope of arbitrability and the concept of the scope of rights and responsibilities under a collective agreement. But it may be that it comes too little and too late to rehabilitate the pluralist/Laskin vision of industrial self-government. *Weber* has reclaimed territory for arbitrators that they themselves had ceded to the courts in defiance of the policy behind the statutory framework for collective bargaining. But it has done so at a moment in labour law history in Canada when arbitrators have been forced to take on public functions that undermine the notion of arbitral jurisdiction as the enforcement of private law. It may be time, then, to reopen the debate about

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<sup>129</sup> MacDowell, “Labour Arbitration – The New Labour Court?”, *supra* note 109.

<sup>130</sup> *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 3242003 SCC 42, [2003] 2 SCR 157 at para. 30*

whether the adjudication of workplace rights claims should remain the private domain of the parties to collective bargaining.

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