

The Jurisdiction of Labour Arbitrators : The Debate Continues*

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The issue of jurisdiction of labour arbitrators has animated much debate and litigation over the years. Some landmark decisions from the Supreme Court of Canada have pertained to the question of arbitral jurisdiction. Currently, the debate is intense. At issue is the jurisdiction of arbitrators to decide entitlement to health and welfare benefits, human rights claims, defamation and other tort claims, and Charter issues. Also at issue is the scope of arbitral review in relation to post-discharge evidence. Through many of the labour-related decisions now being issued by arbitrators and by courts runs the thread of expansion or contraction of arbitral scope.

Is it better for unions and their members for arbitrators to have broader scope for their adjudication? In some instances, clearly yes. In others, perhaps not. Of paramount importance for trade unions and organized employees is the just and prompt resolution of workplace problems. This is the measure against which the questions about arbitral jurisdiction should be measured.

I. FUNDAMENTAL SOURCES OF JURISDICTION

Fundamentally, the jurisdiction of labour arbitrators derives from the collective agreement and from statutory requirements that every collective agreement contain a method of dispute resolution. Some legislative regimes require that collective agreements shall provide for dispute settlement by means of arbitration. Others, such as Alberta's, require that every collective agreement contain a "method" of dispute resolution. Section 133 of Alberta's *Labour Relations Code*¹ provides :

S.133 Every collective agreement shall contain a method for the settlement of differences arising :

- (a) as to the interpretation, application or operation of the collective agreement,
- (b) with respect to a contravention or alleged contravention of the collective agreement, and
- (c) as to whether a difference referred to in clause (a) or (b) can be the subject of arbitration between the parties to or persons bound by the collective agreement.

1. *Alberta's Labour Relations Code*, S.A. 1988, c. L-1.2.

II. SOME HISTORY ON ARBITRAL JURISDICTION

A. Substitution of Penalty

Labour relations statutes also provide for the remedial authority of arbitrators for substitution of penalty in cases of dismissal or discharge.² Statutory provisions extending arbitrators' jurisdiction to substitute penalty were a response to the decision of the Supreme Court of Canada in *Port Arthur Shipbuilding Co. v. Arthurs et al.*³ The history leading up to *Port Arthur Shipbuilding* is described in E.E. Palmer and B.M. Palmer, *Collective Agreement Arbitration in Canada*.⁴ In early decisions, arbitrators had taken the position that there was no inherent power to substitute penalty. If the collective agreement did not expressly provide for such authority, the arbitrator could not interfere with management's judgment. Some arbitrators, however, viewed their authority differently and were willing to determine the appropriate penalty. This view gained ascendancy, so that by 1960, Palmer stated⁵ that there could be little question of the power of arbitrators to vary penalties imposed by management.

However, in 1966, this issue came before the courts for review. In *Re United Steelworkers and Port Arthur Shipbuilding Co.*,⁶ the three grievors had been discharged because of unauthorized absence from work. During each of the absences, the grievors had worked for other employers. Two of the grievors had approximately 15 years' seniority. At arbitration, they testified that a recurring feature of work at Port Arthur Shipbuilding was a seasonal layoff commencing prior to Easter. During this layoff, the grievors sought out and performed work for other companies. Anticipating an imminent layoff in April 1966, the grievors had made arrangements for alternative employment in Terrace Bay, Ontario. A few days before their scheduled departure, it became apparent that the anticipated layoff would not materialize. The grievors contacted the other company to

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2. Alberta's *Labour Relations Code*, *ibid.*, s. 140 (2) provides that "If an arbitrator, arbitration board or other body determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator, arbitration board or other body may substitute some other penalty for the discharge or discipline that to the arbitrator, arbitration board or other body seems just and reasonable in all the circumstances." Similar provisions are contained in, for example, British Columbia's *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 89, Ontario's *Labour Relations Act, 1995*, S.O. 1995, c. 1, sch. A., s. 48(14), Nova Scotia's *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 43(1) and Saskatchewan's *Trade Union Act*, R.S.S. 1978, c. T-17, s. 25(3). Whether the language in Quebec's *Labour Code*, R.S.Q. 1977, c. C-27, s. 100.12 is materially different is the subject of considerable jurisprudence.
 3. *Port Arthur Shipbuilding Co. v. Arthurs* (1968), 70 D.L.R. (2d) 693, 68 C.L.L.C. para. 14, 136 (*sub nom. R. v. Arthurs*) (S.C.C.).
 4. E.E. Palmer and B.M. Palmer, *Collective Agreement Arbitration in Canada*, 3rd ed. (Toronto : Butterworths, 1991) at 236ff.
 5. E.E. Palmer "The Remedial Authority of Labour Arbitrators" in R. St. J. Macdonald, ed., *Current Law and Social Problems*, vol. 1 (Toronto : University of Toronto Press) 125.
 6. *Re United Steelworkers and Port Arthur Shipbuilding Co.* (1966), 17 L.A.C. 109 (Chair : Arthurs).

cancel arrangements, but were told that their withdrawal would leave that company unable to meet commitments to customers. After some days at the job with the other company, the grievors realized the seriousness of the situation and returned to work at Port Arthur Shipbuilding. The personnel manager asked the grievors if they had been absent to work for another employer, and the grievors admitted they had done so.

The third grievor had 24 years seniority and was president of the local union. Although he was in a different situation from the other two grievors in that he was virtually immune from layoff, he was also clearly aware of an article in the collective agreement which provided that : *Leave of absence shall not be granted to any Employee for the purpose of engaging in employment elsewhere [...]* : The third grievor had taken a week without pay to take an alternative, higher paying job so as to earn enough money to effect improvements to his home. The arbitration board viewed the situation of the third grievor as more serious than that of the first two grievors.

Relying on the decision of the Supreme Court of Canada in *Re Polymer Corp. and O.C.A.W.I.U., Local 16-14*⁷ for the principle that arbitrators may fashion appropriate remedies pursuant to the general mandate to make a final and binding determination of the issues, the arbitration board held that there were mitigating factors, and that suspensions should be substituted for the penalties of discharge.

On judicial review, the court quashed the award on the ground that, in the circumstances, the arbitration had no power to substitute penalty.⁸ The Ontario Court of Appeal overturned that decision.⁹ The appeal court majority, consisting of Wells and Laskin, J.J.A., concluded that it was proper for the arbitration board to have taken into account the employees' seniority and record of conduct in substituting penalty.

The Supreme Court of Canada allowed the further appeal, reversing the Ontario Court of Appeal and restoring the decision of the lower court. The Supreme Court held (with Judson J. writing for the Court) that the sole task of the arbitration board was to determine whether there was proper cause for discharge; in substituting its judgment for that of management, the arbitration board had exceeded its authority. The Court stated :¹⁰

The sole issue in this case was whether the three employees left their jobs to work for someone else and whether this fact was a proper cause for discipline. Once the Board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration. This was the opinion of Mr. Justice Brooke and Mr. Justice Schroeder, dissenting on appeal, and with this opinion I agree.

7. *Re Polymer Corp. and O.C.A.W.I.U., Local 16-14* (1962), 33 D.L.R. (2d) 124, 62 C.L.L.C. para. 15,406 (S.C.C.).

8. *R. v. Arthurs* (1966), [1967] 1 O.R. 272, 60 D.L.R. (2d) 214 (H.C.).

9. *Ibid.* [1967] 2 O.R. 49, 62 D.L.R. (2d) 342, 67 C.L.L.C. para. 14,024 (C.A.).

10. *Port Arthur Shipbuilding Co. v. Arthurs*, *supra* note 3, at 696 (D.L.R.) and at para. 14,136 (C.L.L.C.).

As noted by Palmer and Palmer,¹¹ the decision in *Port Arthur Shipbuilding* caused a furor. The debate and the criticism was resolved when labour legislation across Canada was amended to allow for arbitral substitution of penalty.

While *Port Arthur Shipbuilding* represented a dramatic limitation of arbitral jurisdiction (subsequently enlarged by statute), there are a number of examples in arbitral history of decisions expanding jurisdiction. Examples are the ability to award damages, to apply the equitable doctrine of estoppel, and to apply the *Charter of Rights and Freedoms*.¹²

B. Damages

In relation to an arbitrator's ability to award damages, the Supreme Court of Canada had played a role opposite to that represented by *Port Arthur Shipbuilding*. In *Polymer Corporation Limited*,¹³ the Supreme Court of Canada held that a board of arbitration had jurisdiction to award and assess damages. Earlier arbitrators had held that in the absence of a specific provision allowing them to do so, they could not award damages,¹⁴ generally basing that conclusion on the view that, unless the collective agreement expressly provided for an award of damages, the arbitration clause prohibiting arbitrators from exercising power to "alter, modify or amend the collective agreement" would be breached.¹⁵ In 1959 the issue came before an arbitration board chaired by arbitrator (as he then was) Laskin.¹⁶ A grievance had been filed by the company claiming damages for loss suffered as a result of an illegal strike. In a previous award, the arbitration board had held that the union had breached the collective agreement because of the strike. The company requested that the board reconvene to assess damages. The union raised an objection to the board's authority to make an assessment of damages. First, the board held that the question of whether an arbitration board can award damages is not one going to jurisdiction, but is a matter of the powers of a board once it is properly seised of the dispute under the collective agreement or under the relevant legislation. The arbitration board then held that the power to award damages does not depend on the inclusion of a specific provision in the agreement. The object of submitting matters to arbitration is that there shall be a final and binding settlement of disputes. By submitting to the board's adjudication, the parties are presumed to have intended to submit to a complete adjudication of the matter and a proper redress of any wrong suffered as a result of a breach of the collective agreement.

11. E.E. Palmer and B.M. Palmer, *supra* note 4 at 237-239.

12. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

13. *Supra* note 7.

14. E.E. Palmer and B.M. Palmer, *supra* note 4 at 44-45.

15. *Ibid.* at 45.

16. *Re Oil, Chemical & Atomic Workers & Polymer Corp.* (1959), 10 L.A.C. 51.

The union applied for judicial review on the ground that the arbitration board had no authority to award and assess damages. McRuer, C.J.H.C. dismissed the motion for an order of *certiorari* and prohibition.¹⁷ The Ontario Court of Appeal affirmed the judgment of McRuer, C.J.H.C.¹⁸ The union appealed further to the Supreme Court of Canada. Cartwright, J., writing for the Court, dismissed the appeal, holding that the union had the capacity to incur liability in damages for breach of the collective agreement and the arbitration board was within its powers to award and assess damages for the same.¹⁹

III. OTHER EXAMPLES OF EXPANSION OF ARBITRAL JURISDICTION

The jurisdiction of a labour arbitrator to apply the equitable doctrine of estoppel has been the subject of arbitral and judicial debate. The doctrine was first described by Denning J. (as he then was) in *Central London Property Trust Ltd. v. High Trees House Ltd.*²⁰ and later summarized as follows (in *Combe v. Combe*) :²¹

The principle [...] is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualifications which he himself has so introduced [...].

Many arbitrators had accepted that they had the jurisdiction to apply the equitable doctrine of promissory estoppel in the context of collective agreements.²² However, in Alberta, arbitrators' jurisdiction to apply estoppel was thrown into doubt when the Court of Queen's Bench quashed²³ the decision of an arbitrator that had applied the doctrine. A group grievance had been brought alleging breach of a practice that had persisted through five collective agreements, and requesting that the employer be estopped from altering the practice. It had been the practice of the employer to have underground maintenance personnel report for work 10 minutes before the start of their regular shift

17. *Ibid.* (1961) 61 C.L.L.C. para. 15,341 (Ont. H.C.J.).

18. *Ibid.* 28 D.L.R. (2d) 81 (Ont. C.A.).

19. *Supra* note 7.

20. *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; the history of the development of the doctrine and the use by labour arbitrators is described in Gorsky, Usprich and Brandt, *Evidence and Procedure in Canadian Labour Arbitration* (Carswell, 1998, looseleaf) at 2-18ff.

21. *Combe v. Combe*, [1951] 2 K.B. 215 at 220 (C.A.), quoted in Gorsky, Usprich and Brandt, *op. cit.*, note 20, at 2-18.

22. Gorsky, Usprich and Brandt, *supra* note 20 at 2-20; D. J. M. Brown, and D. M. Beatty, *Canadian Labour Arbitration*, 3rd ed. (Aurora : Canada Law Book) at 2:2200.

23. *Smoky River Coal Ltd. v. U.S.A., Local 7621* (1984), 31 Alta. L.R. (2d) 269 (Q.B.)

and remain 20 minutes after the end of the regular shift for the purpose of receiving instructions, filing reports and discussing maintenance problems. For this additional time, the underground maintenance personnel were paid 1/2 hour of overtime pay per day. This practice had the consent of the union. The employer announced that, for reasons of cost-efficiency, the practice of paying the 1/2 hour of overtime would be discontinued.

Applying the equitable doctrine of promissory estoppel, the arbitrator found in favour of the grievors. The Court of Queen's Bench reasoned that while superior courts enjoy a plenary and inherent jurisdiction, including a jurisdiction in equity, the powers of inferior, statutory tribunals are circumscribed by their enabling statutes. The *Labour Relations Act* in effect at the time did not expressly give the arbitrator jurisdiction in equity. Nor did the statute give the arbitrator such jurisdiction by necessary implication, since the arbitrator's powers are all based on a consideration of the written agreement between the parties and not on circumstances and customs collateral to the agreement. The Court of Queen's Bench concluded:²⁴

As a result I find that the arbitrator does not have a jurisdiction in equity and that in assuming such powers he was acting outside of his jurisdiction by statute.

The Court of Appeal dismissed the union's appeal — but on the basis that the arbitrator had made a fundamental error in the application of the doctrine of estoppel, not on the basis that the arbitrator had no jurisdiction to apply estoppel.²⁵ Stevenson J.A. (as he then was), writing for the Court, stated:²⁶

On an application for certiorari to quash the decision of the arbitrator, the Court of Queen's Bench held (reported 8 D.L.R. (4th) 603, 31 Alta. L.R. (2d) 269, 50 A.R. 150) that the doctrine of promissory estoppel was an equitable doctrine capable of application only by courts of equity and, therefore, not open to an arbitrator. I have grave reservations about the proposition that an arbitrator cannot apply so-called equitable principles in carrying out his obligations, but as I have concluded that the arbitrator made a fundamental error in his application of the doctrine of promissory estoppel, it is unnecessary to state a conclusion on this issue.

Alberta arbitrators have since been applying the doctrine of promissory estoppel (as shield, not sword): *Re Lafarge Canada Inc. and B.B.F., Loc. D331* (1997), 65 L.A.C. (4th) 438 (Alta. Arb. Bd.); *Medicine Hat News* (1994), 43 L.A.C. (4th) 110 (Alta. Arb. Bd.); *City of Calgary and A.T.U., Loc. 583 (Dixon), Re* (1994), 9 L.A.C. (4th) 1 (Rooke); *Lethbridge (City) v. C.U.P.E., Local 70* (1986), 26 L.A.C. (3d) 81 (Alta. Arb. Bd.). The

24. *Ibid.* at 277.

25. *Smoky River Coal Ltd. v. U.S.A., Local 7621* (1985), 18 D.L.R. (4th) 742 (Alta. C.A.)

26. *Ibid.* at 745.

breadth of decisions from jurisdictions across Canada is reflected in Brown and Beatty, *Canadian Labour Arbitration*, at 2:2200.²⁷

IV. THE CHARTER

Confirmation of another significant expansion of arbitral jurisdiction came with the 1990 decision of the Supreme Court of Canada in *Douglas/Kwantlen Faculty Assn. v. Douglas College*.²⁸ The Court held that an arbitration board had jurisdiction to determine a grievance disputing the constitutionality of a provision of a collective agreement. Writing for the majority, La Forest J. concluded that in accordance with the supremacy clause in s. 52(1) of the *Constitution Act, 1982*, a tribunal must respect the Constitution, so that if it finds invalid a law that it is called upon to apply, it is bound to treat the law as having no force and effect. Where a tribunal is asked to determine whether Charter rights have been infringed or to grant a remedy under s. 24(1), its statutory mandate must extend to the subject-matter of the application, the parties and the remedy.

The issue in *Douglas College* was mandatory retirement : did a provision in the collective agreement that required the employees to retire at age 65 breach s. 15(1) of the Charter? As is typical, British Columbia's labour legislation granted arbitrators authority to provide a final and conclusive settlement of a dispute arising under a collective agreement. Section 98(g) of the *Labour Code* gave arbitrators authority to interpret and apply any Act intended to regulate employment, to apply the Charter, and to grant appropriate remedies. The Court concluded that the arbitrator had jurisdiction over the parties and the subject matter in the case. The arbitrator therefore had jurisdiction to decide whether a provision of the collective agreement breached the Charter and was therefore of no force or effect. The majority concluded that, in that case, it was not necessary to decide if arbitrators are courts of competent jurisdiction for purpose of s. 24 of the Charter.

The decision in *Douglas College* came just before the Supreme Court of Canada confirmed the jurisdiction of labour boards to determine Charter issues.²⁹

27. Particularly at note 7, listing awards from across Canada.

28. *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4th) 94 (S.C.C.). For a discussion on the debate prior to the decision in *Douglas College* as to whether arbitrators could apply the Charter, see Brown and Beatty, *Canadian Labour Arbitration*, *supra* note 22 at 2:2050.

29. *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)* (1991), 81 D.L.R. (4th) 121 (S.C.C.)

A. Human Rights Principles as Applied to Collective Agreements

Ontario's labour legislation provides expressly that an arbitrator may interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.³⁰ The legislation in British Columbia and Nova Scotia contains similar provisions.³¹ In jurisdictions without such express conferral of jurisdiction, the authority of arbitrators has built incrementally (as it did in Ontario prior to the legislative change). However, there is no doubt that in the last few years there has been a tremendous development in this area of arbitral jurisprudence.

Almost invariably, collective agreements contain clauses which prohibit discrimination in application of terms and conditions of employment on the same grounds as are found in human rights legislation. An elaborate jurisprudence has developed through the pursuit of individual discrimination cases under collective agreements as unions have vigorously pursued the rights of their members to employment without discrimination on the basis of, *inter alia*, gender, mental and physical disability, age, and sexual orientation. As expressed by an arbitrator recently:³²

The number of decisions — of arbitrators, human rights tribunals, and courts — in the area of disabilities, employer rights to set occupational standards, and employer obligations to accommodate those who may not meet them in part — increases daily, and the doctrinal development is complex and changing.

The lack of a clause prohibiting discrimination does not foreclose the arbitrator's ability to refer to human rights legislation. For example, the human rights statute can be used to interpret the almost universal prohibition against discipline or dismissal except for "just" or "proper" or "sufficient" cause. Arbitrators have reasoned that such provisions must be read in light of human rights statutes, and that no discipline or dismissal can be for "just" cause if it violates human rights legislation.³³ Arbitrators have also referred to human rights legislation in interpreting the fairness of the exercise of management rights.³⁴

30. *Labour Relations Act, 1995*, S.O. 1995, c. 1, sch. A, s. 48(13)(j).

31. *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 89(g), as am.; *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 43(1)(e), as am.

32. *United Airlines and I.A.M., Re* (1993), 33 L.A.C. (4th) 89 at 100, MacIntyre, Q.C.

33. J. L. Wallace, "The Duty to Accommodate and Seniority Systems : An Alberta View," (paper delivered at the 11th Annual Labour Arbitration Conference in Calgary) [unpublished].

34. *Ibid.*

A recent decision confirming the important place of human rights analysis in arbitral jurisprudence is *University of Alberta Non-Academic Staff Assn. v. University of Alberta*,³⁵ in which the Court reviewed the jurisprudence building the foundation of the arbitrator's authority to interpret and apply human rights principles. By contrast, a recent decision from the Manitoba Court of Queen's Bench appears to have taken a somewhat more restrictive view of an arbitrator's ability to apply human rights statutes (*Assiniboine South Teachers' Assn. of the Manitoba Teachers' Society v. Assiniboine South School Division No. 3*, [1998] M.J. No. 364). The Court held that in the absence of a no-discrimination clause in the collective agreement, the *Human Rights Code* could be used only to assist in the interpretation of provisions of the collective agreement. Without a violation of an express or implied term of the collective agreement, an arbitration board had no jurisdiction to deal with human rights or Charter issues.

It must also be noted that the effect of a recent Supreme Court decision is that legislative defences under human rights legislation will be readily implied into collective agreements *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*.³⁶

The Saskatchewan Court of Queen's Bench has recently held, based on the principles in *Weber*, that arbitration is the appropriate and exclusive forum for adjudication of human rights complaints in a unionized workplace. In *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)*,³⁷ the Court relied on another recent decision from the Saskatchewan Court of Queen's Bench (*Dominion Bridge Inc. v. Routledge*)³⁸ and held that a complaint of sexual harassment should be determined at arbitration, not at a human rights board of inquiry. The complainant was a member of a trade union and a collective agreement governed the workplace. The collective agreement contained a no-discrimination clause. The Court rejected the submissions of the Human Rights Commission that a decision giving an arbitrator exclusive jurisdiction would be destructive to the broad remedial scheme contained in the human rights legislation. The Court held that where a collective agreement exists within a context of legislation mandating arbitration there should be deference to arbitrators rather than to boards of inquiry.

This effective method of enforcement has developed in the areas of disability discrimination and of discrimination on the basis of pregnancy. In both cases, the law developed first through pursuit of human rights complaints to the Supreme Court and has subsequently been broadened in application to large groups of employees through use of the grievance procedure.

35. *University of Alberta Non-Academic Staff Assn. v. University of Alberta* (1997), 97 C.L.L.C. para. 230-043 (Alta. Q.B.)

36. *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, 134 D.L.R. (4th) 1 (S.C.C.).

37. *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)*, [1998] S.J. No. 27 (Q.B.) (QL).

38. *Dominion Bridge Inc. v. Routledge* (1997), 154 D.L.R. (4th) 504 (Sask. Q.B.).

B. Disability Discrimination

Arbitral decisions considering and applying the duty to accommodate are legion and generally have been of great assistance in bringing down the barriers to maintaining the employment of injured and other disabled workers.³⁹ It was once accepted that injured and otherwise permanently disabled or ill employees could not expect to keep their jobs. Now, it is increasingly accepted that there is an employer obligation to accommodate the disabilities of such employees to the point of undue hardship. This employer duty, with the concomitant employee obligation to respond reasonably, is another clear shift in attitude and approach at unionized workplaces, wrought by developments in human rights law.

C. Discrimination on the Basis of Pregnancy

Following the decisions in *Brooks*⁴⁰ and *Parcels*,⁴¹ boards of arbitration have recognized and affirmed that (a) health conditions related to pregnancy/maternity are valid reasons for absence from work and (b) employment disability plans that exclude compensation for such health-related absences from work are discriminatory. Such entitlements are now enforced under collective agreements either on the bases of language permitting employee choice as to when to commence maternity leave or on the basis of no discrimination clauses which reflect discrimination prohibitions in human rights legislation and therefore yield like results. Once again, in a union setting, employees are well advised to pursue their entitlements through the grievance process for speed and efficiency. Employees bound by individual contracts of employment must advance cases of denial of health benefits associated with maternity through the human rights process.⁴²

39. (1992) Can. Lab. L.J. Vol. 1, No. 1, 2 and 3.

40. *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. (4th) 321 (S.C.C.)

41. *Parcels v. Red Deer General & Auxiliary Hospital and Nursing Home Dist. No. 15* (1991), 15 C.H.R.R. D/257 (Alta. Bd. of Inq.), appeal allowed in part *sub nom. Alberta Hospital Assn. v. Parcels* (1992), 1 Alta. L.R. (3d) 332 (Q.B.).

42. For examples of arbitral decisions pertaining to pregnancy and maternity benefits see *Kootenay Savings Credit Union and U.S.W.A., Local 9090, Re* (1991), 19 L.A.C. (4th) 77 (B.C. Arb. Bd.); *Prince Albert Rural School Division No. 56 v. Teachers of Saskatchewan* (1996), 140 D.L.R. (4th) 266 (Sask. C.A.); *Teachers of Saskatchewan v. Blaine Lake School Division No. 57* (1996), 140 D.L.R. (4th) 287 (Sask. C.A.); *Regina School Division No. 4 v. Teachers of Saskatchewan* (1996), 140 D.L.R. (4th) 300 (Sask. C.A.); *St. Paul, No. 1 (County) and A.T.A. (Tkachuk) (Re)* (1996), 62 L.A.C. (4th) 239 (Alta Arb. Bd.); *Christ the Redeemer Catholic Regional School Division No. 3 v. Alberta Teachers' Association* (May 31, 1996), (Alta. Arb. Bd.) [unreported]; *North Central West School Authorities Association, Whitecourt School District No. 2736 v. The Alberta Teachers' Association*, (May 15, 1995) (Alta Arb. Bd.) [unreported]; application for judicial review dismissed November 23, 1995; on appeal to the Alberta Court of Appeal; *O.S.S.T.F., District 34 v. Essex County Board of Education* (1996), 136 D.L.R. (4th) 34 at 49, 55 (Ont. Div. Ct.), appeal allowed [1998] O.J. No. 3368 (Ont. C.A.); *United Nurses of Alberta, Local #15 and St. Mary's Hospital Camrose*, (March 4, 1994), (Alta. Arb. Bd.) [unreported]; *Alberta and A.U.P.E. (Conroy-Rossall), Re* (1991), 20 L.A.C. (4th) 318 (Chair : McFetridge); *Government of Alberta and A.U.P.E. (Stork)*,

Notwithstanding the significant progress evident in the unionized workplace, there have also been disappointments — for example, age discrimination in employment, forgiven by the Courts, persists in some legislation and hence at the workplace.⁴³

D. The Decisions in *Weber* and *O’Leary*

With the Supreme Court of Canada decisions in *Weber v. Ontario Hydro*⁴⁴ and *New Brunswick v. O’Leary*,⁴⁵ the scope of arbitrators’ jurisdiction has potentially taken a quantum leap, and the potential obligations of unions have increased significantly. These two decisions have dramatically intensified the debate on arbitral jurisdiction.

1. *Weber*

Weber was employed by Ontario Hydro. As a result of back problems, he took an extended leave of absence. Ontario Hydro paid him the sick benefits stipulated by the collective agreement. The employer began to suspect that Weber was malingering and hired private investigators. The investigators gained entry into Weber’s home by pretending they were someone else. As a result of the information obtained, Ontario Hydro suspended Weber for abusing sick-leave benefits. Weber took the matter to his union, which filed grievances, one of which alleged that Hydro’s hiring of the investigators violated the terms of the collective agreement. The grievances went to arbitration and were settled after the arbitration had commenced. In the meantime, Weber had commenced a court action based on tort and breach of ss. 7 and 8 of the Charter. The torts alleged were trespass, nuisance, deceit and invasion of privacy.

Ontario Hydro applied for an order dismissing Weber’s court action. The motions judge dismissed the court action on the grounds that the dispute arose out of the collective agreement, depriving the court of jurisdiction, and was moreover a private matter to which the Charter did not apply.⁴⁶ The Court of Appeal agreed, except with respect to the Charter claims, which it allowed to stand.⁴⁷ Weber then appealed to the Supreme Court of Canada.

(December 21, 1992), (Alta. Arb. Bd.) [unreported].

43. *McKinney v. University of Guelph* (1987), 46 D.L.R. (4th) 193 (S.C.C.).

44. *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.).

45. *New Brunswick v. O’Leary* (1995), 125 D.L.R. (4th) 609 (S.C.C.).

46. *Supra* note 43; *Weber v. Ontario Hydro* (1991), 38 C.C.E.L. 126 (Ont. Gen. Div.).

47. *Ibid.*; *Weber v. Ontario Hydro* (1992), 98 D.L.R. (4th) 32 (Ont. C.A.).

A unanimous Court agreed that the tort actions were precluded, but the Court divided on the issue of whether the Charter claim could proceed, a majority holding that the action for Charter claims was also precluded.⁴⁸ Writing for the majority, McLachlin J. concluded :⁴⁹

[...] mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal.

According to the Court, the task of the judge or arbitrator determining the appropriate forum for a proceeding centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered : the dispute and the ambit of the collective agreement. The decision-maker must determine whether the dispute, in its essential character, arises expressly or inferentially from the interpretation, application, administration or violation of the collective agreement.

McLachlin J. noted the advantages of having a single tribunal at first instance decide all issues arising from a dispute. She explained that this does not mean that the arbitrator will consider separate "cases" of tort, contract, or Charter :

Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter.⁵⁰

Applying the principles to Weber's case, the majority concluded that the differences between the parties related to the administration of the collective agreement within s. 45(1) of the *Labour Relations Act* (which required every collective agreement to provide for the final and binding settlement by arbitration of all differences arising from interpretation, application, administration or alleged violation of the agreement).

48. The Court's decision in *Weber* answered the question on Charter jurisdiction left open in *Douglas College. Weber* determines that an arbitrator has jurisdiction (where the Charter applies) not only to declare a provision of a collective agreement of no force and effect if it breaches the Charter, but also to apply remedies pursuant to s. 24 of the Charter. The scope of the *Weber* decision is noted and thoroughly reviewed in *Calgary Roman Catholic Separate School District No. 1 and A.T.A., Loc. 55 (MacDonald) (Re)* (1997), 68 L.A.C. (4th) 1 (Chair : Sims).

49. *Supra* note 44 at 607.

50. *Ibid.* at 603.

McLachlin J. noted that the collective agreement extended the grievance procedure to any "allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this Agreement" and incorporated the sick leave plan into the collective agreement. Under the plan, Ontario Hydro had the right to decide what benefits the employee would receive, subject to the employee's right to grieve. Weber's grievances alleged that Ontario Hydro had acted improperly in the course of making such a decision.

2. *O'Leary*

O'Leary was employed by the Province of New Brunswick as a traffic counter operator. His work required him to travel throughout the province. The province brought an action against O'Leary, alleging that he drove its leased vehicle with a flat tire, necessitating repairs amounting to \$2,815.54. O'Leary took the position that the courts lacked jurisdiction because the matter arose out of the collective agreement and was governed by the arbitration provisions in the *Public Service Labour Relations Act*. The New Brunswick Court of Queen's Bench dismissed a motion to strike the action, holding that the claim for negligence did not fall under the collective agreement and was not a grievance subject to arbitration.⁵¹ The Court of Appeal upheld the decision on the same grounds.⁵² In a unanimous judgment written by McLachlin J., the Supreme Court of Canada applied the principles set out in *Weber*, and concluded that the dispute between the parties in this case, viewed in its essential character, arose from the collective agreement.⁵³ The Court held that while the collective agreement did not expressly refer to employee negligence in the course of work, such negligence impliedly fell under the collective agreement. McLachlin J. stated :⁵⁴

Again, it must be underscored that it is the essential character of the difference between the parties, not the legal framework in which the dispute is cast, which will be determinative of the appropriate forum for settlement of the issue.

McLachlin J. noted that an article in the collective agreement acknowledged the employee's obligation to ensure the safety and dependability of the employer's property and equipment. The Court inferred from this article the correlative right of the employer to grieve breaches of these obligations. The essence of the dispute concerned the preservation of the employer's property and equipment. Framing the dispute in terms of negligence did nothing to remove the dispute from the contemplation of the collective agreement article.

51. *Ibid.* *New Brunswick v. O'Leary* 35 N.B.R. (2d) 394 (Q.B. T.D.).

52. *New Brunswick v. O'Leary* (1993), 141 N.B.R. (2d) 157 (C.A.).

53. *Supra* note 44 at 611.

54. *Ibid.*

The impact of *Weber* and *O'Leary* has been dramatic. Arbitrators, courts, the trade union community, and academic writers have been wrestling with the scope of the decisions. As stated by Arbitrator Kenneth P. Swan :⁵⁵

There is a long process ahead for arbitrators and the courts, as they try to define the boundaries of what each of them is to do in relation to terms and conditions of unionized employment. But the final outcome will clearly be expansive, not restrictive, of the scope of arbitral authority.

E. THE CURRENT DEBATE

Employee Benefits

The effect of *Weber* and *O'Leary* on adjudication of employee benefit claims has been particularly turbulent. According to commentators, the debate is "raging."⁵⁶ Until the Supreme Court of Canada decisions, the issue of arbitrability of grievances based on denial of health and welfare benefit claims generally proceeded according to a well-established analysis. Arbitrators decided whether they had jurisdiction to adjudicate a denial of benefits under a plan depending on the language of the collective agreement and on the application of the facts defined by Brown and Beatty of four categories as follows :

1. The plan is not mentioned in the collective agreement (therefore a claim based on a denial of benefits or other breach of the plan in most cases is not arbitrable).
2. The collective agreement specifically provides for certain benefits (therefore a dispute is arbitrable).
3. The collective agreement only provides for the payment of premiums for an insurance policy (therefore a dispute regarding failure to provide benefits is not arbitrable).
4. The collective agreement incorporates all or part of a specific plan or policy (therefore the grievance is arbitrable).⁵⁷

55. K. P. Swan, "The Arbitrator as Social Engineer" in W. Kaplan, J. Sack, Q.C., M. Gunderson, R. Filion, Q.C., eds., *Labour Arbitration Yearbook 1998* (Toronto : Lancaster House, 1998) 3 at 12.

56. "Are all insurance claims now arbitrable? The debate rages on" *Lancaster's Labour Arbitration News* (July/August 1998) 1; "Colliding with *Pilon* : is the arbitrability of insurance claims an issue spinning out of control?" *Lancaster's Labour Arbitration News* (November/December 1997) 1.

57. *Supra* note 22 at 4:1400.

In November 1996, the Ontario Court of Appeal decided *Pilon v. International Minerals & Chemical Corp.*⁵⁸ Relying on the reasoning in *Weber* and *St. Anne-Nackawic Pulp & Paper v. C.P.W.U., Loc., 219*⁵⁹ the Court of Appeal dismissed a court action by a unionized employee against an insurer for disability benefits. The collective agreement provided for a group insurance plan, including short and long term disability benefits. The employer paid the cost of all benefits except for long term disability benefits. Long term disability benefits were to be provided by an insurer through a plan administered by the employer and paid for by the employees by way of salary deductions. The collective agreement did not define the criteria for eligibility for disability benefits. However, the collective agreement incorporated by reference the terms of the benefits handbook which was distributed to employees. The handbook stated that short term disability benefits were payable for up to one year to an employee who became unable to perform his or her job as a result of non-occupational injury or illness. Long term disability benefits were payable only after 52 consecutive weeks of total disability. Pilon ceased work because of neck and back pain and sought disability benefits. The company agreed to pay him short term disability benefits for three weeks, but not more. The employer also refused to process the claim for long term disability benefits from the insurer, London Life. Pilon then applied directly to London Life for long term disability benefits, but his claim was denied. Pilon launched a court action against the employer for short term disability benefits, and against London Life for long term disability benefits.

The Ontario Court of Justice dismissed Pilon's action against the employer and the insurer on the basis that the Court had no jurisdiction over the subject matter of the action because it arose out of a dispute concerning entitlements under a collective agreement. Pilon appealed.

The Ontario Court of Appeal dismissed the appeal on the basis of the rulings of the Supreme Court of Canada in *Weber* and *St. Anne Nackawic*. Finlayson J.A. stated for the unanimous Court :⁶⁰

In the case under appeal, the appellant's entitlement to the long-term disability benefits offered by the respondent arises from the Collective Agreement. In the absence of the group insurance scheme established by Article 30 of the Agreement, the appellant has no claim to such benefits whatsoever. The appellant's attempt to frame the dispute as a contractual matter wholly independent from the Collective Agreement is without merit. In our view, it is clear that the dispute arises under the Collective Agreement, and that the grievance and arbitration mechanisms contained therein should govern the resolution of this conflict.

58. *Pilon v. International Minerals & Chemical Corp.* (1996), 31 O.R. (3d) 210 (C.A.), 141 D.L.R. (4th) 72.

59. *St. Anne-Nackawic Pulp & Paper v. C.P.W.U., Loc. 219* (1986), 28 D.L.R. (4th) 1 (S.C.C.).

60. 141 D.L.R. (4th) 72, *supra* note 58 at 77.

Since the decision in *Pilon*, arbitrators have divided into two camps. The leading case for the minority view is *Re Honeywell Ltd. and C.A.W. - Canada (Moore)*.⁶¹ In this case, the collective agreement provided that :

- the company agreed to continue in effect certain medical and insurance plans which were listed in Appendix C to the agreement,
- total premium was to be paid by the employees,
- coverage was to be 66 2/3% of the monthly income, with a maximum benefit of \$2,500,
- to qualify for benefit, the employee must be totally disabled due to sickness or injury for a period of 6 months.

The grievor had been cut off long-term disability benefits by the company's insurer and grieved. The insurer was given notice of the proceedings, but did not attend the arbitration. The employer raised a preliminary objection to jurisdiction. Arbitrator Mitchnick reviewed the arbitral jurisprudence, *Weber, St. Anne* and *Pilon*, and observed⁶² that even prior to *Pilon* there had been a trend towards greater arbitrability of these issues. With the decision in *Pilon*, the test became, according to Arbitrator Mitchnick, a simple test of "but for" :

That is, but for the provision for LTD benefits negotiated by the Union into the collective agreement, would Mr. Pilon have had any claim for LTD benefits to pursue? And similarly, but for the provision of LTD benefits negotiated by the Union into the collective agreement here, would Mr. Moore have had any claim for LTD benefits to pursue?

On the basis of *Pilon*, Arbitrator Mitchnick declared that the arbitration proceedings were the proper forum for the determination of the benefit entitlement issue and that the union was entitled to name the insurer as a "defendant" party to the proceedings. Arbitrator Mitchnick issued a subsequent decision as a result of a preliminary motion by the insurer as to its status in the arbitration.⁶³ Arbitrator Mitchnick reiterated that the union was entitled to add the insurer, Sun Life, as a full party-defendant to the proceedings, with direct liability should the LTD claim prove valid.

61. *Honeywell Ltd. and C.A.W. — Canada (Moore) (Re)* (1997), 65 L.A.C. (4th) 37 (Ont. Arb. Bd.).

62. *Ibid.* at 53.

63. *Honeywell Ltd. and C.A.W. — Canada (Moore) (Re)* (1997), 68 L.A.C. (4th) 196.

A few weeks after the *Honeywell* decision was issued, Arbitrator Beck held in *Re Hamilton (City) and C.U.P.E., Loc. 167 (Poole)*⁶⁴ that because of *Pilon*, the claim for insurance benefits must be dealt with through the grievance procedure. Arbitrator Beck noted⁶⁵ that the disability plan set out in the collective agreement fell into the third category (as set out by Brown and Beatty in *Canadian Labour Arbitration*) — that is, the collective agreement provides only for the payment of premiums, and a grievance based on a denial of benefits would in the pre-*Pilon* approach be inarbitrable. Arbitrator Beck also noted that the position of the employer was that the grievors were in "no-man's land." The arbitral jurisprudence indicated that because of the collective agreement language (employer obligation only to arrange for a plan and to pay premiums), a grievance would be inarbitrable; however, because of *Pilon*, the Courts would not take jurisdiction. In all of the circumstances, and in light of the *Pilon* decision, Arbitrator Beck concluded that the grievances could proceed through arbitration. Two other comments were offered by the arbitrator. First, the arbitrator noted that the settled jurisprudence on arbitrability of benefit claims appeared not to have been cited to the Court in *Pilon*. Secondly, the terms of the collective agreement in *Pilon* might arguable have put the matter out of the third (inarbitrable) category. However, Arbitrator Beck said, "the sweeping terms of the judgment in *Pilon* make clear that all insurance plans within a collective agreement must be dealt with through the grievance procedure, and may not be litigated in the courts."⁶⁶

The *Honeywell* approach has been followed in two further cases.

I.W.A., Local 2693 v. Dubreuil Forest Products Ltd. :⁶⁷

The grievor had initially commenced a court action, but in light of the decision in *Pilon*, the union filed a grievance on her behalf. The collective agreement provided that the employer would pay premiums for disability insurance and would maintain the policy during the term of the collective agreement. Arbitrator Bendel was of the view that *Pilon* was clear : it would subvert the collective bargaining relationship and the statutory scheme of labour relations if claims addressed and governed by the collective agreement were made the subject of civil actions in the courts. Arbitrator Bendel considered the effect of the decision of the Ontario Court of Appeal in *Canadian Broadcasting Corporation v. Burkett*,⁶⁸ which quashed an arbitral award on the ground that it was patently unreasonable for the arbitrator to hold the employer liable for benefits after having concluded that under the collective agreement the employer was responsible only for the payment of premiums. (The Court of Appeal in the *CBC* case (a different panel from that on *Pilon*) did not consider the decision in *Pilon*.) Arbitrator Bendel reconciled the two decisions by reasoning that the intent in *Pilon* was not to expand the employer's responsibility for the payment of benefits, nor was it the Court of Appeal's intention to give insurers immunity

64. *Hamilton (City) and C.U.P.E., (Re) Loc. 167 (Poole)* (1997), 66 L.A.C. (4th) 129.

65. *Ibid.* at 132.

66. *Ibid.* at 134.

67. *I.W.A. Canada, Local 2693 v. Dubreuil Forest Products Ltd.* (June 12, 1998), (Sole Arbitrator : Bendel) summarized in *Lancaster's Labour Arbitration News* (July/August 1998).

68. *Canadian Broadcasting Corp. v. Burkett* (1997), 155 D.L.R. (4th) 159 (Ont. C.A.)

from arbitrations after freeing them from civil action. The purpose of the *Pilon* decision was to have the insurer's liability determined at arbitration. Arbitrator Bendel concluded that this approach was a generally workable and efficient solution, since arbitration is more expeditious than the courts. In addition, an employee's claims against both the insurer and the employer could be dealt with in one place. Arbitrator Bendel directed that the insurer be served with notice of his decision and of the next hearing date.

C.U.P.E. v. Greater Essex County District School Board and Mutual Life of Canada :⁶⁹

Although Arbitrator Samuels concluded that the insurance plan was incorporated into the collective agreement, and therefore the employer was liable for payments, the arbitrator followed the approach of Arbitrator Mitchnick in *Honeywell* and added the insurer as a party. The Arbitrator noted that previously, if the grievor succeeded against the employer at arbitration, the employer would have been required to sue the insurer in court. The decision in *Pilon* was intended to avoid duplication of proceedings and gave the arbitrator exclusive jurisdiction to deal with both the employer and the insurer.

Although the policy considerations articulated by Arbitrators Mitchnick and Bendel are important, the difficulty with the approach of adding insurers as parties to the arbitration is that ultimately, fundamentally, an arbitrator under a collective agreement cannot bind a non-party to the agreement. Even though the statutory regimes mandate a final and binding resolution of differences (some through arbitration, some through a "method"), the fundamental source of jurisdiction of the arbitrator is the collective agreement. Only the parties to that collective agreement can be bound by a declaration, order, or directive of the arbitrator. This was the view of Arbitrator Carrier in *Re Atlantic Packaging Products Ltd. and G.C.I.U., Loc. N-1 (Ramnarine)*⁷⁰ and of Arbitrator Brandt in *Re Waltec Components (Machining Plant) and U.S.W.A., Loc. 9143 (Laliberte-Smith)*.⁷¹ Unless the insurer has specifically and expressly agreed to attorn to the jurisdiction of the arbitrator, any award or decision adverse to it by the arbitrator would be unenforceable, Arbitrator Carrier said.⁷²

The majority of arbitral decisions have concluded that Brown and Beatty's four categories continue to apply, and if the essential character of the dispute is a denial of benefits by an insurance carrier, then the matter is not arbitrable.

This has been the approach in :

69. *C.U.P.E. v. Greater Essex County District School Board and Mutual Life of Canada*, (July 10, 1998) (Sole Arbitrator : Samuels) summarized in *Lancaster's Labour Arbitration News* (July/August 1998).

70. *Atlantic Packaging Products Ltd. and G.C.I.U., Loc. N-1 (Ramnarine) (Re)* (1997), 68 L.A.C. (4th) 174 (Ont. Arb. Bd.).

71. *Waltec Components (Machining Plant) and U.S.W.A., Loc. 9143 (Laliberte-Smith) (Re)*, (1997), 69 L.A.C. (4th) 144 (Ont. Arb. Bd.).

72. *Supra* note 68 at 182.

Oakville (Town) and C.U.P.E., Loc. 136 (Pillon) :⁷³

Arbitrator O'Neil found that the collective agreement language was a variant of the third category (employer responsibility only for payment of premiums). The *Pillon* case was distinguishable, since the terms of the plan in that case were incorporated by reference into the collective agreement. Here, the dispute as to entitlement to benefits was inarbitrable. However, what is arbitrable is whether relevant parts of the policy conform to the standards set out in the collective agreement.

Re Canada Safeway Ltd. and U.F.C.W., Loc. 1518 (LTD Plan) :⁷⁴

This was a supplementary award; the arbitrator had previously determined that the collective agreement does not support the conclusion that the obligation of the employer went beyond the provision of an LTD Plan (i.e. payment of premiums only, not benefits). Here Arbitrator Hope held that neither *Weber* nor *Pillon* addressed the fundamental issue raised in the dispute. Those decisions stood for the proposition that there is no concurrent or overlapping jurisdiction in the courts to deal with issues that fall within collective agreements. But the determination had already been made in the *Safeway* case that eligibility for benefits was a fundamental aspect of the LTD plan, and that the plan did not fall within the collective agreement.

In Re Shoppers Drug Mart 242 and U.F.C.W., Loc. 1518 (Morman) :⁷⁵

The collective agreement provided that the employer implement a 26-week Weekly Indemnity plan providing 75% of an employee's normal weekly wages and that the employer pay 75% of premiums for the benefits listed in the collective agreement. Arbitrator Bruce held that the issues raised in the grievance were not arbitrable. In her view, the parties had agreed that the employer's obligation was limited to the payment of premiums for a standard plan for insurance for weekly indemnity benefits to be administered by an insurer which is not a party to the collective agreement. The arbitrator stated :⁷⁶

Whatever the boundaries of exclusive jurisdiction as defined by the S.C.C., it is readily apparent that the essential character of this dispute is not one that expressly or inferentially arises out of the Collective Agreement. The essential character of the dispute, based on the facts, rather than a legal characterization of the action, is a denial of Weekly Indemnity by an insurance carrier as a result of a determination by the insurer that the grievor is not eligible for benefits. This

73. *Oakville (Town) and C.U.P.E., Loc. 136 (Pillon) (Re)* (1997), 68 L.A.C. (4th) 117 (Ont. Arb. Bd.).

74. *Canada Safeway Ltd. and U.F.C.W., Loc. 1518 (LTD Plan) (Re)* (1997), 68 L.A.C. (4th) 277 (B.C. Arb. Bd.); upheld [1998] B.C.L.R.B.D. No. 263 (B.C.L.R.B.) (QL); reconsideration dismissed [1998] B.C.L.R.B.D. No. 350 (B.C.L.R.B.) (QL).

75. *Shoppers Drug Mart 242 and U.F.C.W., Loc. 1518 (Morman) (Re)* (1998), 69 L.A.C. (4th) 129 (B.C. Arb. Bd.), upheld [1998] B.C.L.R.B.D. No. 365 (B.C.L.R.B.) (QL).

76. *Ibid.* at 140.

dispute does not arise out of an interpretation, application, operation or alleged violation of the Collective agreement either expressly or by inference. Questions of eligibility and the payment of benefits are determined by reference to the plan of insurance with Crown Life which is entirely outside the terms of the Collective Agreement.

Arbitrator Bruce rejected the "but for" test in *Honeywell*, noting that this test ignores the second part of the inquiry mandated by *Weber*: the ambit of the collective agreement.

In Re Siemens Electric Ltd. and C.A.W., Loc. 127:⁷⁷

The grievance raised the question of whether the employer violated the collective agreement when the carrier of the drug plan refused to reimburse retirees over age 65 for co-payments (which had come into effect as a result of amendments to the *Ontario Drug Benefit Act*). Arbitrator Barton analyzed the collective agreement language and found that the obligation of the employer was to provide for plans which provide certain benefits, to collect and to remit premiums, to choose the carriers for the various programs, and to change carriers at its discretion. Based on this, the arbitrator concluded that the insurance contracts themselves were not part of the collective agreement. Arbitrator Barton reviewed the jurisprudence since *Weber* and *Pilon*, noting that most arbitrators hold that if the terms of the insurance contract are not part of the collective agreement, then disputes concerning such terms are not subject to arbitration. Arbitrator Barton rejected the "but for" test from *Honeywell* and doubted whether Arbitrator Mitchnick had jurisdiction to issue a third party notice. The arbitrator concluded that it is still necessary to find that the insurance contract is part of the collective agreement in order for the dispute to be arbitrable.

Other decisions along the same line include *Re ULS Corporation and Canadian Maritime Union (Stehlik)*,⁷⁸ *Re Norton Advanced Ceramics of Canada Inc. and Teamsters Union, Loc. 424 (18-96)*,⁷⁹ and *U.F.C.W., Local 1288P (Vail) v. Harr Shoes*.⁸⁰

A human rights dimension affected the outcome of a recent benefits case in which the issue of arbitrability was raised. In *Re Elkview Coal Corp. and U.S.W.A., Loc. 9346 (Kelloway)*⁸¹ the issue was whether the grievor was entitled to enroll her partner as an eligible spouse to receive health care, dental care and vision care benefits as part of the health and welfare benefits package negotiated under the collective agreement. The collective agreement provided that the company pay the premiums to the insurance

77. *Siemens Electric Ltd. and C.A.W., Loc. 127 (Re)* (1998), 71 L.A.C. (4th) 38 (Ont. Arb. Bd.).

78. *ULS Corporation and Canadian Maritime Union (Stehlik) (Re)* (1997), 70 L.A.C. (4th) 263 (Ont. Arb. Bd.).

79. *Norton Advanced Ceramics of Canada Inc. and Teamsters Union, Loc. 424 (18-96) (Re)* (1998), 69 L.A.C. (4th) 352 (Ont. Arb. Bd.).

80. *U.F.C.W., Local 1288P (Vail) v. Harr Shoes*. (July 9th, 1998), summarized in *Lancaster's Labour Arbitration News* (July/August 1998).

81. *Elkview Coal Corp. and U.S.W.A., Loc. 9346 (Kelloway) (Re)* (1997), 70 L.A.C. (4th) 390 (B.C. Arb. Bd.).

companies for the listed benefits, that coverage be subject to the terms of the insurance policies, and that all benefits were payable by the insurer and not the company. The Plan provided for the eligibility of spouses, defining common law spouses as a person of the opposite sex. The union took the position that the definition of common law spouse contravened the *Human Rights Code* of B.C. The company's position was that the grievance was inarbitrable, since the only obligation on it was to pay premiums; the dispute was with the insurance carrier, not the company. Arbitrator Larson considered *Weber* and the decisions finding inarbitrability because of collective agreement language limiting the obligation on the employer merely to pay premiums. However, the Arbitrator noted that the issue in the case was not whether the union was entitled to challenge eligibility provisions of an insurance plan; rather, the issue was whether the union could compel an employer to provide a policy that meets the requirements of the law. Relying on the decision in *Re Kootenay Savings Credit Union and U.S.W.A., Loc. 9090*,⁸² Arbitrator Larson concluded that the issue arose out of the collective agreement, although the validity of the action of the company depended on the proper interpretation and application of the *Human Rights Code*. The arbitrator noted that this is precisely the mandate of an arbitration board under s. 89(g) of the *Labour Relations Code* (providing authority to arbitrators to interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement). The arbitrator therefore had jurisdiction to decide the substantive issue.

Clearly this debate must be resolved by the appellate courts. Until such time as the issue is settled, grievors face the tragic possibility of being left with no recourse. The possibility remains that the arbitrator will conclude the matter is inarbitrable, while the Court concludes that the dispute is within the exclusive jurisdiction of arbitrators. If, in a particular situation, the employer is ultimately responsible for the benefits (through self-insurance), and if the parties agree that arbitration should be the forum for resolution (providing for this in the collective agreement), then there should be no problem. On the other hand, if the employer wishes to arrange for a true contract of insurance, where ultimate liability for the benefits rests with the insurer, then the problem remains. Perhaps another option is for the collective agreement to confirm the practice which currently appears to be common whereby the union litigates against the insurer when benefit entitlement has been denied. (There is much disagreement in the labour law community as to whether this is a desirable approach.) The appellate courts will have to clarify that in such context, where the collective agreement either does not address the health and welfare plan, or simply sets out the employer's obligation to pay premiums, jurisdiction remains in the Courts to resolve a dispute stemming from a denial of benefits. The only other solution would be legislative — providing some means to bind the insurer in the arbitral process.

F. Defamation

Based on the principles in *Weber*, does an arbitrator have jurisdiction to determine claims of defamation? Most of the post-*Weber* jurisprudence indicates that

82. *Kootenay Savings Credit Union and U.S.W.A., Loc. 9090 (Re)* (1991), 19 L.A.C. (4th) 77 (B.C. Arb. Bd.), referred to above in the discussion on pregnancy and maternity benefits.

defamation claims involving employees and employers fall within the terms of the collective agreement and should be dealt with by arbitration.

In *Re Fording Coal Ltd. and U.S.W.A., Loc. 7884 (Elk Valley Miner Article)*,⁸³ the employer filed a grievance concerning alleged defamatory statements by the union president on safety issues published in the local newspaper. At arbitration, the employer submitted that the arbitrator should adjourn the arbitration pending certain proceedings before the Supreme Court of British Columbia, defer to the court, or determine that the arbitrator was without jurisdiction in the matter. The union argued that the arbitrator's jurisdiction was clear and exclusive. The arbitrator found that the difference between the parties in its essential character and nature arose from the collective agreement. The arbitrator reviewed collective agreement provisions, including an article stating that the company and the union shall co-operate to promote safe work practices, the grievance/arbitration article, and two letters of understanding providing for a labour/management committee to facilitate joint discussion of mutual problems and concerns. The cumulative effect of all the provisions was to establish the intention that disputes be resolved under the provisions of the collective agreement, or "in-house." The arbitrator then held that the manner in which the alleged defamation was published (*i.e.* outside the workplace, in a newspaper article) did not alter the essential character of what was a labour dispute, and that the dispute was within the ambit of the collective agreement.

The employer in *Fording Coal* also argued, relying on the decision of the Supreme Court of Canada in *Canadian Pacific Ltd. v. B.M.W.E.*,⁸⁴ a post-*Weber* decision, that the arbitrator did not have the capacity to award the aggravated and punitive damages claimed by the employer. The issue in that case was the availability of interim relief. McLachlin J. stated for the Court that notwithstanding the existence of a comprehensive code for settling labour disputes, where no adequate remedy exists, the courts retain a residual discretionary power to grant relief. Arbitrator McDonald in *Fording Coal* held that all necessary remedial authority was vested in the arbitral forum to address the difference in that matter, relying on the decision in *Re Ontario Hydro and C.U.P.E., Loc. 1000*⁸⁵ for the jurisdiction to award aggravated and punitive damages.

After an extensive review of the jurisprudence, the *Fording Coal* conclusion was that the arbitrator had exclusive jurisdiction over the difference between the parties.

A number of court decisions have concluded that defamation claims should be dealt with at arbitration :

In *Dwyer v. Canada Post Corp.* :⁸⁶

83. *Fording Coal Ltd. and U.S.W.A., Loc. 7884 (Elk Valley Miner Article) (Re)* (1997), 69 L.A.C. (4th) 430 (B.C. Arb. Bd.).

84. *Canadian Pacific Ltd. v. B.M.W.E.* (1996), 96 C.L.L.C. para. 210-040 (S.C.C.).

85. *Ontario Hydro and C.U.P.E., Loc. 1000 (Re)* (1990), 16 L.A.C. (4th) 264 (Ont. Arb. Bd.).

86. *Dwyer v. Canada Post Corp.*, [1995] O.J. No. 3265 (Gen. Div.), aff'd [1997] O.J. No. 1575 (C.A.) (QL).

A supervisor wrote Dwyer a letter of reprimand. Dwyer sued the employer and the supervisor for defamation. The defendants applied to the Court to dismiss the action for want of jurisdiction. Applying *Weber*, the Court held that the essential character of the act in question fell within the ambit of the collective agreement and dismissed the action. The Ontario Court of Appeal affirmed the decision.

In *Ram v. Prasad* :⁸⁷

The plaintiff, a member of the Carpenters' Union, Local 1928, which was party to a collective agreement with Western Display Service Limited, got into a dispute with two co-workers (one being the shop steward, the other being the crew foreman) over the timing of lunch and coffee breaks. The operations manager became involved. Ram was sent home on the ground that he attempted to assault a fellow employee, had shown insubordination towards the foreman, and had been drunk on the job. Ram filed a grievance. At the grievance meeting, the operations manager took the position that Ram's employment was terminated, but offered to agree to a six month suspension to resolve the matter. The business agent of the union agreed to settle the matter on the basis of the suspension. Ram brought a civil action in defamation against the co-workers and the operations manager. The defendants applied for an order that the Court decline jurisdiction or that the action be dismissed on the ground that the action was based on a dispute which arose from the interpretation, application, administration or violation of a collective agreement. Applying *Weber*, the Court granted the application. In the course of the application, counsel for Ram had conceded that an action could not be maintained against the operations manager, since he stood in the shoes of the employer. The Court held that it had no jurisdiction in relation to the claims against the co-workers, who were also union members. The dispute had its foundation in the collective agreement and had been resolved under it. The issues which Ram now sought to litigate could have been dealt with at the arbitration. The scope of the rule precluding the bringing of actions is not limited to the immediate parties to the collective agreement (i.e., the union and the employer).

In *Bhaduria v. Toronto Board of Education* :⁸⁸

The Court held that the essential character of complaints of wrongs (including defamation) arising out of implementation of a discipline process, arise out of the collective agreement and its administration and therefore are within the exclusive jurisdiction of the arbitrator in the context of dismissal. However, the timing of the alleged defamatory statements is significant. If the statements were made after the disciplinary process, then, following the *Weber* analysis, any claim based on such statements may not arise under the collective agreement; in such context, a court would have jurisdiction over the matter. Bhaduria had been dismissed on the basis that he was incapable of continuing to fulfil his duties as a teacher and had demonstrated unprofessional conduct and poor judgment as a result of a number of letters he had written to the Board of Education containing disturbing accusations and threatening violence. Bhaduria and the union

87. *Ram v. Prasad*, [1997] 3 W.W.R. 176, [1996] B.C.J. No. 1672 (B.C.S.C.) (QL).

88. *Bhaduria v. Toronto Board of Education* (1997), 97 C.L.L.C. para. 220-083. (Ont. Gen. Div.); on appeal to the Ontario Court of Appeal, [1998] O.J. No. 5272 (Ont. Div. Ct.).

launched a grievance claiming discipline without just cause. The grievance requested a declaration of breach of the collective agreement, reinstatement, and compensation for loss of income, benefits and interest. The grievance did not seek a remedy for breach of Charter rights, denial of natural justice in the process leading up to the dismissal, intentional infliction of mental suffering or defamation. The arbitration award reinstated Bhaduria. Judicial review and appeals proceeded through to the Supreme Court of Canada. The Supreme Court found the decision of the arbitrator to be patently unreasonable and held that the Board of Education had just cause to dismiss Bhaduria. Bhaduria then commenced an action claiming that the actions of the Board of Education caused him to suffer mental distress and violated his Charter rights, and that publication by the Board of Education of a yearbook containing minutes of a meeting in which the Board decided to terminate his contract was defamatory. The Board of Education brought a motion to strike the statement of claim. Feldman J. held that the statement of claim should be struck in all matters except for the defamation claim. The essential character of the claims (other than the defamation claim) arose out of the collective agreement and its administration, and therefore were in the exclusive jurisdiction of the arbitrator. As to the defamation claim, since it was unclear from the pleadings whether the alleged defamation arose from the discipline process or as a follow-up to the discipline process, this one claim should be allowed to proceed in the court. The Court noted that since the publication of the yearbook occurred after the reinstatement by the arbitration process, it was questionable whether such publication was legitimately part of the discipline process.

In *Graham v. Strait Crossing Inc.* :⁸⁹

The Court concluded that it did not have jurisdiction to deal with a defamation claim pertaining to a letter by a former employer to the Workers Compensation Board. Graham had been injured on the job. He was a member of the Labourers International Union of North America and as such was covered by a collective agreement. The collective agreement contained safety provisions, including the provision that employees who appear to be under the influence of alcohol or drugs shall be subject to disciplinary action up to and including dismissal. Graham filed a compensation claim with the Workers Compensation Board. The employer wrote to the Board objecting to the compensation claim and stating that Graham was working under the influence of alcohol. Graham commenced an action for defamation. The employer brought a motion seeking that the claim be struck on the grounds that the Court had no jurisdiction. The employer alleged that the subject-matter of the claim related to the interpretation and application of a collective agreement. Graham's position was that at the time the alleged defamatory statement was made he was no longer an employee, and that a defamation claim is not always within the ambit of the collective agreement. The Court concluded that the essential character of the dispute arose out of the interpretation, application and administration of the collective agreement. The injuries which led to the claim for compensation occurred on the job site. The communication complained of was about Graham solely in his capacity as an employee. The manner of publication of the alleged defamation to the Workers Compensation Board was within the collective agreement. On this basis, the Court granted the motion. The Court here did not examine the issue of timing of the communication as had the Court in *Bhaduria*.

89. *Graham v. Strait Crossing Inc.* (1998), 160 D.L.R. (4th) 173 (P.E.I.S.C., T.D.).

By contrast, the Ontario Court (General Division) held in *Bentley v. Leonard*⁹⁰ that it did have jurisdiction to deal with claims for defamation or infliction of nervous shock since an arbitration board did not conceive that it had jurisdiction over such claims. Bentley had worked as a nurse at the Royal Victoria Hospital. A disagreement arose between Bentley and another nurse about nursing duties performed on their shift. As a result of the disagreement, a number of incident reports were filed. Bentley went on sick leave and did not return to work. The Ontario Nurses' Association filed grievances against the employer. At the arbitration hearing, the employer submitted as evidence a letter containing a summary of interviews of 12 co-workers containing comments about Bentley and her performance. The letter was signed by the 12 co-workers. Bentley commenced a civil action against the 12 co-workers, claiming compensation for libel and slander, intentional and/or negligent infliction of nervous shock, as well as punitive damages. The defendants brought a motion for an order dismissing the action based on the court's lack of jurisdiction.

The Court reviewed the arbitration decision and concluded that (a) the essential nature of the dispute was the appropriateness of continued employment with the hospital and compensation if that employment was discontinued, (b) the arbitration board "did not conceive that compensation for defamation or harm resulting from the infliction of nervous shock was relevant to their mandate pursuant to the collective agreement." On such basis, the Court held that it had jurisdiction to deal with the matter.

As noted in the case comment on *Bentley* by J. Wilkin,⁹¹ the Court did not follow the analytical sequence prescribed by *Weber* and followed in *Bhaduria*. The Court in *Bentley* did not examine the terms of the collective agreement to determine its ambit. Instead, the Court relied on the findings of the arbitration board. The Court took jurisdiction because the arbitration board appeared to decline it. While clearly it is of concern that a forum for the resolution of disputes be available to grievors or plaintiffs, it is problematical when inconsistent analysis results in very different decisions on the same issue. Further direction will be necessary from arbitrators and the Courts.

The Ontario Court (General Division) has allowed a defamation action to proceed in another case involving a claim against an employer and co-workers. In *Kulyk v. Toronto Board of Education*⁹² the plaintiff, a union employee, alleged that another union employee and other employees had sexually harassed her. She complained to her union but was told that the collective agreement had no provision for dealing with sexual harassment complaints. Kulyk brought actions against the union, the other union employee and the employer for, among other things, loss of reputation. The Court struck out the other claims, but allowed the defamation action to proceed against the union employee and the employer. The Court relied on a decision of the Manitoba Court of Appeal in *Hall*

90. *Bentley v. Leonard*, [1997] O.J. No. 3364 (Gen. Div.). The decisions in *Bhaduria* and *Bentley* are analyzed and contrasted in J. Wilkin, "Wrestling with *Weber* : *Bhaduria*, *Bentley* and the Exclusive Jurisdiction of Arbitrators" (1998) 7 E.L.L.R. 109.

91. *Ibid.*

92. *Kulyk v. Toronto Board of Education* (1996), 139 D.L.R. (4th) 114.

v. *Manitoba*,⁹³ which had held that an action in defamation was independent of the collective agreement. However, the Manitoba Court of Appeal did not consider the decision of the Supreme Court of Canada in *Weber* (which had been issued some months prior).

Two recent decisions, one at arbitration and one from the Courts, have provided guidance on the different considerations involved when the alleged defamation is between co-workers in different bargaining units. Arbitrator Morton Mitchnick concluded in *Air Canada Pilots' Association v. Air Canada*,⁹⁴ that he did not have jurisdiction to decide whether one employee has defamed another employee of the same company when the employees are not covered by the same collective agreement. The grievor, a flight captain with Air Canada, refused to fly as he had been scheduled when he learned that Y had been assigned as the in-charge flight attendant. As a result of the refusal, Air Canada suspended the grievor for insubordination. The grievor's refusal stemmed from a dispute a few months prior. Both the grievor and Y had worked on a flight after which Y wrote a letter to management alleging that the grievor's conduct on the flight had been improper. The grievor decided to sue Y in court. Prior to filing the action, the Pilots' Association asked the board of arbitration, which was scheduled to hear the suspension grievance, to make a preliminary determination as to whether the board had jurisdiction over the defamation claim.

The Arbitrator ruled that there was nothing in the collective agreement nor in the facts to give him jurisdiction over the defamation claim. The Arbitrator observed that numerous courts had interpreted *Weber* too broadly, "down-loading" jurisdiction over a wide variety of issues onto arbitrators. In many of the cases, in Arbitrator Mitchnick's view, the courts had neglected to consider whether the issue before them fell within the scope of the collective agreement. On review of the case law, the arbitrator found no authority for the proposition that a non-managerial employee outside the bargaining unit could be held liable for damages in a grievance brought under a collective agreement to which he or she was not a party. Even though the collective agreement contained provisions with broad language ("a pilot [...] who considers himself unjustly dealt with," "grievances of a general nature may be initiated by any pilot [...] who considers himself aggrieved"), the article authorizing the arbitrator to consider any matters referred to it in accordance with the collective agreement, as well as the governing legislation militated in favour of limiting the jurisdiction of an arbitrator to issues arising between the parties to the collective agreement — those who have contracted to submit to such arbitration.

Similarly, the British Columbia Supreme Court held in *Mendoza v. St. Michael's Centre Hospital Society*⁹⁵ that while a defamation claim against an employer must proceed in arbitration, the Court does have jurisdiction in relation to a claim against a co-worker who is in a different bargaining unit. Mendoza was a nurse employed by St. Michael's Centre Hospital and a member of the B.C. Nurses' Union. Hernandez was a care aide

93. *Hall v. Manitoba* (1995), 129 D.L.R. (4th) 707.

94. *Air Canada Pilots' Association v. Air Canada* Canada, (June 1, 1998) [unreported] summarized in Lancaster's *Labour Arbitration News* (July/August 1998) 6.

95. *Mendoza v. St. Michael's Centre Hospital Society*, [1998] B.C.J. No. 914 (B.C.S.C.) (QL).

worker and a member of the Health Employees' Union. Hernandez filed a grievance alleging that Mendoza sexually harassed her and that the employer failed to keep the workplace free of sexual harassment. Hernandez was also concerned about Mendoza's treatment of patients. She made an entry in the communication book kept at one of the nursing units stating that Mendoza was neglecting patient needs, was refusing to do work, and was harassing Health Employees' Union staff. Mendoza filed a grievance under the BCNU collective agreement complaining that Hernandez had made an allegation of sexual harassment and had written defamatory allegations. A mediator was unable to resolve the disputes. Mendoza commenced actions against the employer and Hernandez. He did not take any steps to pursue his grievance. After a comprehensive review of jurisprudence, the Court held that (a) the essential nature of the claim against the employer arose from the interpretation, application, operation or violation of the collective agreement and should be arbitrated, and (b) the essential nature of the claims against Hernandez did not arise from interpretation, application, operation or violation of the collective agreement. She was not a party to the nurses' collective agreement, and she was not standing in the place of the employer.

Although a pattern has emerged that defamation matters, particularly where connected to the imposition of discipline, are to be dealt with at arbitration, there is still some uncertainty. Further consideration by appellate courts will be necessary.

G. Arbitrators vs. Other Tribunals

As noted above, the Saskatchewan Court of Queen's Bench has recently applied the principles in *Weber* to conclude that arbitrators had exclusive jurisdiction over matters that had been decided by other decision-makers. The decision pertaining to a human rights tribunal has been discussed above. Two other decisions pertained to labour standards and occupational health and safety decision-makers. The decisions were all appealed, and the judgment of the Saskatchewan Court of Appeal is, at the time of writing, on reserve.

In *Dominion Bridge Inc. v. Routledge*⁹⁶ several employees were laid off from work. Under the terms of their collective agreement, they were entitled to a shorter notice period than that specified in the *Labour Standards Act*. The employees sought relief under the Act. A wage assessment was issued on their behalf, and the employer appealed to an adjudicator appointed under the *Labour Standards Act*. The employer raised a preliminary objection to the jurisdiction of the adjudicator on the grounds that the matter was governed exclusively by arbitration under the collective agreement. The adjudicator decided that he had jurisdiction. The employer appealed to the Court of Queen's Bench. The Court held that while the provisions of the *Labour Standards Act* take priority over terms of a collective agreement, these provisions must be enforced by an arbitrator under the agreement. The Court reviewed *Weber* and decisions applying it, stating :⁹⁷

96. *Supra* note 38.

97. *Ibid.* at 522.

From my reading of the foregoing, it is apparent that the current judicial opinion is that there should be deference to arbitrators where a collective agreement exists within the context of legislation which mandates arbitration.

Exclusive jurisdiction of arbitration in relation to an occupational health and safety issue was the subject of a decision of the Saskatchewan Court of Queen's Bench in *Prince Albert District Health Board v. Saskatchewan (Occupational Health and Safety, Executive Director)*.⁹⁸ The complainant was employed by the Prince Albert District Health Board as a laboratory technologist and was a union member of the Canadian Union of Public Employees. A collective agreement was in effect. The complainant refused to perform ECGs alone on night shifts at the Victoria Hospital on the basis that she felt that she did not have the proper training, and thus she was concerned for the safety of patients. She was suspended indefinitely by the employer. The employer and the union met and agreed on a two-day suspension without pay. The complainant then filed a complaint with the provincial Occupational Health and Safety Office. An Occupational Health Officer investigated the complaint and found that the employer had breached the Act. The Officer issued a notice of contravention which directed the employer to cease discriminatory action, to pay all wages lost, and remove any reference to the matter from the employee's record. The employer applied to the Court for an order that the decision be quashed and for an order in the nature of prohibition preventing the Occupational Health and Safety Adjudicator from hearing an appeal of the Officer's decision.

The employer argued that all matters governing the relationship between unionized workers and their employer should be dealt with by the method set out in the collective agreement. The Occupational Health and Safety director argued that rights provided by *The Occupational Health and Safety Act* were individual rights, as opposed to collective rights, and accordingly all workers, including unionized workers, should be entitled to the protection granted by the Act. The director submitted that both statutory regimes (labour relations and occupational health and safety) are compatible.

The Court noted that the collective agreement specifically dealt with health and safety and set out a process to be followed once a dispute arises. The Court was of the view that the reasoning in *Dominion Bridge* was applicable to this case and concluded that the Director of Occupational Health and Safety did not have jurisdiction over the matter. Accordingly the Court quashed the decision of the Officer and prohibited the adjudicator from hearing the appeal.

98. *Prince Albert District Health Board v. Saskatchewan (Occupational Health and Safety, Executive Director)*, [1998] S.J. No. 120 (Q.B.) (QL).

V. RESTRICTION OF SCOPE : POST-DISCHARGE EVIDENCE

Ironically, while the arbitral perimeters are expanding as a result of the decisions of the Supreme Court of Canada in *Weber* and *O'Leary*, another Supreme Court of Canada decision rendered at almost the same time is having the effect of truncating previously well-established arbitral scope.⁹⁹ The decision in *Cie minière Québec Cartier v. Québec (Grievances arbitrator)*¹⁰⁰ was rendered approximately one month after the decisions in *Weber* and *O'Leary*. The company dismissed an employee, Beaudin, who had a serious alcohol problem causing him to miss work repeatedly. Each incident resulted in disciplinary sanctions. On several occasions, the sanctions were reduced in exchange for promises by Beaudin that he would seek treatment for his alcohol problem. Beaudin failed to seek treatment. He once again missed work as a result of the alcohol problem and the company decided to dismiss him. The union filed a grievance on behalf of Beaudin. Several months after the dismissal and prior to the arbitration hearing, Beaudin underwent a treatment program, which was successful. The arbitrator found that the company had been justified in dismissing Beaudin at the time it had done so but, in light of the subsequent successful treatment, it would be appropriate to annul the dismissal to give Beaudin one last chance.

The company applied for judicial review. The Quebec Superior Court granted the application and quashed the decision. The union then appealed to the Quebec Court of Appeal, a majority of which allowed the appeal and restored the decision of the arbitrator.¹⁰¹ The company appealed to the Supreme Court of Canada, which allowed the appeal. The judgment of the unanimous Court was delivered by L'Heureux-Dubé J. The Court held that the arbitrator exceeded his jurisdiction in overturning the decision of the employer to dismiss the grievor. Having found that the dismissal was justified at the time it was implemented, the arbitrator had no jurisdiction to overturn that decision on the grounds that subsequent-event evidence indicated that the grievor had been cured of his alcohol problem. An arbitrator can rely on subsequent-event evidence only if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. L'Heureux-Dubé J. stated :¹⁰²

If the dismissal was justified at the time it was implemented, the arbitrator had no jurisdiction to provide Mr. Beaudin with such a last chance. There is no provision in Québec labour law or in the collective agreement between the Company and the Union which would permit a labour arbitrator to overturn a decision by the Company to dismiss an employee notwithstanding the fact that the Company demonstrated just cause for the dismissal.

99. The contrast between the decisions in *Weber* and *O'Leary* and the decision in *Cartier* is discussed by Swan, *supra* note 55 at 12 ff.

100. *Cie minière Québec Cartier v. Québec (Grievances arbitrator)* (1995), 125 D.L.R. (4th) 577 (S.C.C.).

101. *Cie minière Québec Cartier v. M.U.A., Local 6869*, 59 Q.A.C. 208, 44 A.C.W.S. (3d) 277.

102. *Supra* note 100 at 582.

Many arbitrators reacted to the decision in *Cartier* by finding ways to distinguish or limit it. A method found to do so was to distinguish the Quebec legislation. The difference between the language of the two provisions was analyzed by Arbitrator Shime in *Canada Post Corporation v. Canadian Union of Postal Workers (Zachar)*.¹⁰³ Arbitrator Shime noted¹⁰⁴ that it was important to look at the *Canada Labour Code* in an historical context.

The provision of the Code referred to was enacted as the result of a decision of the Supreme Court of Canada in *Port Arthur Shipbuilding Co. v. Arthurs*.¹⁰⁵ In that case the collective agreement provided that the employer could discharge the employees for "proper cause." The learned arbitrator found that in making a determination concerning proper cause an arbitrator could have regard both to the offence and to the penalty. The Supreme Court¹⁰⁶ held that the only finding the board could possibly have made in the circumstances was that there was proper cause. It also determined that once the board had found that there were facts justifying the discipline, the particular form chosen was not subject to review on arbitration.

Following the decision of the Supreme Court of Canada some legislatures as well as the Parliament of Canada amended their respective labour relations statutes to give arbitrators wider powers.

Arbitrator Shime concluded¹⁰⁷ that the language of the *Canada Labour Code* gives an arbitrator wider jurisdiction than the Supreme Court found under the Quebec *Labour Code* in *Cartier*.

A similar difference between the Quebec legislation and legislation of other jurisdictions was noted in a number of other cases :

The decision in *Re Bell Canada and C.E.P. (Vanroessel)*,¹⁰⁸

Referred to a prior arbitration between the same parties, *Re Bell Canada (Leclerc grievance)*, Sept. 22, 1995, unreported (Devlin), which distinguished the *Canada Labour Code* provision from the Quebec *Labour Code* provision. Both Arbitrator Devlin and Arbitrator Dissanayake held that because the jurisdiction conferred on the arbitrator by the *Canada Labour Code* is much broader than the corresponding provision in the Quebec *Labour Code* and therefore the reasoning in *Cartier* did not apply. Both arbitrators held that they had jurisdiction to consider post-discharge evidence.

103. *Canada Post Corporation v. Canadian Union of Postal Workers (Zachar)* (January 19, 1996) (Canada) [unreported].

104. *Ibid.* at page 6 of the decision.

105. *Supra* note 3.

106. *Supra* note 6.

107. *Supra* note 103 at page 7 of the decision.

108. *Bell Canada and C.E.P. (Vanroessel) (Re)* (1996), 58 L.A.C. (4th) 1 (Canada Arb. Bd.).

In *Re Standard Products (Canada) Ltd. and C.A.W., Loc. 4451*¹⁰⁹ and in *Re Peel Memorial Hospital and S.E.I.U., Loc. 204*;¹¹⁰

The arbitrators compared the Ontario legislation to the Quebec provision, concluding that *Cartier* was distinguishable on this basis.

In *Re Manitoba and M.G.E.U. (McNeice)*;¹¹¹

Arbitrator Freedman compared Manitoba's legislation to the Quebec provision, concluding that *Cartier* was distinguishable on this basis.

Syndicat des travailleurs et travailleuses des postes v. Société canadienne des postes;¹¹²

Was a judicial review of an arbitral award. The grievor was dismissed because of frequent absences caused by drug addiction and alcoholism. At the arbitration hearing, the union attempted to introduce evidence that the grievor had entered a treatment program. Relying on *Cartier*, the arbitrator refused to admit the evidence. On judicial review, the Court held that the powers of an arbitrator under the Quebec *Labour Code* were more limited in relation to the admission of post-discharge evidence than those of an arbitrator under the *Canada Labour Code*. The Court ordered that the case be returned to the arbitrator.

In *C.E.P., Local 305 v. International Wallcoverings Ltd.*;¹¹³

Arbitrator Mitchnick noted that the *Cartier* decision is being criticized and expressed doubt that the decision is applicable in Ontario.

In *Re NewTel Communications and C.E.P., Loc. 410 (Stockley)*;¹¹⁴

The arbitration board distinguished *Cartier* on the basis that the collective agreement provided that an arbitration board had the power to substitute such other penalty for the discharge or discipline as it deemed just and reasonable in the circumstances. The arbitration board relied on the decision in *Re Westmin Resources Ltd.*

109. *Standard Products (Canada) Ltd. and C.A.W., Loc. 4451 (Re)* (1996), 56 L.A.C. (4th) 88 at 97 (Ont. Arb. Bd.).

110. *Peel Memorial Hospital and S.E.I.U., Loc. 204, Re* (1996), 52 L.A.C. (4th) 254 (Ont. Arb. Bd.).

111. *Manitoba and M.G.E.U. (McNeice) (Re)* (1996), 52 L.A.C. (4th) 186 (Man. Arb. Bd.).

112. *Syndicat des travailleurs et travailleuses des postes v. Société canadienne des postes*, [1998] A.Q. No. 587 (Que. S. C.) (QL).

113. *C.E.P., Local 305 v. International Wallcoverings Ltd.* (March 12, 1998) (Ont. Arb. Bd.) [unreported].

114. *Re NewTel Communications and C.E.P., Loc. 410 (Stockley)* (1998), 71 L.A.C. (4th) 73 (Nfld. Arb. Bd.) (Chair : Oakley).

and *C.A.W., Loc. 3019*,¹¹⁵ in which the arbitrator distinguished *Cartier* on the basis of differences between the British Columbia and Quebec legislation. However, the arbitral decision in *Westmin* was quashed on review.¹¹⁶

However, in Alberta, the Courts have held that there is no material difference between the Quebec legislation and the provision in Alberta's *Labour Relations Code*. Two decisions from the Court of Queen's Bench have held that *Cartier* is applicable in Alberta. In *Canada Safeway Ltd. v. U.F.C.W., Local 401*,¹¹⁷ the Court concluded that (a) the principles set out in *Cartier* are of general application, and (b) the provision of the Quebec *Labour Code* is substantially the same as s. 140(2) of Alberta's *Labour Relations Code*. In this case, the grievor had been found guilty of sexually assaulting another employee and was terminated from employment. The union filed a grievance alleging termination without proper cause. During the arbitration hearing, expert evidence of a psychologist was heard respecting the medical treatment following the conviction. The arbitrator found that the employer was entitled to discipline the grievor and that he was entitled to consider the post-termination evidence. The arbitrator reduced the termination to a suspension without pay. The Court held that by relying on the subsequent event evidence the arbitrator had exceeded his jurisdiction. While the *Labour Relations Code* allowed for an arbitrator to review the discharge for cause and to substitute another penalty if it was just and reasonable in all the circumstances, "all the circumstances" meant those pertaining at the time of discharge.

In *U.N.A., Local 2 v. Red Deer Regional Hospital*,¹¹⁸ the Court upheld the arbitration board's refusal to consider evidence of a nurse's post-termination rehabilitation. The nurse had been terminated for stealing narcotics from the hospital and for working while impaired by narcotics. The arbitration board upheld the termination. On judicial review, the Court rejected the union's submission that the Quebec *Labour Code* differed from the provision on substitution of penalty in Alberta's labour legislation. The Court agreed with the decision in *Canada Safeway* that the principles set out in the *Cartier* decision are of general application and are not based on an interpretation of the Quebec Code.¹¹⁹ The Court further stated :¹²⁰

I agree with the rationale of the Cartier decision that the mandate of the arbitration board is to determine whether or not the company had just cause for dismissing the employee at the time when the employee was actually dismissed.

115. *Westmin Resources Ltd. and C.A.W., Loc. 3019 Re* (1997), 63 L.A.C. (4th) 134 (B.C. Lab. Rel. Bd.).

116. *Ibid.* [1997] B.C.L.R.B.D. No. 335 (B. C. L.R.B.) (QL).

117. *Canada Safeway Ltd. v. U.F.C.W., Local 401* (1997), 47 Alta. L.R. (3d) 192 (Q.B.).

118. *U.N.A., Local 2 v. Red Deer Regional Hospital* (1998), 59 Alta. L.R. (3d) 112 (Q.B.).

119. *Ibid.* at 124.

120. *Ibid.*

Cartier has also been followed by the British Columbia Labour Relations Board. In *Re Westmin Resources*¹²¹ the B.C. Labour Relations Board quashed an arbitral decision on the basis that the arbitrator considered post-discharge evidence. The grievor had been dismissed for excessive absenteeism related to alcohol. After the dismissal, the grievor attended and successfully completed a recovery program. The arbitrator found that the employer's decision to terminate was reasonable, but reinstated on the basis of the post-discharge evidence showing that there was "every reason to expect the preservation of the employment relationship will prove mutually productive."¹²² On review of the award, the B.C. Labour Relations Board found that the facts could not be distinguished from those in *Cartier*, and that the B.C. *Labour Code* was not materially different from the Quebec legislation. In the Board's view, the reasons in *Cartier* were not tied to the language of the Quebec *Code*.

The *Cartier* decision has had a profound effect on arbitrations dealing with terminations in a context of alcoholism or other addictions. It is unfortunate that at a time when it is being recognized that alcoholism and other addictions constitute a disability,¹²³ and that employers owe a duty to accommodate employees with disabilities, the authority of arbitrators to review the full situation of the employee has been limited. Arbitrator Swan has commented:¹²⁴

Arbitrators and all those involved in the process ought to be deeply concerned about the Supreme Court's apparent return to Port Arthur Shipbuilding (although there was no reference to this case in the decision), a judgment many felt was simply wrong. Some will apply the same criticism to Québec Cartier. But as long as it is not reversed by the Court itself or by legislation, it remains a fetter on arbitral justice.

If the arbitration process is to provide answers to complex relationship issues in the workplace, there must be a broad jurisdiction to consider all relevant evidence, and to apply all the proper remedial creativity available under the collective agreement and the relevant statutory and constitutional structures under which arbitrators operate.

In short, if arbitrators are to be cast in the role of social engineers, albeit cautious ones, they cannot be deprived of either information or tools. No engineer could function without both, and no social engineer should be expected to. In short, if *Québec Cartier* is the law, then the law must be changed. As was the case after *Port Arthur Shipbuilding*, arbitrators should be among those who call for legislative change to ensure that we have the authority we need to make appropriate remedial orders in what are "final and binding resolutions" of collective agreement disputes.

121. *Supra* note 115.

122. *Ibid.* at 162.

123. *Entrop v. Imperial Oil Ltd.* (1998), 35 C.C.E.L. (2d) 56 (Ont. Div. Ct.); leave to appeal to Ontario Court of Appeal granted [1998] O.J. No. 1927 (C.A.) (QL).

124. *Supra* note 55 at 17.

Lest this be thought to be only a pro-union concept, it should be recalled that employers often wish to adduce evidence discovered after discharge as well, especially where it portrays the character of a discharged employee as even more heinous than had been known. Indeed, the first reported award on *Québec Cartier* is one where a union argued that *Québec Cartier* effectively excluded such evidence.¹²⁵

VI. THE POSITIVES AND THE NEGATIVES OF EXPANDED ARBITRAL JURISDICTION

We have seen the expansion of arbitrators' jurisdiction in the areas of (a) *Charter* and human rights, and (b) insurance and tort claims.

A. Charter and Human Rights

In the area of Charter and human rights claims, this development has been very positive — and more would be welcome.¹²⁶ It is crucial that workplace disputes be resolved quickly and fairly. A discrimination claim could languish for years in the processes of human rights commissions. The ability of an arbitrator, who has experience in labour relations and understands the policy issues and practicalities of collective agreement interpretation and administration, to examine and resolve all issues at one place and one time is an asset for all parties. It cannot be in the interests of employers or unions or union members to allow unresolved disputes to simmer.

The advantages and disadvantages of labour arbitrators applying the *Charter* were reviewed by La Forest J. in *Douglas College*.¹²⁷ Advantages included :

- first and foremost, the citizen should be entitled to assert rights and freedoms guaranteed by the Charter when appearing before decision-making bodies;
- the issues may be raised at an early stage in the context in which they arise; court procedures will often be more expensive and time-consuming;
- the simple, speedy, and inexpensive processes of arbitration and administrative agencies sifts the facts and compiles a record if the matter ends up being reviewed by a Court.

125. *Toronto (City) and C.U.P.E., Local 79 (D.Y.), Re* (1995), 52 L.A.C. (4th) 118 (Chair : Haefling).

126. For example, in the area of effective remedies for discrimination and sexual harassment. See K.P. Swan, *supra* note 55, at 7; J. Fudge, "Gender Issues in Arbitration : An Academic Perspective" in W. Kaplan, J. Sack and M. Gunderson, eds., *Labour Arbitration Yearbook - 1991*, vol. I (Butterworths/Lancaster House) 19 at 128; M. Cornish and S. Lopez, "Changing the Workplace Culture Through Effective Harassment Remedies" (1995) 3 *C.L.E. L.J.* 95.

127. *Supra* note 28.

Among the disadvantages addressed were :

- greater obligations and complexity go against the "raison d'être" of administrative tribunals : specialization, simple rules of evidence and procedure, speedy decisions;
- it multiplies the occasions for judicial review.

Human rights pursuits have a mutually supportive relationship with other collective agreement pursuits such as the protection of seniority rights and litigation of just cause issues. Indeed, the concepts become inextricably intermixed.

B. Insurance and Tort Claims

Using the arbitration process to enforce entitlement to benefits is a controversial issue even with the labour bar. While there is no doubt that in recent years, with the more conservative approach in the insurance industry to claims, and with the intersection of human rights principles in benefits law (maternity leave benefits, duty to accommodate), we have seen a proliferation of cases requiring assertion by unions of claims against insurance companies. While there is no doubt that trade unions could muster the know-how and resources to arbitrate such issues, and they are allied issues in that they pertain to negotiated terms of employment, the arbitration process is currently not designed to resolve such disputes. Such disputes require discovery process, exchange of expert reports, and procedural rules to ensure disclosure. If trade unions are to be required to arbitrate such cases, then the procedural infrastructure must be put in place by legislation. After all, for example, we could be concerned with an individual making a claim for permanent disability benefits that would be payable for the period up to retirement date, potentially millions of dollars of benefits. A summary process is neither designed nor adequate to deal with such claims at the present time. Even as litigating insurance claims is traditionally outside the realm of trade union knowledge and experience, even more so would be advancing a claim for a tortious wrong. Neither trade unions nor their representatives are equipped to assess and pursue such claims, which are inherently personal in nature, and not linked to collective agreement terms and conditions of employment as are health benefit claims. The clear connection to the collective agreement which health benefit claims have is absent in tort claims. As well, the claims require the same type of infrastructure as health benefit claims, which is amply provided for in the civil process.

The implications of *Weber*, *O'Leary* and *Pilon* are unsettling. Will unions have to carry forward all issues despite the procedural inadequacies? Will every union representative need legal training to be able to recognize the array of torts that may occur in the workplace? Will workplace tort claims be subject to the much shorter time limitations for grievances contained in collective agreements? What additional expenses could unions be facing?

All of us in the labour law and labour relations community are grappling with these issues. Two things are clear : one, the current jurisdictional ping-pong, particularly in the area of employee benefits, must be resolved very soon. The risk of an individual being stranded with no recourse is unacceptable. If it is to be resolved by remission to the arbitration process, then the appropriate supports must be put in place. Second, a legislative response to the effects of *Québec Cartier* is needed. The balancing process that had been developed through a long history of arbitral jurisprudence is now unavailable in some jurisdictions. The ability of the arbitrator to balance interests and issues in the context of disabilities such as alcoholism must be restored.