Arbitrating the New Employment Realities – The Evolution of Arbitration from Basic Contract Dispute Resolution

Donald J. Jordan, Q.C.
Harris & Company, Vancouver

In my group of speakers I was assigned the task of tracing the development of expansive arbitral jurisdiction in Canada. The purpose of my taking on that role was to provide a jumping off point for comparing and contrasting the scope of arbitral jurisdiction in Canada and the U.S. If I had stuck strictly to that role this paper would be a lot shorter! However, as matters stand, the reader (or listener) will soon perceive that I have a "view" on the evolution of arbitral jurisdiction in Canada. My "view" is not really positive or negative about the extent of arbitral jurisdiction in Canada. Rather, I have a concern that the scope of our arbitral jurisdiction in Canada will lead us to a circumstance where we will have come full circle in terms of the concerns which led to the development of labour arbitration as a domestic dispute resolution mechanism intended to be intimately related to the notion of industrial self government, as opposed to a system in which arbitrators are bound to apply legal principles developed in, and for, legal regimes which really do not have their roots in the workplace. Of course, I am not suggesting that these legal regimes ought not to apply to employment related matters, both in an unionized and non-union environment. The not so subtle undercurrent to my remarks can be summed up by reference to the famous quotation from the philosopher George Santayana that "those who cannot remember the past are condemned to repeat it"[1].

Before addressing the history of arbitral jurisdiction in Canada in more detail and, in light of the fact that there will be a significant comparative element in our panel discussion, let me say that I do not pretend to know much about the scope arbitral jurisdiction in the U.S. However, even my superficial investigation of arbitral jurisdiction in the U.S., undertaken for the purposes of these remarks, allows me to conclude that I can confidently say that the differences between the approach in Canada and the U.S are far more profound than the differences arising from the fact that we spell labour/labor differently! I leave it to my U.S colleagues to comment upon the differences between the jurisdiction of arbitrators in our respective countries.

Some Brief History

To quote another well known aphorism, "You can't really know where you're going until you know where you have been". So, in allegiance to this logic, I am going to start with a very brief thumbnail sketch of the early days of arbitral jurisdiction in Canada. There are many

[1] George Santayana, "The Life of Reason, 1905

comprehensive descriptions of this evolution in the academic literature[2]. But for the purposes of these remarks, I will simply offer the following point form observations:

- Modern labour legislation in Canada has its roots in the Federal Government's passage of Privy Counsel Order 1003, in 1944. This legislation was modelled upon the U.S *Wagner Act* of 1935. Interestingly, it initially featured a "labour court" rather than a labour board to administer the statute, with a rotating series of judges who sat for 2 week periods.

- The enduring legacy of PC 1003, in terms of labour arbitration, is the statutory guarantee of a grievance arbitration procedure, backstopped by arbitration, as a *quid pro quo* for a prohibition on mid-contract work stoppages. With some evolution over the years, there is not much difference between the language contained in PC 1003 and the language contained in labour legislation throughout Canada which is to the following effect:

> Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question of whether a matter is arbitrable
>
> ....

- If a collective agreement does not contain such a provision, the legislation deems one to be included in the collective agreement and usually provides a statutory pro forma for a grievance arbitration provision to be inserted into a collective agreement.
- It should be noted that this circumstance did not prevail for long. "Labour courts" were soon replaced by administrative tribunals (labour boards) to administer the legislation.
- The often referenced virtues of labour arbitration were, and still are, often commented on. Labour arbitration was intended to be, and at least notionally this remains the intention, cheaper, quicker and less formal than proceedings before a court with its attendant trappings.

[2] For example, see "Arbitrations as a Cornerstone of Industrial Justice" – The Honourable Warren K. Winkler, Chief Justice of Ontario: https: //www.ontariocourts.ca/coa/about-the-court/archives/2011-arbitration-cornerstone-industrial-justice/

- In its initial manifestations, labour arbitration often took the form of tripartite board with a neutral chairperson guided in his deliberations by a shop floor representative appointed by the union and a representative management; both with first hand knowledge of the operation of the particular enterprise generating the arbitration. Over time, there developed a widespread acceptance of the idea that the nominees to tripartite would not be "neutral" but would be selected with the expectation that their participation would generally reflect an attitude sympathetic to the positions of those who nominate them. The common law courts abhorred this approach.[3]
- Alternatively, there are many early arbitration awards made by a single arbitrator who was often not legally trained. It was common for persons with a reputation in the labour/management community for fairness and good judgment to receive such appointments.
- Even in the early years of labour arbitrations concerns were expressed about the participation of lawyers and the reliance upon common law principles, in labour arbitration. In addition, arbitral awards were often reviewed by the common law courts using the writ of certiorari. This led to a situation described by one commentator as placing the ultimate result of a workplace dispute in the hands of judges whose attitude to collective employee action "ranged from distrust to distaste"[4]. Legislators responded to the rampant use of common law writs by including in most labour legislation in Canada privative clauses along the following lines:

  > The decision or award of an arbitration board under this *Act* is final and conclusive and is not open to question or review in a court on any grounds whatsoever and proceedings by or before an arbitration board must be restrained by injunction, prohibition or processes or proceedings in a court and are not removable by certiorari or otherwise into a court.

- Notwithstanding these expressions of legislative intention by lawmakers throughout Canada, the effective of privative clauses was limited. Indeed, in 1974, Paul Weiler in his seminal article "The Remedial Authority of the Labour Arbitrator: Revised Judicial Version" (1974) 44 Canadian Bar Review 29 noted that there was almost exponential growth in judicial review of arbitrations in and around that time.[5]

---

[3] See *Carnation Foods Co. v. Canadian Food and Allied Workers, Local 798,* (1972) 28 D.L.R (3d) 584 (Manitoba C.A.)

[4] Paul Weiler, Reconcilable Differences, The Carswell Company 1980 at page 93

[5] There is tangible relationship between the evolution of administrative law concepts related to the "standard of review" by a court over the decision of administrative tribunals largely driven by cases involving either labour arbitration or the interpretation of labour relations legislation generally. It is not within the compass of this paper to examine that although it might be a fruitful endeavor in other circumstances.

- Judicial review of labour arbitrators' decisions received a jumpstart in 1982 with the decision in *Roberval Express Ltd v. Transport Drivers, Warehouseman and General Workers Union, Local 106 (Roberval)* [6]. Prior to the *Roberval* decision there were impediments to the use of the common law writs for judicial review of arbitrators because the common law writs were generally only available to review the decisions of "statutory tribunals". However, this impediment was removed by the decision in *Roberval* which held that, particularly in light of the extensive authority that labour arbitrators derive from statutes, and notwithstanding that the language of labour legislation that parties were entitled to resolve disputes under a collective agreement by "arbitration or otherwise", labour arbitrators were to be treated as statutory tribunals for the purposes of judicial review.

The scope of arbitral jurisdiction was then quiescent for a number of years and, generally, was related to the interpretation and application of words of a collective agreement or discipline matters arising from a unionized workplace. However, that was all about to change.

Advent of Enhanced Arbitral Jurisprudence

For many years, academics and commentators decried the "creeping legalism"[7] of the arbitration system. However, since the mid-1980s this "creeping legalism" has become a tsunami of legalism. These jurisdictional enhancements are briefly noted in the recent Supreme of Canada decision in *Northern Regional Health Authority v. Horrocks* (*Horrocks*)[8]. However, it is worth elaborating on some of them here:

[6] *Roberval Express Ltee v. Transport Drivers, Warehouseman and General Workers Union, Local 106* [1982] 2 S.C.R. 888

[7] See "Creeping Legalism in Canadian Industrial Relations" by S.P. Muthuchidambaram (1972) Indian Journal of Industrial Relations 255. See also Ruben & Ruben "Creeping Legalism in Public Sector Grievance Arbitration", Journal of Collective Negotiations, Volume 30, No. 1 (2003)

[8] *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42

1. In *Saint Anne Nackawic Pulp & Paper Co Ltd. v. Canadian Paper Workers Union, Local 2019*[9], an Employer proceeded to Court seeking damages for an illegal walkout. The claim was based on the fact that the walkout had violated both the collective agreement and the relevant labour legislation. The Court held that the grievance and arbitration procedures provided for in labour relations statutes generally provide the exclusive recourse open to parties to a collective agreement for its enforcement. However, a common law courts would continue to enjoy the power to grant injunctions for a illegal strike activity as such remedies are not remedies to enforce collective agreement but to enforce the general law embodied in the statute (including the express prohibition on mid-contract work stoppages). However, even in this context the Court was not to award civil damages. If damages were to be available, they must be sought under a grievance alleging a breach of the collective agreement.
2. In *Weber v. Ontario Hydro*[10] and its companion case in *New Brunswick v. O'Leary*[11], the Court dealt with three competing models of the jurisdictional alliance between labour tribunals (including arbitrators) and the common law courts. It rejected the "concurrent model" (a model whereby, if an action is recognized both in the common law or by statute, it may proceed in Court notwithstanding that it arises out of the employment context) and the "overlapping model" (whereby a Court proceeding could be brought if it raised issues which went beyond the traditional subject matter of labour law), The Court endorsed the "exclusive jurisdiction model" pursuant to which a decision regarding the appropriate forum for the determination of matter involved consideration of the nature of the dispute and the ambit of the collective agreement. The purpose of these inquiries was to determine whether the essential character of the dispute arises from the interpretation, application and administration of a collective agreement. The essential character of a dispute is not determined by reference to how that matter is described in the pleadings but by reference to the inquiries set out above. The *Weber* case also concluded that arbitrators had the power to assess claims pursuant to the *Canadian Charter of Rights and Freedoms*.
3. In *Board of Police Commissioners for the City of Regina v. Regina Police Association*[12], the Court held that the analysis set out in *Weber, supra*, applied equally when deciding which of the two competing statutory regimes (labour arbitration being one of them) should govern a dispute.

---

[9] *Saint Anne Nackawic Pulp & Paper Co Ltd. v. Canadian Paper Workers Union, Local 2019* [1986] 1 S.C.R. 704
[10] *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929
[11] *New Brunswick v. O'Leary* [1995] 2 S.C.R. 967
[12] *Board of Police Commissioners for the City of Regina v. Regina Police Association* [2000] 1 S.C.R. 360

4. In *Goudie v. Ottawa (City)*[13], the Court clarified that access to the courts is not necessarily denied to a Plaintiff who is a member of bargaining unit and who alleges a cause of action outside of the collective agreement. In this case the issue related to what was characterized as a pre-employment agreement which could not have arisen under the provisions of a collective agreement.

5. In *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*[14] the Court held that the exclusive jurisdiction model for matters arising under a collective agreement resulted in the rights and obligations of human rights legislation being incorporated into each collective agreement over which the arbitrator had jurisdiction. Human rights and other employment related legislation established a floor beneath which an employer and an union cannot contract and arbitrators have the duty to enforce those rights as if they were part of a collective agreement. (emphasis added)

6. In *Nova Scotia (Workers Compensation Board) v. Martin*[15] the Court held that, where empowering legislation implicitly or explicitly grants a tribunal the jurisdiction to decide questions of law, (a conclusion easily reached by reference to the powers given to arbitrators under labour legislation throughout Canada), an administrative tribunal even has the authority to determine the constitutional validity of a legislative provision arising in the proceedings before them. The tribunal's authority to decide questions of law need not be expressly stated but may arise from implication by looking at the enabling statute as a whole.

7. In *R v. Conway*[16], the Court held that a statutory tribunal (like a labour arbitrator) is a "court of competent jurisdiction" not only to apply the *Charter* but to provide the remedies set out in section 24 of the *Charter*.

8. In *Nor-man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*[17] the Court held that not only were labour arbitrators legally permitted to apply common law equitable doctrines, such as estoppel, they were not obliged to apply them in the same manner as the common law courts. A labour arbitrator's "mission" is different from that of a common law court and is informed by the particular context of labour relations.

---

[13] *In Goudie v. Ottawa (City)* [2003] 1 S.C.R 141

[14] *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324* [2003] 2 S.C.R. 157

[15] *Nova Scotia (Workers Compensation Board) v. Martin* [2003] 2 S.C.R. 504

[16] *R v. Conway* [2010] 1 S.C.R. 765

[17] *Nor-man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals* [2011] 3 S.C.R 616

9. This brings us to the decision of *Horrocks, supra.* In *Horrocks*, the Supreme Court of Canada patched up one remaining weak spot in arbitrators' jurisdiction by extending the principles in the *Regina Police* case. In *Horrocks*, the issue was whether the exclusive jurisdiction of a labour arbitrator extended to human rights disputes arising under a collective agreement. In what can only be described as a brave of counsel work, Ms. Horrocks' representatives argued that the exclusive jurisdiction model originally set out in *Weber* applied only to decide jurisdictional contests between labour arbitrators and the courts. When the competing forum is a statutory tribunal, they argued, an arbitrator's jurisdiction is concurrent unless the constating statute of the other administrative tribunal expressly mandates exclusivity. The Court held that labour arbitration was not merely a primary forum for human rights but rather was the exclusive forum. In all circumstances, exclusive arbitral jurisdiction is more than a mere preference. It can only be dislodged by clear language in another statute conferring exclusive jurisdiction on another tribunal. Once again, the fundamental underpinning of the Court's decision was the conclusion that the inclusion of mandatory dispute resolution clause requiring arbitration in a labour relations statute is to be taken as a explicit indication of legislative intent to oust the operation of human rights legislation.

What Does the Future Hold?

For those who are critical of this tsunami of jurisdiction overpowering the arbitral system, one would have thought that the low hanging fruit would be evidence that the increasing legalism causes too much delay in bringing about a resolution to a grievance. However, while there is statistical support for the assertion that increased legalism is increasing delay, those studying the issue have concluded that the data only provides "modest support" for that theory[18]. Apparently, use of lawyers only prolongs the time from first hearing to final award and this suggest that the way that lawyers present cases takes longer than the way that non-lawyers present cases, or that the submissions of lawyers take arbitrators longer to deal with in writing decisions.

However, as I stated in the outset, I do not argue that the enhanced jurisdiction of labour arbitrators is either a good thing or a bad thing, it simply is the current state of affairs. Rather, my concern is that the advent of increased legalism corrodes some of the policy observations which led to the establishment of labour arbitration as a system for resolving workplace disputes in the first place. I feel confident to making the bald assertion that the differences in the time it takes to bring a final resolution to a grievance is slowly approaching that which one would

[18] See "Labour Rights Arbitration: An Empirical Investigation of Delay in a Changed Legal Environment", an address to the Canadian Industrial Relations Association Annual Meeting, June 6, 2019 (Banks, Chaykoski & Slotsve: Event History Analysis of Grievance Arbitration in Ontario: Labour Justice Delayed? (2017) 72 Relations industrielles #4

experience in the common law system; that the cost differential between proceeding to a labour arbitration as opposed to a common law court proceeding is rapidly diminishing and the level of complexity, given the increased use of legal analysis foreign to the workplace, has eroded the informality of labour arbitration.

If one accepts that one of the driving forces behind the statutory policy compelling grievance arbitration to resolve disputes arising under a collective agreement was the recognition that existing dispute resolution mechanisms (i.e. the Courts) were foreign territory to the types of considerations which ought to predominate in resolving a workplace dispute, then the challenge for labour arbitration in the current climate of enhanced arbitral jurisdiction can be easily discerned. The challenge is to insure, in the face of grievance arbitrations which will now engage consideration of all employment related statues, the *Canadian Charter of Rights and Freedoms,* the principles of human rights and matters such as the consideration of whether jurisdiction is exclusive or not, remains accessible and understandable to those who are the intended beneficiaries of the system; the workers and the day to day management of an enterprise.

Frankly, the advent of increasing legalism has moved the arbitration system away from the idea that it is adjunct to industrial self-government intended to ensure that disputes in the workplace are responsive to the, and understandable by, the intended beneficiaries of the system. The more labour arbitrations descends into the arcane world of legal jargon and (Oh the horror!) Latin phrases, the less it serves its original intended purpose. The more elusive the comprehension of arbitral proceeding becomes to those who are its intended beneficiaries then, and this where I align myself, the less useful it becomes. I think it is a fair generalization to say that all of the decision makers will have to be lawyers, and all of the presenters will have to be lawyers. To use one final aphorism (as opposed to the more modern trope “back to the future”), “The more things change, the more they stay the same”. As current arbitration system moves ever closer to the characteristics exhibited by a “labour court”, it may well be a policy backlash in response.