The Statutory Framework of Grievance Arbitration in New Brunswick

Grievance arbitration is a means of resolving disputes over the interpretation of collective agreements developed as an alternative to settling those disputes at common law or on the sidewalk. The grievance arbitration process is a dynamic one, reflecting the fact that the continuing relationship between the parties is unlike a merely contractual tie. It is this difference that has prompted one observer to describe the arbitration process as:

> an integral part of the system of self-government . . . . [T]he system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees.[1]

Such a characterization has been more or less accepted by the Supreme Court of the United States.[2]

In New Brunswick, as in all other Canadian jurisdictions, the parties to a collective agreement are bound by legislation to that agreement for a fixed period of time.[3] During the term of the collective agreement they are prohibited from resort to strike, picket or lockout to force the resolution of interpretive disputes.[4] Just as the certification process was developed as an alternative to economic coercion to obtain recognition, so the arbitration process or some alternative method of settling disputes involving the interpretation of the collective agreement is the legislatively prescribed trade-off for both industrial action and judicial interference.[5]

In the United States, on the other hand, grievance arbitration is not prescribed by legislation. Indeed, efforts to impose schemes of arbitration by statute have several times been declared unconstitutional.[6] The parties to a collective agreement in the U.S. can, therefore, resort to the strike or lockout; but in the overwhelming majority of cases the parties voluntarily submit themselves to binding arbitration when a dispute arises.

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[1]Harry Shulman, "Reason, Contract, and Law in Labor Relations", (1955) 68 *Harvard L.R.* 999 at 1024.

[2]*Transportation Communication Employees Union* v. *Union Pacific Railroad Co.* (1966), 385 U.S. 157.

[3]R.S.N.B. 1973, c. 1-4, s. 56.

[4]*Ibid.*, s. 91. This is also true of all other Canadian jurisdictions except Saskatchewan.

[5]*Ibid.*, s. 55.

[6]See S. P. Simpson, "Constitutional Limitations on Compulsory Industrial Arbitration", (1925) 38 *Harvard L.R.* 753.

In Canada we have two different systems of grievance arbitration which, in practice, are very similar.[7] The first of these is statutory: the parties are compelled by legislation to submit their disputes to arbitration. The other is a private, consensual system; it exists where the statute compels the parties to submit to some means of settling a dispute, but not necessarily arbitration.

New Brunswick has both systems. The *Industrial Relations Act,* s. 55 (1) provides that:

> Every collective agreement shall provide for the final binding settlement by arbitration or otherwise, without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable.[8]

Because the section says "by arbitration or otherwise", the New Brunswick Court of Appeal held that the arbitration tribunal is not a statutory one; *i.e.,* it is not one to which the parties are compelled by law to resort.[9] It is a private and consensual tribunal.

On the other hand, the New Brunswick *Public Service Labour Relations Act* does establish arbitration as a statutorily prescribed means of settling disputes.[10] In fact, the grievance arbitration system established under that act is called "adjudication", which seems to reinforce the image of a more formal system. The *Public Service Labour Relations Act* does not permit parties to select an alternative system. In the *Sewell* case, the Court of Appeal recognized this distinction and held an adjudicator under that *Act* was a statutory body or tribunal."

I have already noted that there is a difference between these two systems. That difference is the courts' inherent right to review the decisions of statutory arbitrators for jurisdictional error. They do not, on the other hand, have a right to review the decisions of private consensual arbitrators.[12]

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[7]One could say that we have a third system in that in Saskatchewan the American situation described above prevails.

[8]S. 81 declares that the *Arbitration Act* R.S.N.B. 1973, c. A-10 does not apply to an arbitration under s. 55.

[9]*Re Atlantic Sugar Refineries Ltd. and Bakery and Confectionery Workers International Union of American Local No. 433* (1961), 27 D.L.R. (2d) 310 (N.B.C.A.).

[10]*Public Service Labour Relations Act,* R.S.N.B. 1973, c. P-25, s. 91.

[11]*Re Sewell* (1972), 4 N.B.R. (2d) 514 (N.B.C.A.), at 520.

[12]See generally on this distinction: *Re International Nickel Co. of Canada and Rivanda* (1956), 2 D.L.R. (2d) 700 (Ont. C.A.); *Re International Nickel Co. of Canada and International Union of Mine, Mill & Smelter Workers, Local 637* (1959), 19 D.L.R. (2d) 380 (Ont. C.A.); *United Steel Corporation Ltd.* v. *Fuller* (1958), 12 D.L.R. (2d) 322 (Ont. C.A.); *Re Texaco Canada Ltd. and Oil, Chemical and Atomic Workers International Union,* Local 16-599 (1964), 44 D.L.R. (2d) 199 (Ont. H.C.); *Howe Sound Co.* v. *International Union Mine, Mill and Smelter Workers* (1962), 33 D.L.R. (2d) 1 (S.C.C.); *Port Arthur Shipbuilding Co.* v. *Arthurs* (1968), 70 D.L.R. (2d) 693 (S.C.C.); *Bell Canada* v. *Office and Professional Employees' International Union* (1973), 37 D.L.R. (3d) 561 (S.C.C.).

In practice, however, this distinction in the reviewability of decisions is largely academic. Although there is no inherent right in the courts to review the decisions of a consensual arbitrator, one can nonetheless proceed in court by way of a motion to quash on the ground that the decision is outside the bounds of what was consented to;[13] or there may be a statutory right of review. Under the *Industrial Relations Act* of New Brunswick, for example, there is such a statutory right. Section 78(1) provides that:

> Where, in any proceeding under the provisions of section 55,
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> (a) an arbitrator has misconducted himself or the proceedings, the Court may remove him,
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> (b) an arbitrator has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside,
>
> (c) an arbitrator or an arbitration board has decided that a question is arbitrable and an award was made by an arbitrator or arbitration board determining that question, the Court may, if in its opinion the question was not arbitrable, set the award aside,
>
> (d) an arbitrator or arbitration board has decided that a question is not arbitrable, the Court may, if in its opinion the question was arbitrable, order that the question be tried by the arbitrator or arbitration board.

In practice these are the same grounds upon which a court with an inherent power to review may set aside an arbitrator's decision.

This writer does not share the often heard concern over the intrusion of judicial review into the arbitration process.[14] A healthy system of arbitration, commanding the confidence of the parties, is in no danger from supervision by the judiciary. Frequent resort to the courts may however be an indication that the system is not in good health or that it lacks the confidence of the parties. This raises one of the less obvious distinctions between the private consensual arbitration under the *Industrial Relations Act* and the statutory system under the *Public Service Labour Relations Act.*

Since arbitration is, at least theoretically, a system of choice under the *Industrial Relations Act,* it exists because of the parties' commitment to it. If the parties have a real commitment to the process as an extra-judicial means of settling their disputes, then resort to the courts to have those decisions set aside ought to be infrequent; and, indeed, it is relatively infrequent in New Brunswick. On the otherhand, arbitration

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[13]*Howe Sound Co.* v. *International Union of Mine, Mill and Smelter Workers,* (1962), 33 D.L.R. (2d) 1 (S.C.C.); *International Association of Machinists and Aerospace Workers and Hudsons Bay Mining & Smelting Co. Ltd.* (1967), 66 D.L.R. (2d) 1 (S.C.C.); *Association of Radio and Televisions of Canada* v. *CBC* (1973), 40 D.L.R. (3d) 1 (S.C.C.).

[14]See for example, P. C. Weiler, *"The 'Slippery Slope' of Judicial Intervention"*, (1971) 9 *Osgoode Hall L.R.* 1.

in the Public Service is not a system of choice but one to which the parties are compelled to resort. One might therefore expect their commitment to the system to be somewhat less; and, indeed, from that system there is relatively frequent resort to the courts to review the decisions of arbitrators. This may be compounded by the fact that, while the parties are free to name arbitrators in their public service collective agreements,[15] they rarely do so; they are not then a party to the selection of their arbitrator. Under the *Industrial Relations Act,* on the other hand, the parties select their arbitrator, and it is only when they cannot agree that this becomes the responsibility of the Minister of Labour and Manpower.[16] Even then he must have regard for those people who are unacceptable to either of the parties.

Thus far it has been established that private sector grievance arbitration is private because it is resorted to, in theory at least, by choice. In fact, parties to a collective agreement have never selected a means other than arbitration to settle their differences. If the parties fail to include a clause for the final resolution of disputes, the agreement will be deemed to include a rather comprehensive arbitration clause that appears in s. 55 (2) of the act. If the parties agree on an arbitration clause that is, in the opinion of the Industrial Relations Board, inadequate, the Board may, on application of one of the parties, modify the clause so as not to conflict with the legislation.[17] Essential features, such as the manner of appointing an arbitrator where the parties fail to agree on the selection and agreement that the arbitrator has jurisdiction to determine the arbitrability of the matter in dispute, must appear in the arbitration clause. Sections 73 and 78 of the *Industrial Relations Act* establish the powers of an Arbitration Board or single arbitrator and set out certain procedural requirements, such as the taking of an oath, the settling of time limits for making an award, and the manner of enforcement of an award.

One of the more important of these sections establishing the arbitrator's powers is s. 76 (1), which allows him to substitute penalties for the discharge or discipline meted out by an employer in cases where cause exists and the contract does not itself contain specific penalties for the infraction. This section is a result of legislative reaction to the Supreme Court of Canada's decision in the *Port Arthur Shipbuilding* case,[18] in which it was held that an arbitrator, having found that "cause" for penalty did exist, exceeded his jurisdiction in varying that penalty. Thus the provision in the *Industrial Relations Act* empowering the arbitrator to vary a penalty gives him considerably more remedial scope

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[15]*Public Service Labour Relations Act,* R.S.N.B. 1973, c. P-25, s. 95(2)(*a*).

[16]S. 55(2).

[17]*Industrial Relations Act,* R.S.N.B. 1973, c. I-4, s. 55(5).

[18]*Port Arthur Shipbuilding Co.* v. *Arthurs* (1968), 70 D.L.R. (2d) 693 (S.C.C.).

than he would otherwise have, although it has also been criticized as subjecting him to the temptation to compromise.

That is briefly the statutory framework of grievance arbitration in New Brunswick. It is often incorporated to some extent in the collective agreement itself. The only purpose of this arbitration machinery is to assist in the administration of the substantive provisions in the collective agreement. Together these procedural and substantive provisions are the system of private law by which the parties agree to be bound for the duration of the contract.

Private consensual arbitration is in theory a means by which parties to a collective agreement can have their disputes settled expeditiously, inexpensively and by persons who have some expertise in the area of disputes. Unfortunately, grievance arbitration today is not expeditious; it is also not inexpensive. I would go on to say that it is also in some danger from having matters decided by persons who lack expertise in the area of dispute. It is generally accepted that this is because we have allowed the lawyers to become involved in the arbitration process.

This is part of the problem, but it is only a symptom of a more fundamental reason: that the parties often do not perceive grievance arbitration as the private consensual system it is supposed to be. They do not accept the process as providing the final and binding solution of their disputes. They do not recognize the system as a creature of their own making and one which they are free to change when it ceases to serve their purposes. Lawyers may have taken over the arbitration process but they were invited to do so. In this regard the remarks of Dr. H. D. Woods to the 1979 annual meeting of the National Academy of Arbitrators are apposite.

> I sometimes think I am one of a vanishing breed, an arbitrator who is not trained in the law. And in somber moments I am inclined to reflect on the gradual change which seems to be inevitably altering the makeup of this demi-profession. The volumes of the proceedings of the Academy and of other publications devoted to arbitration and industrial relations bear massive witness to the fact that what emerged a few short decades ago as an instrument of the parties in industrial relations to assist themselves in resolving disputes over conflicting rights and obligations is itself becoming more formalized and more detached from its creators, management and labour. In my deepest moments of gloom, or should I say envy, I have difficulty repressing the despairing cry: 'Arbitration is dead; long live the legal profession'.[19]

The consequences of arbitration ceasing to serve the interests of labour and management are enormous. It means that unions or their members will resort to the unsanctioned strike or will store up grievances like snowballs with which to pummel their opposite party in

[19]H. D. Woods, "Shadows Over Arbitration", President's Address to the 30th Annual Meeting of the National Academy of Arbitrators (Spring, 1979).

the next set of contract negotiations. In too many instances a grievance arising from a small unit of employees will not be satisfactorily resolved but will not go to arbitration because of the cost involved or the uncertainty of the outcome. That issue will come up at the next bargaining session and its resolution will be termed a 'pre-condition' to bargaining by the union or management.

In the address from which I have already quoted Dr. Woods expresses the belief that the difference between a voluntary system of arbitration and a statutory process is significant, and one that has influenced the tone and character of arbitration. If one looks at the current writing on arbitration in Canada, generated by the Arthurs-Weiler Shool, which also encompasses George Adams, Donald Brown, David Beatty and perhaps Innis Christie, one notes that they speak of a common law of arbitration and the "policy making model" of arbitration.[20] They are concerned with the development of this system over time just as the judicial system developed. They have spear-headed the publication of arbitration decisions and encouraged the writing of reasons for decision. The logical culmination of this is, as Dr. Woods points out, the development of state agencies to resolve grievance disputes that are a close parallel to the Courts. That is already the case in British Columbia where at one time arbitration was, at least in theory, a private process.

In New Brunswick we are at a crossroads. The present system of arbitration in the private sector, especially in the construction industry, is not being used properly. There are complaints from labour and from management that arbitration awards too often do not solve their problems and indeed frequently exacerbate them. There are also complaints that the process is expensive and that it takes too long. We can take two roads from here. We can develop a more adequate statutory system of arbitration, or we can encourage labour and management in our Provinces independently to develop a more suitable private system.

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[20]See P. C. Weiler, "Two Models of Judicial Decision-Making", (1968) 46 *Can. Bar. Rev.* 406; P. C. Weiler, "The Role of the Labour Arbitrator: Alternative Versions", (1969) 19 *U. Toronto L.J.* 16; P. C. Weiler, "Labour Arbitration and Industrial Change", *Task Force on Labour Relations*, Study No. 6 (1969); G. W. Adams, "Grievance Arbitration and Judicial Review in North America", (1971) 9 *Osgoode Hall L.J.* 443.

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