

Judicial Review of Statutory Interpretation by Arbitrators

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This paper will attempt to show that the modern law of judicial review has developed principles of such general application in the area of curial deference that they may be applied as readily to statutory interpretation by labour arbitrators as by specialised statutory tribunals such as labour relations boards. The courts have staked out a constitutionally protected role as guardians of parliamentary supremacy by policing the frontiers of jurisdictional grants to administrative decision-makers and they appear to be content to leave matters within such frontiers exclusively to the specialist donees of those grants.¹ Ideally, that policing should be accomplished with an appreciation for the value of dispute resolution by administrative processes.

Indeed, it is suggested that, given the appropriate jurisdictional grant, arbitrators will be permitted, in pursuance of their primary mandate to settle disputes arising under a collective agreement, to interpret and apply in a deferential atmosphere many statutes which do not fall within the confines of the collective agreement.² Outside that mandate would likely be:

1. a statute whose final interpretation has been confided to some other tribunal to the extent that error of law in its interpretation by an arbitrator would violate that statute or public policy;³
2. a statute which the parties themselves cannot waive or contract out of both on their own behalf and, in the case of the union, on behalf of the employees bound by the collective agreement;⁴
3. the statute is one which reasonably relates to the area of the arbitrator's expertise, that is the resolution of disputes in the context of collective employment law;⁵
4. where the interpretational issue places the arbitrator in real or reasonable apprehension of conflict with another tribunal with jurisdiction over the parties to the collective agreement or the subject matter of the dispute.⁶

This will be subject to the usual constraints on the grant of curial deference where the

interpretation is patently unreasonable or relates to a statute circumscribing or limiting jurisdiction. The list in no way purports to be exhaustive.

It has long been settled that arbitrators must construe statutes where their interpretation is called for in the proceedings before them: *McLeod v. Egan*.⁷ However, despite having the obligation to construe where necessary, arbitrators have not been as fortunate as statutory tribunals in the degree of immunity from judicial review which their statutory interpretations enjoy.

This is due largely to the fact that statutory tribunals find their origin and their primary function within a single statute, often called **constitutive** or **home** statute whereas arbitrators, while for the most part ultimately of statutory origin, function primarily within the confines of collective agreements. Both types of tribunal have been accorded a degree of curial deference in the **domestic** functions. What is more problematic is the movement of a tribunal outside its constitutive document, be it statute or collective agreement.

This is usually less likely to be necessary for a statutory tribunal which administers a comprehensive statutory scheme within the confines of the constitutive statute. Arbitrators, on the other hand, functioning within a collective agreement, are more likely to be confronted with necessary statutory interpretation as part of the dispute resolution process.

It is suggested that the development of the law in this area has been held back by the well-known *dicta* of Laskin, C.J.C., in *McLeod v. Egan*. These *dicta* withhold curial deference from arbitrators who interpret statutes outside the collective agreement.

Arbitration is among the cardinal institutions of modern labour relations. Ironically, the best statement of the special role of labour arbitration was made in the context of justifying judicial intrusion into that arena. In *St. Anne-Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*,⁸ Estey, J., stated:

Labour legislation was enacted largely to regulate industrial relations with an eye to preserving industrial peace [...] A cornerstone in this legislative edifice was to make strike

action or lock-out illegal during the currency of a collective agreement. In exchange for restricting the right to strike and lock-out, the legislation made collective agreement binding and enforceable. In the United States, the no-strike clause and the arbitration clause have been viewed as the quid pro quo for each other.

*This, in the Canadian context, may be taken as indicated by the fact that grievances are directed to be settled by arbitration **without stoppage of work.***

Earlier, at 11, Estey, J. described arbitration as the centrepiece of a statutory framework which is, in his words:

the all-embracing legislative programme for the establishment and furtherance of labour relations in the interest of the community at large as well as in the interests of the parties to those labour relations.

As mentioned, statutory tribunals have obtained judicial deference from the courts on statutory interpretation, at least of their constitutive statutes. With such tribunals, there is usually some statutory assignment of interpretational power and responsibility for achieving a statutory programme accompanied by a privative clause. However, to some extent at least, the extension of curial deference to statutory labour tribunals has been shaped by a judicial appreciation of the special role which those tribunals play in the fulfilment of public policy.

Thus, in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*,⁹ the seminal case in the field of curial deference to statutory tribunals,¹⁰ the New Brunswick Public Service Labour Relations Board had a positive legislative grant "to give effect to any provision contained in this *Act* or the regulations under this *Act*".¹¹ Further, in section 101 of the Act, the Board's decisions were stated to be "final and shall not be questioned or reviewed in any court".¹² Finally, in the same Section of the *Act*, the legislature extended the protection of a no *certiorari* clause.¹³

With these formidable weapons of offence and defence, it is not surprising that the Board's decisions would be protected from judicial review. But the basis for such protection was not only

the specific grant of power and immunity referred to earlier. Dickson, J., as he then was, emphasised at 235-236 that the Board was a specialised tribunal:

called upon [...] to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

He placed the legislative grants in a context of "considerable sensitivity and unique expertise".¹⁴

Dickson, J., only then reached his conclusion at 236:

*The interpretation of s. 102(3) would seem to lie logically at the heart of the specialized jurisdiction confided to the Board. In that case, not only would the Board not be required to be **correct** in its interpretation, but one would think that the Board was entitled to err and any such error would be protected from review by the privative clause in s. 101 [...].*

Having found that the Board was alone entrusted with the jurisdiction to decide the matter, Dickson, J., went on at 237 to show how it could lose the benefit of its protected entitlement to err:

Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?¹⁵

It is unusual, however, for the range of power and immunity conferred on the Board in *CUPE* to exist in the arbitration context. There are exceptions, of course.¹⁶

Typically, one finds in a collective agreement a generous grant of jurisdiction to resolve collective agreement disputes together with a "final and binding" clause and a prohibition against amending the agreement.¹⁷ This is the parties' response to the legislative directive to include in any collective agreement a mechanism for the final settlement of disputes arising under the collective

agreement. The provision in the *Newfoundland Labour Relations Act* is representative:

*Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the agreement or any question as to whether a matter is arbitrable.*¹⁸

This admonition is usually accompanied by the grant of a variety of powers to arbitrators such as control of proceedings, discretion as to the reception of evidence, and ability to substitute penalties on discipline and discharge. There is unlikely to be reference to the interpretation of statutes although sometimes one finds a discretion to refer certain matters to The Labour Relations Board which may be indicative of a wider sphere of operation for arbitrators than just the collective agreement.¹⁹

There is sometimes a "no *certiorari*" or **no review** clause. Such clauses are a commonplace in the armaments of statutory tribunals such as labour relations boards and other tribunals of a public nature charged with statutory administration. They are less common, in statutory form at least, for arbitrators.²⁰

Within the foregoing legislative and contractual context, one can sketch the origins of the law of judicial review as it applies to arbitral statutory interpretation.

The story begins with *Re Ford Motor Company of Canada Ltd. and International Union, United Automobile Workers of America*²¹ where Arnup, J.A., stated:

What is required is that I should be persuaded that the result [the arbitrator] has reached is one which he could reasonably arrive at after consideration of the provisions of the statute and of the collective agreement.

Shortly after, writing a minority concurring judgment in *McLeod v. Egan* which has had significant impact on subsequent provincial superior court decisions,²² Laskin, C.J.C., stated

bluntly at 519 that if the Ontario Court of Appeal intended to apply the same test:

to the construction of a statute called for in a grievance arbitration as to the construction of the collective agreement itself under which the grievance arises, I would hold it to be wrong. No doubt, a statute like a collective agreement or any other document may present difficulties of construction, may be ambiguous and may lend itself to two different constructions neither of which may be thought to be unreasonable. If that be the case, it nonetheless lies with the Court, and ultimately with this Court, to determine what meaning the statute should bear. That is not to say that an arbitrator, in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a Court as being wrong.

That statement, taken alone, offers no insight into why two standards of review are injected into the review process for arbitrators depending on whether the issue under review is construction of the collective agreement or of a statute. Earlier in the judgment at 518-519, Laskin, C.J.C., offered this comment:

Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature. On such a matter, there can be no policy of curial deference to the adjudication of an arbitrator, chosen by the parties or in accordance with their prescriptions, who interprets a document which is in language to which they have subscribed as a domestic charter to govern their relationship.

The usual (certainly, the hoped for) projection of collective bargaining relations is a collective agreement. It may be that Laskin, C.J.C., referred here to statutes which, by appropriate language presumably, have become part of the collective agreement so as to be within the arbitrator's normal sphere of operation.²³ This approach dovetails with his earlier reference to going "outside the collective agreement". If the statute is within the collective agreement, curial deference will be shown. It is a commonplace of collective bargaining that the parties may and often do bring statutes within the collective agreement.²⁴

What is unresolved on this analysis is the question why, if it is accepted that it may be necessary to the resolution of a collective agreement dispute to construe a statute outside the collective agreement, no curial deference is extended to that interpretation. As Estey, J., stated in *Douglas Aircraft Co. of Canada v. McConnell*;²⁵

Historically, it has been said by the courts that the parties to an arbitration, however it might have been constituted, would not have contemplated that the arbitrator would, in the making of his award, fail to uphold the applicable general law of the community. While this is so, it is equally, and here more vitally true that the law of review has evolved, even in the absence of a privative clause, to a point of recognition of the purpose of contractually-rooted statutory arbitration: namely, the speedy, inexpensive and certain settlement of differences without interruption of the work of the parties. The scope of review only mirrors this purpose if it concerns itself only with matters of law which assume jurisdictional proportions and this I conclude to be the present state of the law of judicial review of such statutory tribunals.

Later, at 276-277, he noted that the test for reviewable error for the collective agreement as well as for statutes "is of the same scope and type, with one important exception" which related to the absence of curial deference in the case of statutory interpretation.²⁶ He offered this rationale for allowing the exception:

This is so because the parties are not in law deemed to have authorized the board to settle their differences contrary to the statutes of the community.

Absent this assumed withholding of authority emanating from the parties to the collective agreement, it does not appear from Estey, J.'s, judgment that he necessarily saw statutory interpretation by an arbitrator as outside jurisdiction or otherwise unentitled to curial deference. In discussing Laskin, C.J.C.'s, *dicta* at 272, he stated:

The Chief Justice of Canada in concurring in the result reached by the majority concluded that the Court below had applied the test of "reasonableness" to the arbitrator's interpretation of a statute and not to the interpretation of the collective agreement. In doing so, the error of construction with reference to a statute appears to have been treated as an error with reference to a collateral or jurisdictional matter, and hence reviewable but on a

*different branch of the court's authority.*²⁷

The collateral question type of analysis is now largely discredited²⁸ and that process had started even before *Douglas Aircraft*.²⁹

As to jurisdictional analysis, that must now be understood in light of *U.E.S., Local 298 v. Bibeault*.³⁰

Before looking at *Bibeault*, it may be helpful to note that a judicial construction is not necessarily "correct" in the dictionary sense. It is, rather, governing, where the extent of a legislative grant of authority is at stake. That aside, a judicial interpretation is an opinion, a view, as Laskin, C.J.C., recognised in the extract from *McLeod v. Egan* quote above.

In *Bibeault*, Beetz, J., stated at 1086:

It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

- 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;*
- 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.*

This formulation is internally complete and does not contemplate **exceptions**. Nor does it distinguish arbitrators from other tribunals. Therefore, one would expect to treat arbitral statutory interpretation no differently from any other **question of law** raised for jurisdictional analysis.³¹

The real question on judicial review is whether the decision-maker is entitled to err in law.

The answer to that question is in large measure related to legislative intent: *Bibeault*. Beetz, J., stated at 1087 that the only question which should be asked is:

Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?

To answer that question it is necessary to engage in what Beetz, J., described at 1088 as "a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error". He explained such an analysis in these terms on the same page:

*[T]he Court examines not only the **wording** of the enactment conferring jurisdiction on the administrative tribunal, but the **purpose** of the statute creating the tribunal, the **reason** for its existence, the area of **expertise** of its members and the nature of the **problem** before the tribunal. At this initial stage a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction [...].³²*

The nature of the functional and pragmatic approach reaffirms the judicial power to concede or withhold jurisdiction. But, given that the issue is the demarcation of jurisdictional limits, there may be no alternative.

In Beetz, J.'s view, the pragmatic and functional analysis just described brings the following advantages to the judicial review process:³³

1. a focus on legislative intent rather on an isolated legislative provision;
2. a focus on whether the capacity or duty to decide a question (which must always exist) extends to making a final or binding decision;
3. a focus on the necessary exercise of the constitutionally protected superintending and reforming function of the superior courts.

It is the second of these considerations which is dominant here. It is settled that arbitrators have jurisdiction to interpret statutes in the course of resolving collective agreement disputes. Does that entitle them to curial deference?

There is a jurisdictional cast to the issue of curial deference to arbitral statutory interpretation. That is not necessarily inappropriate because every case of judicial review starts logically from the premise that the arbitrator or the statutory tribunal must operate within jurisdiction.

Whether a determination is made within a labour arbitrator's jurisdiction will depend upon a pragmatic and functional analysis of the collective agreement and any statute regulating the arbitration and review processes. While it will be conceded generally that the legislature has the authority to assign to arbitrators the jurisdiction to interpret statutes, the same cannot be said so casually for the parties to the collective agreement, no matter how lofty the societal goals achieved by their agreeing to work within the framework of a collective agreement.

As Estey, J., noted in *Douglas Aircraft*, arbitration is contract based. This being so, it is arguable that any grant by the parties to an arbitrator of jurisdiction to interpret statutes with resultant curial deference on review amounts to contracting to be bound by a statutory interpretation which may not be the judicially **correct** one.

Statutory interpretation is a matter of law and statutory misinterpretation is an error of law regardless of source. As Beetz, J., stated in *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*:³⁴

A mere error of law is an error committed by an administrative tribunal in good faith in interpreting or applying a provision of its enabling Act, of another Act, or of an agreement or other document which it has to interpret and apply within the limits of its jurisdiction.

[...]

A mere error of law should also be distinguished from a jurisdictional error. This relates generally to a provision which confers jurisdiction, that is, one which describes, lists and

limits the powers of an administrative tribunal, or which is [TRANSLATION] "intended to circumscribe the authority" of that tribunal, as Pigeon, J., said in Komo Construction Inc. v. Commission des relations de travail du Quebec, [1986] S.C.R. 171 at 175.

Beetz, J., did not distinguish between tribunals which interpret statutes and those which interpret agreements in his definition of **mere error of law**.³⁵ This being so, Laskin, C.J.C.'s, decision to accord curial deference to one type of error of law by an arbitrator (collective agreement interpretation) but not to another (statutory interpretation) can only be seen (in the absence of a pragmatic and functional jurisdictional analysis) as a policy choice rather than as a response made within the conceptual framework of judicial review. It treats statutory interpretation as jurisdictional when it may not be so on a pragmatic and functional analysis. It is suggested that this represents an unwillingness to let go of judicial control of statutory interpretation with resultant distortion (Estey, J's, "exception" noted in *Douglas Aircraft* at 276-277) of the law of judicial review.

To get to the point of extending curial deference to arbitrators for misconstruction of the collective agreement, the Supreme Court did not have recourse to a statutory "no *certiorari*" or "no review" clause. The Court recognised that arbitrators have been given the final authority by their constitutors and the legislature to resolve disputes which arise under collective agreements: *Volvo Canada Limited v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 720*.³⁶

Because error of law in statutory interpretation is of the same order as error of law in collective agreement interpretation, it is suggested that there is nothing inherently wrong in extending curial deference to arbitral statutory interpretation which occurs within a closed non-precedent based system. The legislative directive to the parties to provide for final settlement coupled with the responding "final and binding" clause of the collective agreement provide a basis for a functional and pragmatic analysis in each case which could, in an appropriate case, lead to an extension of curial deference.³⁷

Further, it is suggested that a privative clause for arbitration awards enhances arbitral

immunity for statutory interpretation. If the privative clause is not needed to obtain curial deference for collective agreement interpretation, it must have some effect and that effect may indeed extend to statutory interpretation, especially where that is an often necessary aspect of the arbitral function.

Lamer, J., as he then was, in *Blanchard v. Control Data Canada Limited*³⁸ dealt with the role of privative clauses in judicial review. In that case, there was a statutory privative clause of the "no *certiorari*" or "no review" ("*nulle action*" type) which Lamer, J., writing a minority concurring judgment, found at 488 to be indicative of the legislative intent:

to make the arbitrator responsible for deciding completely and finally the questions submitted to him by the Act. This deference is undoubtedly based both upon the respect of the legislator for the arbitrator's expert knowledge and on the importance of ensuring a quick settlement of labour law disputes.

He noted at the same page that "[T]hese clauses bar judicial review of any question other than that of jurisdiction". Lamer, J., equated the prohibition of judicial review ("*nulle action*") with a legislative mandate of finality. It is suggested that if a "no review" clause equates with finality then a finality clause equates with the exercise of judicial restraint on review.³⁹

There is specific authority for the proposition that the *CUPE* type of analysis (attribution of jurisdiction and tolerance of errors of law within jurisdiction where they are not patently unreasonable) applies to statutory interpretation by a collective agreement arbitrator with the benefit of a privative clause: *Syndicat des professeurs du collège de Lévis-Lauzon v. Collège d'enseignement général et professionnel de Lévis-Lauzon*.⁴⁰

There the Supreme Court endorsed the grant of curial deference to arbitral interpretation of at least one sort of statute. At issue was whether an arbitrator's interpretation of the timeliness provisions of a collective agreement was preliminary or collateral so as to exclude it from the grant of curial deference. The privative clause in question was the same "*nulle action*" clause that was considered in *Blanchard*; Beetz, J., extended curial deference to the arbitral interpretation of the

collective agreement and stated at 610 that:

I would be of the same opinion if the provisions regarding the prescription of grievances were contained in legislation rather than in the collective agreement [...];

Beetz, J., did not condition this statement by requiring that the statute be part of the collective agreement.

He expressly applied to the judicial review process for arbitration awards the statements which Dickson, J., made in *CUPE* about judicial restraint and the avoidance of the preliminary or collateral question analysis.⁴¹ In effect, this amounts to an adoption of Dickson, J.'s, position at 236 that curial deference is to be extended to statutory tribunals protected by a privative clause where the matter of interpretation "would seem to lie logically at the heart of the specialized jurisdiction confided to the Board".⁴²

Beetz, J., disposing of the preliminary or collateral question heresy, stated at 608 that:

*[T]he arbitration tribunal's full jurisdiction consists in the power to dispose of grievances before it by applying the relevant provisions of the collective agreement or the law.*⁴³

This unqualified statement that the jurisdiction of collective agreement arbitrators extends beyond the collective agreement to enable them to apply the "relevant provision of [...] the law" ("*les dispositions pertinentes [...] de la loi*") is reminiscent of Beetz, J.'s, reference to intra-jurisdictional misinterpretation both of statutes and of collective agreements as "mere errors of law"⁴⁴ without qualification as to the type of tribunal doing the interpretation.

Perhaps the greatest movement to date towards the extension of curial deference to statutory interpretation by an arbitrator protected by a privative clause came when a majority of the Supreme Court of Canada adopted as its own the dissenting judgment of Lambert, J.S., of the British Columbia Court of Appeal in *Telecommunications Workers Union v. British Columbia*

*Telephone Company.*⁴⁵

That case arose under the *Canada Labour Code* and concerned a return to work agreement in which the parties entrusted to an arbitrator the fate of certain employees whom the employer had terminated for inappropriate behaviour on the picket line.

The dispute does not appear to have been of the sort which the legislation contemplated when it required the parties to a collective agreement to provide a mechanism for the final resolution of disputes. That provision, as *St. Anne Nackawic* makes clear, is the trade-off for the "no strike/lockout" clause which was not operative as the parties were involved in a legal strike. One could say that the arbitration was truly consensual as there was no legislative compulsion or persuasion to adopt the process.

There was little or no guidance to the arbitrator in the submission to arbitration. As Lambert, J.A., pointed out at 730:⁴⁶

[T]he parties left the arbitrator to determine the applicable principles, just as they left him to determine the relevant facts.

In holding that the employees must be reinstated, the arbitrator interpreted section 107(2) of the *Canada Labour Code*⁴⁷ and found, as summarised by Lambert, J.A., at 724 that:

a striking employee does not have a right to be re-employed at the conclusion of the strike, and that all s-s. 107(2) does is to preserve only so much of the employment status as is necessary to maintain the union's position as bargaining agent, so that the union may negotiate an agreement that will cause the employer to re-employ the striking employee.

This finding may be fleshed out by Lambert, J.A.'s statement at 730 that :

[The arbitrator] concluded that an employer is not entitled, in law, to dismiss a striking employee during a strike.

Lambert, J.A., found at 724 that the arbitrator misconstrued the statutory

provision:

[T]he arbitrator placed too restrictive a view on s-s. 107(2) [...] The employer-employee relationship is not in full flower during the strike, but, at the very least, there must remain a continuing obligation on each party to the relationship not to do anything that so damages the root of the relationship that the relationship will never be able to flower again.

The use of the word "only" in s-s. 107(2) supports the conclusion that the relationship may cease during the strike, for reasons other than the strike itself.

He found that the disposition of the case depended not on whether the arbitrator erred (as he did) but on whether he made a jurisdictional error.⁴⁸ The significance of this is that engaging in statutory interpretation does not in itself preclude the extension of curial deference.

In reaching his conclusion that there was no jurisdictional error, Lambert, J.A., noted that the award was governed by a privative clause *Canada Labour Code*⁴⁹ and that the arbitration was consensual.

The effect of the privative clause was to preclude setting the award aside for "error of the law on the face of the record" and he stated at 725:

That is so, whether the error occurred in answering the very question asked, or whether it occurred in answering a subsidiary question on the path of reasoning leading to the answer to the very question asked. Error of law, in itself, is not a jurisdictional matter.

He stated further at 726:

A tribunal of limited "jurisdiction" must start out within its jurisdictional envelope, and it must stay there, on all aspects of its task, until the task has been completed. If there is an

express or implied term of its "jurisdiction" that it will do its task in a rational way, as there always is with a statutory tribunal and usually is with a consensual tribunal, then the tribunal goes outside its jurisdictional envelope if it reaches a decision in a way that is patently unreasonable.

The effect of the truly consensual nature of the process was to focus the question of the extent of the jurisdictional envelope onto the submission to arbitration. Perhaps there was more room for the arbitrator to engage in statutory interpretation where the dispute did not arise within the confines of a collective agreement.

Lambert, J.A., stated at 726:

There is no obligation on any other arbitrator, dealing with a similar issue between the parties, to follow the award. That is in contrast to the position of a statutory tribunal. A statutory tribunal should follow its own previous decisions, and, for that reason, ought to be required to be right in its interpretation of general public enactments and general legal principles, and ought to arrive at its decisions, even on matters particularly within its special expertise and function, on the basis of a demonstrably rational process. Those requirements do not have quite the same force in the case of a consensual arbitrator.⁵⁰

One can see the hesitation in the words "not [...] quite the same force". Similarly, the majority of the Supreme Court, while adopting Lambert, J.A.'s, judgment as its own added that the "highly imprecise terms" of the submission was a significant consideration.⁵¹

Nonetheless, this case represents the extension of curial deference to an arbitrator (albeit a truly consensual arbitrator with "highly imprecise" terms of reference) whose decision is grounded in an erroneous interpretation of the *Canadian Labour Code* and protected by a statutory privative clause.⁵²

The significance of the decision is its emphasis on the parties' ability to frame a submission to arbitration in such terms as to immunise necessary arbitral statutory interpretation from judicial review. The majority of the Supreme Court noted at 568 in support of its adoption of Lambert,

J.A.'s, judgment that:

[i]t is not possible to conclude from the terms of reference that both the union and the employer were in agreement that the employer had the right to discipline striking employees and that the sole question for the arbitrator was the appropriate disciplinary action; it is clear from the union's submissions throughout that they did dispute the employer's right to impose any disciplinary measures; in light of the broad terms of reference put to him, it was squarely within the arbitrator's jurisdiction to consider whether the employer had the right to discipline workers participating in a lawful strike [...]

Without saying as much, the Supreme Court allowed the parties to confide the interpretation of section 107(2) of the *Canada Labour Code* to the arbitrator. It was not possible to consider whether the employer had the right to impose any discipline during a strike without considering the effect of the Code.

This seems to suggest that the parties themselves, by being unable to agree on the question whether the employer could impose any discipline during a strike, raised the issue of the interpretation of the *Canada Labour Code* and entrusted the resolution of that issue to the arbitrator as part of his total jurisdiction. It is not intended here to resurrect the debate over immunised referral of a specific question of law to an arbitrator but rather to show that the parties may have a dispute in which a statutory question is necessarily raised for resolution by the arbitrator. Then, within the framework of finality in a closed system of dispute resolution, one would expect that the arbitrator's interpretation would be immunised.

In her dissent in the Supreme Court, L'Heureux-Dubé, J., treated the misinterpretation of section 107(2) as jurisdictional because it led the arbitrator to declare that he had no jurisdiction to decide on any discipline if the conduct was directly related to the labour dispute.⁵³ Significantly, her decision rested not on the fact that the arbitrator was interpreting a statute but on the effect which the interpretation had on the arbitrator's duty to decide. In her view, it led to "a 'patently unreasonable' interpretation of his jurisdiction".⁵⁴ This is significant because it denies curial deference to the arbitrator not because he is interpreting a statute but because the interpretation is fundamental to the issue of his jurisdiction.

It is suggested that the extension or withholding of curial deference in the context of arbitral statutory interpretation can no longer be decided on the basis of the "public general enactment" test propounded by Laskin, C.J.C., in *McLeod v. Egan*. Whether *McLeod v. Egan* was right or wrong in the result is not the issue.

McLeod v. Egan involved the determination by an arbitrator that the collective agreement gave the consent required by statute for overtime work beyond certain maximum hours. The Act prohibited overtime beyond those hours unless a permit was obtained from the Director of Employment Standards. The permit did not require that such overtime be worked "without the consent or agreement of the employee or his agent".⁵⁵ The issue was whether a consent within the meaning of the Act had been given.

The arbitrator found that the statutory language left the matter for determination under the terms of the collective agreement. He construed the agreement and found that it provided for compulsory overtime.

Martland, J., writing a majority opinion, stated at 523-524:

In my opinion such consent or agreement must relate specifically to the performance of the work by the employee beyond the normal statutory legal limits. [...] There is nothing in the agreement that can possibly be construed as having met the requirements of [s. 11(2) of the Act] and, therefore, it is unnecessary to determine whether this particular consent can be given by a collective agreement.

In my opinion there was an error of law on the fact of the award in respect of the legal requirements of s. 11(2) of the Act.

This statement, sensitive though it is to individual rights, ignores the word "agreement" in the Act and sets a standard which is then applied regardless of employment context. It will be recalled that in *Blanchard*, Monet J.A., with whom all of the Supreme Court judges concurred, dissented in the Quebec Court of Appeal.⁵⁶ In his dissent at 137, he determined to approach the labour standards statute as one involving collective rather than individual employment ("*rappports*

individuels"; "*rapports collectifs*", "*même s'il n'existe pas ici une convention collective*"). He then keyed that passage by means of a footnote to *McGavin Toastmaster Ltd. v. Ainscough*,⁵⁷ a seminal decision on the ouster of private law concepts from the collective agreement. He went on to state on the same page:

Pour réussir devant notre Cour, l'appelante doit, à la fin du compte, établir le caractère déraisonnable de la sentence arbitrale (je le répète).

In *Blanchard*,⁵⁸ Monet J.A., demonstrated the legislative rejection of civil law concepts at 137-138 by referring to the implementation of the minimum wage as a move away from « *un libre échange des volontés des parties* », *reinstatement in employment in place of a damage award* « *que le respect et la confiance mutuels existent ou non* », *and the replacement of the courts for these purposes by* « *l'arbitrage par des spécialistes dont la décision est finale, sans parler des clauses restrictives* ».

It is a truism that the interpretation of employment statutes is enhanced by a sensitivity to the underlying principles and goals of the industrial relations system, a sensitivity which is not necessarily shared by judges, at least not to the exclusion of others who must settle disputes or implement policy. That sensitivity is often described as expertise.⁵⁹

One can see the immense judicial effort put into demonstrating an appreciation of these principles and goals in the judgments of Beetz and Estey, JJ., in *Bibeault* and *St. Anne-Nackawic* respectively. One desired result of that effort is doubtless the achievement of credibility as the judge imposes a judicial solution.

It is suggested that today, *McLeod v. Egan* would properly be decided by means of a functional and pragmatic analysis as outlined in *Bibeault*. Such analysis would examine the words "consent or agreement of the employee or his agent" to see whether they circumscribed or delimited the arbitrator's jurisdiction or, if not, whether he gave them a meaning which they could not reasonably bear. In either case, curial deference would not have been extended unless the

impugned interpretation were *obiter*.⁶⁰

The analysis would have involved examining the legislative wording, the purpose of the statute creating the arbitration process, the reason for its existence, the expertise of the arbitrator, and the problem being experienced.⁶¹

It is suggested that a proper starting point in the analysis would have been an expression of sensitivity to the arbitral role and the degree of finality with which the legislature and the parties clothed awards. Arbitration is a means of dispute resolution by a tribunal with expertise and the trust and confidence of the parties.⁶² It bears repeating that the arbitrator was resolving a dispute which arose under the collective agreement, that his decision was binding on the employer, the union, and the employees bound by the agreement, and that his resort to the statute was necessary.

In the employment context, the word "agent" refers frequently to the collective bargaining agent which always regulates its relationship with the employer by means of an "agreement", the collective agreement. The phrase "consent or agreement of the employee or his agent" contains the words "consent" and "agreement". A look at the dictionary will show that "consent" usually refers to an individual transaction whereas "agreement" suggest a contract or binding arrangement between parties who may or may not be individuals.⁶³

From this could be drawn the conclusion that the Act was meant to be read in the context of collective and individual employment and that "consent" referred to individual employment situations whereas "agreement" referred to collective employment situations.

Part of the analysis would be to divine the purpose of the legislative overtime provisions. The setting of minimum standards is obvious. Less obvious is the equalisation of bargaining power. A large part of the rationale for employment standards legislation is to assist the unorganised work force.

Arbitrators are not necessarily specialists in the area of minimum standards as they are

concerned to elucidate what the parties have agreed on and, having done that, they tend to think that the job is done. However, in this case, the minimum standard is treated as a matter of contract ("consent or agreement") and the resolution of contract disputes is the accepted area of arbitral expertise. There would be no question of waiver of the statute as the issue is whether there was consent or agreement.⁶⁴

In conclusion, regardless of the correctness or otherwise of *McLeod v. Egan*, it is suggested that judicial review of arbitral statutory interpretation should be approached as a matter of deferential review for error of law and that such interpretation will only take on a jurisdictional hue if the statute circumscribes or limits the arbitrator's jurisdiction or if the arbitrator interprets the statute in a patently unreasonable manner. In both situations, a pragmatic and functional analysis of the interpretational issue as outlined in *Bibeault* is called for. Cases which treat statutory interpretation as an "exception" are reflective of a distorted model of judicial review and should not be followed in the result unless that result can be achieved by the *Bibeault* approach.

FOOTNOTES

1. See the discussion by Wilson, J., in *National Corn Growers v. Canadian Import Tribunal*, [1990] 2 S.C.R. 1324 at 1332-1346.
2. For a contrary view, see D. Pother, "Judicial Review of Labour Arbitrators: A comment on *Telecommunication Workers Union v. British Columbia Telephone Co.*" in W. Kaplan, J. Sack, Q.C. & M. Gunderson, eds., *Labour Arbitration Yearbook 1991*, vol. II (Toronto: Butterworths, 1991) 55 at 69-75.
3. An example would be constitutional law. That this area of judicial review is non-deferential is beyond debate as is made clear by *Douglas College v. Douglas/Kwantlen Faculty Association*, [1990] 3 S.C.R. 570 at 605, La Forest J., where he withholds curial deference, with minimal discussion, because constitutional interpretation, in that case the *Canadian Charter of Rights and Freedoms*, is not "within the limits of [arbitrators'] expertise". See for statutory tribunals *Cuddy Chicks Ltd. v. Ontario Labour Relations Board* (1991), 81 D.L.R. (4th) 121 (S.C.C.).

The exception for labour relations board interpretations respecting the division of powers under the Constitution encompasses the expertise rationale but also relates to the need for a referee to break an impasse which may occur where tribunals of equal authority in their respective spheres may exert incompatible jurisdiction over the same subject-matter. The Supreme Court of Canada does not consider it necessary even to discuss curial deference in this context: *Central Western Railway Corporation v. United Transportation Union*, [1990] 3 S.C.R. 1112. See also *Re the Queen in Right of Ontario and Ontario Public Service Employees Union* (1987), 34 D.L.R. (4th) 637 (Ont. Div. Ct.); retrospective effect given to Charter.

See *Re Canadian Union of Public Employees, Local 1394 and Extencicare Health Services Inc.* (1990), 67 D.L.R. (4th) 121 (Ont. Div. Ct.).

4. *Bradburn v. Wentworth Arms Hotel*, [1979] 1 S.C.R. 846, involved statutory construction by an arbitration board which placed the board in opposition to the public policy of *The Labour Relations Act* on a matter of fundamental importance. Estey, J., stated at 858-859 that an interpretation which stripped the parties of their economic sanctions of strike and lockout conflicted with the general philosophy of labour relations and should only be sanctioned where the collective agreement provided clearly for the same. Cf. *Re Dayco (Canada) Ltd. and National Automobile, Aerospace & Agricultural Implement Workers Union of Canada* (1991), 73 D.L.R. (4th) 718 (Ont. C.A.), leave to appeal to the Supreme Court of Canada granted 20 June 1991, Bull. Proc. Sup. Ct., 21 June 1991, at 1592.

McLeod v. Egan is an example of this exception; it is seen as dealing with "the situation where a statute prohibits something which the collective agreement allows": B. Adell, "The Rights of Disabled Workers at Arbitration and under Human Rights Legislation" in

- W. Kaplan, J. Sack, Q.C., and M. Gunderson, eds., *Labour Arbitration Yearbook 1991*, vol. I (Toronto: Butterworths, 1991) 167 at 180. See to the same apparent effect, Laskin, C.J.C.'s comment in *Bradburn v. Wentworth Arms Hotel*, [1979] 1 S.C.R. 846 at 853, that *McLeod v. Egan* was a case "where statutory considerations [...] are dominant."
5. It is necessary to be alert not to resolve a dispute in the context of individual employment law when the dispute really involves collective employment law: *Control Data Canada Ltée. v. Lalancette*, [1983] C.A. 129 at 137-138, Monet J.A. (diss.); dissenting judgment affirmed [1984] 2 S.C.R. 476 *sub nom. Blanchard v. Control Data Canada Limited*. Note Dickson, J.'s, admonition against drawing "too heavily upon private sector experience": *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at 242.
 6. *Re Service Employees International Union, Local 204, and Broadway Manor Nursing Home* (1985), 13 D.L.R. (4th) 220 (Ont. C.A.); *Ferris v. Produits Petro-Canada Inc.* (1987), 6 Q.A.C. 114; *Re United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 264 and Metal Fabricating & Construction Ltd.* (1990), 69 D.L.R. (4th) 452 (Sask. C.A.).
 7. *McLeod v. Egan*, [1975] 1 S.C.R. 517. See also the minority concurring judgments of Wilson, J., in *Douglas College v. Douglas/Kwantlen Faculty Association*, [1990] 3 S.C.R. 570 at 606 and *Cuddy Chicks Ltd. v. Ontario Labour Relations Board* (1991), 81 D.L.R. (4th) 121 (S.C.C.) at 123.
 8. *St. Anne-Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219* (1986), 28 D.L.R. (4th) 1 at 16 (S.C.R.), [hereinafter *St. Anne-Nackawic*].
 9. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor corporation*, [1979] 2 S.C.R. 227, [hereinafter *CUPE*].
 10. The case is usually cited in tandem with *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses' Association*, [1971] 1 S.C.R. 382.
 11. *CUPE*, *supra* note 9 at 233.
 12. *Ibid* at 235.
 13. *Ibid*.
 14. *Ibid.* at 236.
 15. In *Re Ontario Public Service Employees Union and Forer* (1986), 23 D.L.R. (4th) 97 (Ont. C.A.), Blair, J.A., stated that he agreed with the comment in Evans, Janisch, Mullan & Risk, *Administrative Law Cases, Text and Materials*, 2d ed., (1984) at 512, that the patently unreasonable test relates jurisdictional review to the seriousness of the agency's error La Forest, J., tried to dispel that perception in *Paccar of Canada Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers, Local 14*, [1989] 2 S.C.R. 983 at 1004, where

he stated that "[t]he emphasis should be not so much on what result the tribunal has arrived at, but on the tribunal arrived at that result."

16. For example, in *Douglas College v. Douglas/Kwantlen Faculty Association*, *supra* note 3, the arbitration board had an express legislative grant of power "to provide a final and conclusive settlement of a dispute arising under a collective agreement" with further authority to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by the collective agreement": *ibid.* at 581-582.
17. The "no amendment" clause is treated here as an aspect of the jurisdictional grant. Collective agreement interpretation which amounts to an amendment of the collective agreement is not entitled to curial deference. See, for example. *Air-Care Ltd. v. United Steel Workers*, [1976] 1 S.C.R. 2. Even in the absence of such a clause, there is no jurisdiction to amend the collective agreement and curial deference is not a consideration: *Memorial University of Newfoundland v. Memorial University of Newfoundland Faculty Association* (1981), 73 D.L.R. (4th) 567 (Nfld. S.C., T.D.).
18. S.N. 1977, c. 64, s. 83(1). The Newfoundland legislation is an example of the "consensual" arbitration model because of the use of the phrase "arbitration or otherwise". The alternative is the statutory model where the parties are not given a legislative choice to use a dispute resolution mechanism other than arbitration: the Act simply says "by arbitration". It was thought at one time that greater deference ought to be shown to be consensual arbitrator than to the statutory one. It is suggested that this distinction is no longer operative: *Re Suncor Inc. and McMurray Independent Oil Workers, Local # 1* (1983), 142 D.L.R. (3rd) 305 (Alta. C.A.).
19. I see the conferring of an arbitral discretion to refer certain matters to The Labour Relations Board as evidence of a broader rather than a narrower jurisdictional grant to arbitrators where to arbitrator has jurisdiction to decide the matters if a referral is not made; D. Pother, "Judicial Review of Labour Arbitrators: A Comment on *Telecommunication Workers Union v. British Columbia Telephone Co.*", *supra* note 2 at 73, n. 62.
20. A review of federal and provincial general (as opposed to public service or specialty) labour relations acts or codes discloses that four have privative clauses of the "no *certiorari*" or "no review" type ("*nulle action* in Quebec) and six do not. The *Alberta Labour Relations Act* is unusual in prohibiting review but permitting *certiorari*: R.S.A. 1980, c. L-1.1, s. 143. All acts have a requirement that the parties to the collective agreement provide a mechanism for the final resolution of collective agreement disputes. In some acts, arbitration is required; in others, resolution may be by "arbitration or otherwise".
21. *Re Ford Motor Company of Canada Ltd. and International Union, United Automobile Workers of America*, [1972] 1 O.R. 36 at 42 (Ont. C.A.).
22. *Retail, Wholesale & Department Store Union and Dominion Stores Ltd.* (1982), 137 D.L.R. (3rd) 524 (Sask. C.A.).

Even while honouring them by mention, courts were distancing themselves from the *dicta* by extending curial deference to interpretation of the "home" or "constitutive" statute, an idea emanating from *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 at 388-389, Dickson, J. and *CUPE*, and developed in *Alberta Union of Provincial Employees v. Olds College*, [1982] 1 S.C.R. 923 at 931, Laskin, C.J.C.. See, for example, *Re Sollars and Canadian Union of Public Employees* (1984), 9 D.L.R. (4th) 145 (Sask. C.A.).

In *Haldimand-Norfolk Regional Board of Commissioners of Police v. Ontario Nurses' Association* (1990), O.A.C. 148, the court avoided *McLeod v. Egan* by limiting its effect to cases where interpretation of the outside statute resolves the essential question. The court stated at 149 that "[T]he issue always remains: is the eventual conclusion, bearing in mind the interpretation of the statutes examined and applied, one that is patently unreasonable?"

23. That is the gloss which the Supreme Court of Newfoundland, Trial Division, in *Newfoundland Association of Public Employees v. Newfoundland* (1990), 81 Nfld. & P.E.I.R. 201, placed on the words. Puddester, J., stated at 208 that, for a statute to qualify as "a projection of the collective bargaining relations", the collective agreement must:

expressly or otherwise directly and unequivocally [make] the provisions of a statute a direct and necessary part of the interpretation of the agreement.

24. It seems anomalous that arbitral immunity from review can be obtained for statutory interpretation where the statute is incorporated into the collective agreement whereas it does not exist where there is no such incorporation. This rather mechanistic approach amounts to a consensual transformation of statute into contract and ignores the principle that certain statutes cannot be waived or contracted out of: *Ontario Human Rights Commission v. Etobicoke*. What if the collective agreement in *McLeod v. Egan* had incorporated the *Ontario Employment Standards Act* by reference?
25. *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245 at 275-276 [hereinafter *Douglas Aircraft*].
26. Without referring to any exception, Tarnopolsky, J.A., adopted a similar stance in *Municipality of Metropolitan Toronto v. Canadian Union of Public Employees, Local 43* (1990), 69 D.L.R. (4th) 268 at 275 (Ont. C.A.).
27. In *Bradburn v. Wentworth Arms Hotel*, [1979] 1 S.C.R. 846 at 849, Laskin, C.J.C., distinguished the *McLeod v. Egan* situation from situations where a question of jurisdiction is involved.
28. See *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412 at 421, Beetz, J.; *Blanchard v. Control Data Canada Limited*, [1984] 2 S.C.R. 476 at 489-492, Lamer J. [hereinafter *Blanchard*]; and *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1087, Beetz, J. [hereinafter *Bibeault*].

29. *CUPE*, *supra* note 9 at 233.
30. *Supra* note 28.
31. Even before *Bibeault*, there was a judicial reluctance to apply the test of **general public enactment** as the basis for withholding curial deference: *Ferris c. Produits Petro-Canada Inc.* (1987), 6 Q.A.C. 114 at 122, LeBel, J.A.,:

J'hésiterais à appliquer intégralement cet aspect de la motivation dans la présente espèce. En effet, l'article 128 de la Loi sur les normes du travail attribue à l'arbitre nommée en vertu de ces dispositions, les pouvoirs de l'arbitre de grief agissant sous l'autorité du Code du travail. Comme à celui-ci, il lui permet de statuer sur l'interprétation d'une loi ou d'un règlement, en lui rendant applicable l'article 100.12 du Code du travail. En certains cas, l'interprétation des textes des lois générales est une fonction nécessaire de l'arbitre ou du tribunal inférieur. Elle constitue une part de leur activité que protège l'attitude normale de réserve judiciaire.

32. The pragmatic and functional approach mandated by *Bibeault* has been affirmed by the Supreme Court of Canada in subsequent cases: *Paccar of Canada Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers, Local 14*, *supra* note 15; *Re Public Service Alliance of Canada and Attorney-General of Canada* (1991), 80 D.L.R. (4th) 520 at 529-530, Sopinka J.(S.C.C.).

Provincial superior courts have also recognised the approach: *Re Consumer's Packaging Inc. and Aluminium, Brick & Glassworkers' Union, Local 256* (1991), 81 D.L.R. (4th) 261 at 266-267, Hoyt J.A. (N.B.C.A.); *United Food and Commercial Workers, Local 1252 v. Lewisporte Wholesalers Ltd.* (1990), 79 Nfld. & P.E.I.R. 237 at 244-245, L.D. Barry J. (Nfld. S.C., T.D.).

33. *Bibeault*, *supra* note 28 at 1089-1090.
34. *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412 [hereinafter *l'Acadie*].
35. Nor did Lamer, J., in *Blanchard v. Control Data Canada Limited*, *supra* note 28 at 492-493 when he asked "which errors of law result in loss of jurisdiction". The answer:

[O]nly unreasonable errors of law can affect jurisdiction.

36. *Volvo Canada Limited v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 720*, [1980] 1 S.C.R. 178 at 214, Pigeon, J.
37. There is an emerging trend to treat these sorts of provisions as privative clauses: *Re Dayco (Canada) Ltd. and National Automobile, Aerospace & Agricultural Implement Workers Union of Canada* (1991), *supra* note 4; *United Food and Commercial Workers, Local 2020*

v. Lewisporte Wholesalers Ltd. (1990), 79 Nfld. & P.E.I.R. 237 at 247.

In *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106* [1982] 2 S.C.R. 888 at 902, Choinard, J., stated that section 156(1) of the *Canada Labour Code* ("Every [...] decision [...] of an arbitrator [...] is final [...]") and not the clauses of the collective agreement, conferred finality on arbitration.

38. *Supra* note 28.
39. *Alberta Union of Provincial Employee v. Olds College*, [1982] 1 S.C.R. 923.
40. *Syndicat des professeurs du collège de Lévis-Lauzon v. Collège d'enseignement général et professionnel de Lévis-Lauzon*, [1985] 1 S.C.R. 596 at 610, Beetz J.
41. *Ibid.*
42. The issue in *Lévis-Lauzon* being grievance time limits, the repository of those time limits (whether the collective agreement or legislation) is unimportant as the matter fell within the particular expertise of the arbitrator.
43. See to similar effect Gonthier, J., in *National Corn Growers v. Canadian Import Tribunal*, [1990] 2 S.C.R. 1324 at 1369-1370.
44. *L'Acadie*, *supra* note 34 at 420.
45. *Telecommunications Workers Union v. British Columbia Telephone Company*, [1988] 2 S.C.R. 564, rev'g. (1985), 20 D.L.R. (4th) 719 [hereafter "*B.C. Telephone*"].
46. D.L.R., *ibid.*.
47. Now R.S.C. 1985, c. L-2, s. 3(2).
48. *B.C. Telephone*, *supra* note 45 at 725 .
49. R.S.C. 1970, c. L-1, s. 156, now R.S.C. 1985, c. L-2, s. 58.
50. L'Heureux-Dubé, J., dissenting in the Supreme Court, criticised these comments as distinguishing inappropriately between consensual and statutory arbitration (*supra* note 45 at 588) but it is suggested that Lambert, J.A., was really distinguishing arbitration generally from the work of statutory tribunals. It is clear that arbitral awards (even when made in a strictly statutory regime) are not binding: *Isabelle v. Ontario Public Service Employees Union*, [1981] 1 S.C.R. 449 at 457, Laskin C.J.C.
51. *Ibid.* at 568.
52. D. Pothier, "Judicial Review of Labour Arbitrators: A Comment on *Telecommunication Workers Union v. British Columbia Telephone Company*" *supra* note 2 at 73-74 that :

In B.C. Tel., the justification for not interfering is not because [he] should be given deference in interpreting general provisions of the Canada Labour Code, but because he was not required to interpret those provisions.

However, the arbitrator's decision to reinstate was made without reference to the nature of the picket line misconduct and on the basis that the employer had no legal right to discharge striking employees during a legal strike for conduct directly related to the labour dispute. This resolution is based upon his erroneous interpretation of section 107(2).

53. *B.C. Telephone, supra* note 45 at 583.
54. *Ibid. at 584.*
55. *McLeod v. Egan, supra* note 7 at 521.
56. *Sub nom. Control Data Canada Limitée v. Lalancette*, [1983] C.A. 129 at 137-143.
57. *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718.
58. *Blanchard, supra* note 28.
59. And expertise will be valued by a reviewing court even where it is clear that the tribunal will not be extended curial deference: *Douglas College v. Douglas/Kwantlen Faculty Association, supra* note 3 at 604-605.
60. *L'Acadie, supra* note 34 at 437, Beetz, J.
61. *Bibeault, supra* note 28 at 1088.
62. In Newfoundland, aspiring arbitrators must undergo a rigorous examined programme of training and apprenticeship administered by the bipartite Labour-Management Cooperative Committee before they may have their names added to the list used by the Minister of Employment and Labour Relations for arbitral appointments where the parties cannot agree or the appointment must be made by the Minister. The programme is voluntary and non-statutory but the vast majority of appointments made by the parties to collective agreements come from the list.
63. *The Random House Dictionary of the English Language*, unabridged, J. Stein, ed., (New York: Random House, 1967).
64. The imposition of a governing judicial interpretation of "consent" on the basis of withholding curial deference to an arbitrator amounts (perhaps unavoidably) to impinging on the jurisdiction of any labour standards tribunal which may have jurisdiction.