Court File No. M38188

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36 AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

BOOK OF AUTHORITIES OF COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

(Motion for Leave to Appeal the Orders of Justice Pepall dated October 27, 2009 and November 4, 2009)

CaleyWray
Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto, Ontario M5H 2M5

Douglas J. Wray (18023C)
Email: wrayd@caleywray.com
Tel: 416-775-4673
Fax: 416-366-3763

Jesse Kugler (52532R)
Email: kuglerj@caleywray.com
Tel : 416-775-4677
Fax: 416-366-3293

Lawyers for Communications, Energy and Paperworkers Union of Canada

INDEX

Court File No. M38188

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36 AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

I N D E X

Tab

1. *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A.)

2. *Re Country Style Food Services Inc.* (2002) 158 O.A.C. 30 (C.A.)

3. *Re Blue Range Resource Corp.*, [1999] A.J. No. 975 (Alta. CA)

4. *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Imeplement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230 (S.C.C.)

5. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76 (S.C.C.)

6. *Re Fraser Papers Inc.*, [2009] O.J. No. 4287

7. *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] S.C.J. No. 72

8. *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div.)

TAB 1

[Indexed as: **Cineplex Odeon Corp., Re**]

In the Matter of the Companies' Creditors Arrangement Act

In the Matter of a Plan of Compromise or Arrangement of Cineplex Odeon Corporation and the other Applicants in Schedule "A"

Ontario Court of Appeal

MacPherson J.A.

Judgment: March 27, 2001

Docket: CA M27138

David M. McNevin, for Applicant, Mady Development Corporation

Corporations — Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues — Seats and screens located in creditor's movie theatre were found to be trade fixtures that could be removed by debtor — Creditor brought application for leave to appeal under ss. 13 and 14 of Companies' Creditors Arrangement Act — Application dismissed — Issue of tenants' trade fixtures was small component of Act proceedings and was not significant to practice generally — Issue was not significant to particular proceedings — Appeal was not prima facie meritorious as trial judge did not err in determination that seats and screens were trade fixtures — Not clear case in which leave to appeal should be granted — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 13, 14.

Cases considered by *MacPherson J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) — considered

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — applied

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 13 — pursuant to

s. 14 — pursuant to

APPLICATION by creditor for leave to appeal from decision of trial judge under *Companies' Creditors Arrangement Act.*

***MacPherson J.A.*:**

1 The applicant, Mady Development Corporation ("MDC") seeks leave to appeal from the decision of Farley J. dated March 6, 2001 in which he determined that certain fixtures (seats and screens) located on MDC's premises (a movie Theatre in Windsor) were trade fixtures rather than permanent fixtures. As a

result, Farley J. ordered that Cineplex Odeon Corporation ("Cineplex") could remove the trade fixtures from the premises.

2 The application for leave to appeal is made pursuant to ss.13 and 14 of the *Companies' Creditors Arrangement Act* ("CCAA"). The parties are agreed that four factors should be considered on such an application:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the proceeding itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

See: *Re Blue Range Resource Corp.* (1999), 12 C.B.R. (4th) 186 (Alta. C.A.) at 190.

3 I do not think that the issue proposed for the appeal is of significance to the practice generally. Generally speaking, the issue of tenants' trade fixtures does not arise in, or is a very small component of, *CCAA* proceedings.

4 I do not think that the issue proposed for the appeal is of significance to this particular *CCAA* proceeding. The issue relates to theatre seats and movie screens in one theatre in the context of a nationwide re-organization designed to keep a major corporation afloat *and* to deal fairly with all creditors, which will include MDC.

5 I do not think that the proposed appeal is *prima facie* meritorious. Farley J. specifically considered the leading authorities and the relevant provisions of the lease. In my view, his conclusion that the theatre seats and movie screens were trade fixtures is correct.

6 The respondent concedes the fourth factor. This was a proper concession because this court could hear the appeal on an expedited basis in very short order.

7 In *Re Smoky River Coal Ltd.* (1999), 237 A.R. 326 (Alta. C.A.), Hunt J.A. conducted an extensive review of the history and purposes of the *CCAA*. She said, at p 341:

> The fact that an appeal lies only with leave of an appellate court (s.13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

8 I agree with Hunt J.A.'s observation. In my view, the present matter is not one of those clear cases on which leave to appeal should be granted. In the end, I think that Farley J.'s analysis and conclusion are correct.

Application dismissed.

TAB 2

In The Matter Of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended;

And In The Matter Of The Courts of Justice Act, R.S.O. 1990, c. C-43, as amended;

And In The Matter Of A Plan of Compromise or Arrangement of Country Style Food Services Inc., Country Style Food Services Holdings Inc., Country Style Realty Limited, Melody Farms Specialty Foods and Equipment Limited, Buns Master Bakery Systems Inc. and Buns Master Bakery Realty Inc.;

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
(M28458)

Indexed As: Country Style Food Services Inc. et al., Re

Ontario Court of Appeal
Feldman, J.A.
April 16, 2002.

Summary:

A motions judge sanctioned a plan of arrangement under the Companies' Creditors Arrangement Act for the respondent, Country Style Group of Corporations (a franchise). Three Country Style franchisees sought leave to appeal the order.

The Ontario Court of Appeal, per Feldman, J.A., dismissed the application.

Creditors and Debtors - Topic 8599

Debtors' relief legislation - Companies' creditors arrangement legislation - Appeals (incl. leave to appeal) - A motions judge sanctioned a plan of arrangement under the Companies' Creditors Arrangement Act for the Country Style Group of Corporations (a franchise) - Three Country Style franchisees sought leave to appeal the order - They argued that some franchisees overcontributed to a national advertising fund in relation to other franchisees entitling them to make a claim against the company for unjust enrichment - However, because they did not know about this potential claim until after the sanction hearing, they did not file claims in the process, participate as unsecured creditors, and have the right to vote for or against the plan - The Ontario Court of Appeal, per Feldman, J.A., dismissed the application - There was nothing to suggest that the plan as sanctioned and approved by the court was not "fair and reasonable" - If leave to appeal was granted, the progress of the action would be hindered and the restructuring might not go ahead at all - The applicants did not propose any alternative to the plan - The significance to the action appeared to be procedural but not substantive - See paragraphs 15 to 20.

Cases Noticed:

R. v. Palmer, [1980] 1 S.C.R. 759; 30 N.R. 181, refd to. [para. 4].

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384; 27 C.B.R.(4th) 197 (C.A.), refd to. [para. 15].

Blue Range Resources Corp., Re (1999), 244 A.R. 103; 209 W.A.C. 103; 12 C.B.R.(4th) 186 (C.A.), refd to. [para. 15].

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R.(3d) 62 (C.A.), refd to. [para. 15].

Cineplex Odeon Corp. (2001), 24 C.B.R.

(4th) 201 (Ont. C.A.), refd to. [para. 15].

Counsel:

Craig R. Colraine and Mitchell D. Goldberg, for Tozeng Ltd., 1124019 Ontario Ltd. and 665371 Ontario Ltd., applicants;
Joanna Board, for 1304271 Ontario Ltd. and 995804 Ontario Inc. (supporting the applicants);
Patrick J. O'Kelly and Ashley J. Taylor, for Country Style, respondent;
Frank J.C. Newbould, Q.C., for the Bank of Nova Scotia, respondent;
Mahesh Uttamchandani, for CAI, DIP Lender, respondent.

This application was heard on April 15, 2002, before Feldman, J.A., of the Ontario Court of Appeal, who released the following decision on April 16, 2002.

---

[1] **Feldman, J.A.** [in Chambers]: This is an application for leave to appeal the order of Spence, J., made on March 7, 2002, whereby he sanctioned a Plan of Arrangement (the "Plan" under the **Companies' Creditors Arrangement Act**, R.S.C. 1985, c. C-36 ("**CCAA**") for the respondent, Country Style Group of Corporations. The application is brought under s. 13 of the **CCAA** which provides:

> "s. 13 Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs."

[2] The application was originally brought before Spence, J., but as he was unable to hear it before April 16, 2002, the date scheduled for the closing of the plan transaction, he suggested that the application be brought to this court.

[3] All three applicants are Country Style franchisees. Only one, Tozeng Limited, is also a creditor that filed a proof of claim and voted in the proceeding.

[4] The applicants concede that on the record before him, Spence, J., did not make any error in approving the Plan which was approved by a substantial percentage of the unsecured creditors and by the secured creditor. In fact, no one opposed the approval of the plan at the sanction hearing. The basis for this application is that immediately after the hearing approving the Plan, the applicants became aware of facts which they say vitiate the approval process in three ways:

(1) Over a period of time, some franchisees had contributed to Country Style's national advertising fund while others had not. The applicants claim that to the extent that some franchisees thereby over-contributed, they were entitled to claim as creditors against the company for unjust enrichment in the Plan process. However, because they did not know about the over-contribution and unequal treatment until it was too late to claim in the plan process, they have been denied both the amount of their claim and the opportunity to vote for or against the Plan and to participate in the process.

(2) The company was offering improper incentives to creditors to vote for the Plan.

(3) The Monitor was in a conflict of interest.

The applicants rely on fresh evidence in order to assert these claims and rely on s. 134(4) of the **Courts of Justice Act**, R.S.O. 1990, c. C-43, which allows a court in a proper case, to accept fresh evidence. In **R. v. Palmer**, [1980] 1 S.C.R. 759; 30 N.R. 181, at 775, the Supreme Court of Canada set out four criteria for the admission of fresh evidence on appeal, summarized as follows:

(1) by due diligence, the evidence could not have been adduced in the proceeding below;

(2) it is relevant to a decisive or potentially decisive issue;

(3) it is reasonably capable of belief;

(4) if believed, it may reasonably have affected the result.

[5] The respondents object to the admission of the fresh evidence on this application and rely heavily on the assertion that the first criterion, due diligence, has not been met in this case. They also suggest that the record discloses that Mr. English, the principal of Tozeng Limited, did know about the differential treatment of franchisees as long as one year ago.

[6] Mr. O'Kelly on behalf of Country Style, points to the fact that a creditor, Tarragon Mercantile Inc., did propose to oppose the sanction order until an out-of-court settlement was reached on the evening before the sanction motion. Tarragon filed a motion record with the court that contained affidavits outlining some of the allegations on which the applicants now rely (in particular, the alleged irregularities with the proxy solicitation process and the alleged conflict of interest of the Monitor) and raised other matters as well. I am told that Spence, J., was advised on the return of the motion that Tarragon was withdrawing its opposition. The plan was thereupon sanctioned by the court. I am advised that no one opposed the order.

[7] Mr. O'Kelly's submission is that because Tarragon was in a position to find out the information necessary to bring forth some of the allegations now asserted by the applicants, the applicants could have done so as well had they exercised due diligence. In my view, on the face of it, there is merit in that submission.

[8] The one issue which is not fully detailed in the Tarragon material is the national advertising fund issue. However, the information relied on in respect of the fund is contained in an affidavit of Catherine Mauro dated March 25, 2002 and filed on this application. She is the former director of marketing and product development who was terminated by Country Style on February 4, 2002. Ms Mauro also provided one of the affidavits which is included in the Tarragon material. Again, therefore, it appears that the applicants could have discovered further information from Ms. Mauro prior to the March 7 hearing had they acted with due diligence in speaking with her.

[9] Even more significant, however, is the fact that in his affidavit filed in connection with the original material seeking court protection, Mr. Gibbons, the President of Country Style, disclosed as part of his de-

scription of the financial status of the debtor companies that one of the historical responses by management when a franchisee developed financial difficulties was "deferring or accepting reduced royalty, advertising and/or sign rental payments for a period of time" (affidavit para. 37). This information was also included in the Management proxy circular which was sent out to all creditors, of which Mr. English was one.

[10] The applicants' position is that until they talked to Catherine Mauro after the sanction hearing, they did not know that some franchisees were not paying the full 3.5% of monthly gross sales to the national advertising fund, and that the 13 corporate stores, taken over from failed franchisees, paid nothing into the fund. The applicants also take the position that the company and the monitor made it impossible for the franchisees to learn of this by failing to disclose it to the franchisees. Their evidence is that representations were made to franchisees by senior management that all franchisees paid the same percentage of their sales into the national advertising fund.

[11] However, it appears that there was disclosure of the differential treatment of franchisees in respect of the advertising fund in Mr. Gibbons' affidavit and the Management circular. Counsel also pointed out that franchisees could ask to be added to the service list for all of the documentation and that some were added, including Ms. Board's clients who have been represented by her here in support of the application.

[12] I conclude, based on the material currently before the court, that it cannot be said that there was non-disclosure of the differential treatment of franchisees in respect of the contribution to the national advertising fund, or that the applicants could not have discovered this evidence if they had exercised due diligence. Although it appears that the potential significance of the different contributions as a possible claim against Country Style based on unjust enrichment, may not have been considered by the applicants until after the sanction motion, a failure to appreciate the significance of information does not meet the due diligence test.

[13] Finally, the respondents point to the fact that Mr. English has deposed that in May 2000, he sought and obtained differential treatment in respect of the royalty fees he was paying and that he has been trying to retain the so-called "tiered store" status for his stores which allows them to pay lower fees. Therefore, Mr. English was aware of differentiation among franchisees in respect of some of the amounts payable to the franchiser and wanted to preserve that differentiation when it benefited him. The respondents say this shows that the new evidence should not be accepted and that furthermore, there is no merit to the suggestion that the franchisees have any claim against the debtor company based on alleged overpayments. As a result, they argue that the new evidence would not have affected the outcome of the sanction hearing had it been available at that hearing.

[14] I am satisfied that I need not deal with this part of the submission on this motion, as the due diligence criterion is not met.

[15] Even if the fresh evidence met the test for admission, which it does not on the due diligence criterion, the court must be satisfied that this is a case where leave to appeal

ought to be granted. The jurisprudence in this area dictates that leave to appeal in CCAA proceedings should be granted sparingly: **Consumers Packaging Inc., Re** (2001), 150 O.A.C. 384; 27 C.B.R.(4th) 197, at 199 (C.A.); **Blue Range Resources Corp., Re** (1999), 244 A.R. 103; 209 W.A.C. 103; 12 C.B.R.(4th) 186, at 190 (C.A.). In order to grant leave the court must be satisfied that there are "serious and arguable grounds that are of real and significant interest to the parties": **Multitech Warehouse Direct Inc., Re** (1995), 32 Alta. L.R.(3d) 62, at 63 (C.A.). This is determined in accordance with a four-pronged test as follows:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous;

(d) whether the appeal will unduly hinder the progress of the action.

See **Blue Range Resource Corp.**, supra, at 190; **Cineplex Odeon Corp.** (2001), 24 C.B.R.(4th) 201, at 202 (Ont. C.A.).

[16] As I understand it, the main issue on appeal is the submission that the applicant franchisees and other franchisees, some of whom have filed affidavits in support, overcontributed to the national advertising fund in relation to other franchisees and the company in connection with its corporate stores. This overcontribution entitled them to make a claim against the company for unjust enrichment. However, because they did not know about this potential claim until after the sanction hearing, they did not file claims in the process; they therefore did not have the right to participate as unsecured creditors, and they did not have the right to vote for or against the Plan.

[17] Counsel for the applicants concedes that there is no evidence in the record to demonstrate that had the affected franchisees made claims and voted, the Plan would have been defeated or amended in any way.

[18] Counsel also concedes that no alternative plan has been proferred at any stage. He suggests, however, that because of the circumstances set out, the Plan cannot be considered fair and reasonable. The Monitor has made it clear in its reports that the only alternative to the Plan is bankruptcy or receivership, whereunder there would be nothing for the unsecured creditors. Counsel suggested in argument that his clients would be prepared to see the debtor company go bankrupt rather than proceed with the sanctioned Plan. There is no affidavit evidence to this effect, and I frankly find it hard to accept that franchisees with viable operations would prefer to see the corporate entity with which they are associated be liquidated in a bankruptcy or receivership.

[19] Based on the record, there is nothing to suggest that the Plan as sanctioned and approved by the court is not "fair and reasonable." If leave to appeal is granted, the progress of the action will clearly be hindered and the restructuring may not go ahead at all. If the appeal were to be successful and the process reopened, the applicants do not propose any alternative to the plan, so that the significance to the action appears to be procedural but not substantive.

[20] For all of these reasons, the applicants have not satisfied the test for the court to exercise its discretion to grant leave to appeal.

[21] During argument, counsel for the applicants suggested that one of the problems facing his clients is that they owe money to the debtor company, but are not able to make a claim against the company in respect of the overpayment into the advertising fund because of the orders made in the CCAA process. In response, counsel for Country Style took the position that s. 18.1 of the CCAA preserves the applicants' ability to assert a right of set-off against the company in respect of their claims against any monies which they may owe to the company. In other words, their claims against the company are not necessarily barred.

[22] As this was not an issue for resolution on this leave to appeal motion, I make no comment on (1) the effect of s. 18.1 of the CCAA on post- Plan claims by or against the debtor company; or (2) on the effect of the claims bar order in respect of claims by people who were not listed or served as creditors in the proceeding, or people who did not know that they had claims against the company.

[23] Finally, I note that the franchisees as a group were not considered to be people to be officially served with and included in the CCAA process. I was advised by a representative of the Monitor who was present in court for this appeal, that Mr. Gibbons did send a letter to all franchisees enclosing the original stay order and advising them of the Monitor's website where much of the CCAA material would be posted. Although the process under the Act contemplates the participation and protection of creditors, the debtor company, and possibly the shareholders, in cases where the debtor company is a franchisor, the franchisees may have an interest in the ultimate structure of the franchise operation as proposed by the Plan process. It may therefore be appropriate where a franchisor seeks CCAA protection, to consider whether the franchisees ought to be given notice of the proceedings and the opportunity to request the ability to participate on an appropriate basis.

CONCLUSION

[24] Leave to appeal is denied.

Application dismissed.

Editor: Rodney A. Jordan/gs

TAB 3

Indexed as:

Blue Range Resource Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of Blue Range Resource Corporation
Between
Duke Energy Marketing Limited Partnership, appellant, and
Blue Range Resource Corporation and
Humble Petroleum Marketing Ltd., respondents
(Appeal # 99-18395)
And between
Engage Energy Canada, L.P., appellant (applicant), and
Blue Range Resource Corporation, respondent
(Appeal # 99-18397)
And between
Enron Capital & Trade Resources Canada Corp., appellant (applicant), and
Blue Range Resource Corporation, Humble Petroleum Marketing Ltd., PriceWaterhouseCoopers Inc., in its capacity as monitor, Royal Bank of Canada, National Bank of Canada, and First National Bank of Chicago, respondents (respondents)
(Appeal # 99-18410)
And between
Duke Energy Marketing Limited Partnership, appellant, and
Blue Range Resource Corporation and
Humble Petroleum Marketing Ltd., respondents
(Appeal #99-18411)
And between
Engage Energy Canada, L.P., appellant (applicant), and
Blue Range Resource Corporation and
Humble Petroleum Marketing Ltd., PriceWaterhouseCoopers Inc., in its capacity as monitor, Royal Bank of Canada, National Bank of Canada, and First National Bank of Chicago, respondents
(Appeal #99-18418)
And between
Big Bear Exploration Ltd., appellant (respondent), and
Enron Capital & Trade Resources Canada Corp., respondent (applicant)
(Appeal # 99-18424)

[1999] A.J. No. 975

1999 ABCA 255

244 A.R. 103

12 C.B.R. (4th) 186

Dockets: 99-18395, 99-18397, 99-18410, 99-18411, 99-18418 and

99-18424

Alberta Court of Appeal
Calgary, Alberta

Fruman J.A.

Heard: August 18, 1999.
Judgment: filed August 24, 1999.

(20 paras.)

Appeal from the order of LoVecchio J. dated June 18, 1999. (Appeal # 99-18395) Appeal from the order of LoVecchio J. dated June 18, 1999. (Appeal # 99-18397) Appeal from the order of LoVecchio J. dated June 30, 1999 and filed July 8, 1999. (Appeal #99-18418) Appeal from the order of LoVecchio J. dated June 30, 1999. (Appeal #99-18411) Appeal from the order of LoVecchio J. dated June 30, 1999. (Appeal #99-18418) Appeal from the order of Wilkins J. dated July 16, 1999. (Appeal # 99-18424)

Counsel:

L.B. Robinson, for Engage Energy Canada, L.P.
J.L. Ircandia and M. Marion, for Blue Range Resource Corporation et al.
A.R. Anderson and B. Urrell, for Enron Capital Trade Resources Canada Corp.
H.A. Gorman, for Duke Energy Marketing Limited Partnership.
R.J. Wilkins, for Big Bear Exploration Ltd.

MEMORANDUM OF DECISION

1 **FRUMAN J.A.**:-- Blue Range Resource Corporation, a company which produces and sells natural gas, experienced serious financial problems. On March 2, 1999, it successfully petitioned the court for an order staying proceedings against it under s. 11 of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended. A series of further applications were heard, resulting in numerous orders adversely affecting companies which had contractual arrangements with Blue Range, and its subsidiary, Humble Petroleum Marketing Ltd. Six of those orders are the subject of applications for leave to appeal under s. 13 of the CCAA.

Leave Under the CCAA

2 Section 13 provides that any person dissatisfied with an order or decision made under the CCAA may appeal from it, with leave from either the judge appealed from, or the Court of Appeal. The section does not clarify the grounds upon which leave may be granted. The test that has been adopted in Alberta

requires the applicant to show "serious and arguable grounds that are of real and significant interest to the parties": Re Multitech Warehouse Direct (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.); Luscar Ltd. v. Smoky River Coal Ltd., [1999] A.J. No. 185 at para. 22 (C.A.).

3 An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in CCAA proceedings. A judge exercising a supervisory function under the CCAA has an ongoing management process, much like a trial judge making orders in the course of a trial: Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 at 272 (B.C.C.A.).

4 In Med Finance Co. S.A. v. Bank of Montreal (1993), 22 C.B.R. (3d) 279 at 282 (B.C.C.A.), Hinds J. summarized the matters to be considered in granting leave to appeal an issue under the Bankruptcy Act:

> (a) whether the point on appeal is of significance to the practice;
> (b) whether the point raised is of significance to the action itself;
> (c) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
> (d) whether the appeal will unduly hinder the progress of the action.

5 The parties agree, as do I, that these four elements are subsumed in the more general wording of the Multitech test. In particular, the importance to the practice or to the industry should be considered. While many matters involving competing claims on money will be significant to the parties, they may have little precedential value. This element is entirely consistent with the requirement that an appellate court exercise its powers sparingly.

6 In this case, unlike Multitech and Smoky River, a plan of arrangement is already in place and an appeal would not unduly hinder the progress of restructuring Blue Range's affairs. It is therefore unnecessary to consider any potential delay caused by granting leave.

7 The leave applications relate to orders granted by LoVecchio J. on June 18 and June 30, 1999, and by Wilkins J. on July 16, 1999.

June 18, 1999 Order - CA Appeal Nos. 18395 and 18397

Variation Order

8 The original CCAA stay order permitted termination of various contracts. Engage Energy Canada, L.P. and Duke Energy Marketing Limited Partnership applied for a variation of the initial stay order to provide that Blue Range should only be permitted to terminate its gas marketing contracts with them if Blue Range was incapable of performing them, or termination was essential to the success of the restructuring. LoVecchio J. dismissed the application. Although he recognized that the applicants would potentially suffer substantial losses as a result of the termination of the contracts, he found that an order authorizing the termination was appropriate in the circumstances, especially since it did not affect the creditors' rights to claim for damages.

9 Engage and Duke seek leave to appeal. No legal principles are in issue, nor is there any suggestion that the chambers judge lacked jurisdiction to make the initial order or to refuse a variation. A chambers judge has a broad discretion under the CCAA. It is clear from his reasons that LoVecchio J. was aware of the circumstances, understood the competing issues and attempted to balance the interests of all the parties. He is owed considerable deference. Engage and Duke allege no errors, other than their disagreement with the exercise of his discretion. They have not made out serious and arguable grounds, and their application for leave to appeal is denied.

Set-Off

10 At the time of the CCAA stay order, Engage and Duke had received but not yet paid for natural gas deliveries made by Blue Range in February and March of 1999. As a result of the termination of their gas purchase contracts with Blue Range, they would have to buy natural gas at higher prices, resulting in damages. Engage and Duke sought orders permitting them to set-off anticipated damages they would incur, against the payments owed by them to Blue Range for natural gas deliveries. LoVecchio J. dismissed their application, based on his finding that the future damages were sufficiently independent from the obligation to pay for gas already delivered that equitable set-off was not appropriate.

11 Engage and Duke seek leave to appeal. Section 18.1 of the CCAA provides that the law of set-off applies to all claims made against a debtor company. Although the section is a recent addition to the statute, at the hearing counsel relied upon the same authorities and did not disagree on the principles upon which determinations of set-off are made. They disagreed considerably on the application of those principles to the facts of this case, however. The point in issue has significance to the parties, as well as to the practice. It requires a determination whether amounts owing to a debtor company under a contract at the time of a CCAA stay, are sufficiently connected to damages suffered from the termination of that contract as a direct result of the CCAA proceedings, to warrant equitable set-off. The point must be considered in the context of the legislation which now specifically authorizes set-off in s. 18.1. The issue raises serious and arguable grounds. Leave to appeal is granted.

June 30, 1999 Order - CA Appeal Nos. 18410; 18411 and 18418

12 Duke, Engage and Enron Capital & Trade Resources Canada Corp. have applied for leave to appeal the June 30, 1999 decision of LoVecchio J. Although their application is unopposed, I nevertheless have an obligation to ensure that the tests for granting leave are met.

13 The chambers judge was asked to decide whether contracts providing for delivery of natural gas were "eligible financial contracts" as defined in s. 11.1(1) of the CCAA. He received the evidence of U.S. and Canadian experts, and heard extensive argument and submissions. He concluded, based on the sources cited by counsel, that almost any contract could fit within the definition, but went on to decide that the contracts being considered were "physical" rather than "financial" contracts, and not captured by the language of the section. The effect of his decision is to restrict "forward commodity contract" in subsection 11.1(1)(h) to derivative contracts.

14 Section 11.1 of the CCAA was enacted in 1997. The June 30 decision is the first to deal with the interpretation of "eligible financial contract" and the first to consider financing vehicles that provide for delivery of product. Its meaning has a real and significant interest to the parties, as well as a significant impact upon the oil and gas industry generally, as it affects available financing instruments. The issue raises serious and arguable grounds. Leave to appeal is granted.

July 16, 1999 Order - CA Appeal No. 18424

15 Big Bear Exploration Ltd. acquired control of Blue Range on December 12, 1998. The two companies were kept separate, with Big Bear assuming Blue Range's management obligations. On March 1, 1999 a management agreement was committed to writing. Big Bear also paid liabilities to third parties in respect of Blue Range's assets and operations. Meanwhile, on January 12, 1999 the two companies executed a loan agreement. Advances made by Big Bear to Blue Range under the loan were secured under a General Security Agreement signed at the same time.

16 Enron and the Blue Range Creditors' Committee applied to the court for an order that amounts owed to Big Bear for management fees and third party liabilities, totalling more than $1.1 million, were not secured under the terms of the General Security Agreement. Wilkins J. granted the order, finding that the General Security Agreement had to be read with the Loan Agreement, whose terms were not broad enough to cover the management fees.

17 Big Bear seeks leave to appeal. There were no facts in dispute before the chambers judge. Big Bear complains about the brevity of the reasons, alleges errors in contractual interpretation and disagrees with the chamber's judges conclusion, arguing that the General Security Agreement should be interpreted without reference to the Loan Agreement. In essence, the point raises an issue of priority among creditors resulting from the interpretation of a particular and unique financial instrument. It has no possible precedential value and does not raise serious and arguable grounds. Leave to appeal is dismissed.

Summary

18 C.A. Appeal Nos. 18395 and 18397 -- Leave to appeal the portion of the June 18, 1999 order dealing with variation of contracts is dismissed. Leave to appeal the portion dealing with set-off is granted.

19 C.A. Appeal Nos. 18410; 18411 and 18418 -- Leave to appeal the June 30, 1999 order is granted.

20 C.A. Appeal No. 18424 - Leave to appeal the July 16, 1999 order is dismissed.

FRUMAN J.A.

cp/i/kjm

TAB 4

Indexed as:

Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)

Dayco (Canada) Ltd., appellant;
v.
National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (formerly International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)) and Howard D. Brown, Arbitrator, respondents.

[1993] 2 S.C.R. 230

[1993] S.C.J. No. 53

File No.: 22180.

Supreme Court of Canada

1992: May 7 / 1993: May 6.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (109 paras.)

Labour relations -- Grievance arbitration -- Company ending retired workers' benefits derived from expired collective agreement -- Union initiating grievance -- Whether or not grievance arbitrable -- Whether or not arbitrator correctly assumed jurisdiction.

Judicial review -- Labour Relations Board -- Grievance arbitration -- Company ending retired workers' benefits derived from expired collective agreement -- Union initiating grievance -- Whether or not grievance arbitrable -- Whether or not arbitrator correctly assumed jurisdiction -- Whether or not privative clause applicable -- Labour Relations Act, R.S.O. 1980, c. 228, s. 44.

Appellant shut down its Hamilton plant in 1983 and permanently closed it in 1985. The company provided certain group insurance benefits to its employees under former collective agreements, the last one of which was signed on April 27, 1983 and expired on April 21, 1985. Prior to the final closing, the company and the union negotiated a shutdown agreement, under which the group insurance benefits for active employees would be discontinued six months after the plant closed. The agreement did not mention the retirees' benefits. The collective agreement was formally terminated on [page231] May 29, 1985. The pension plan was wound up and an annuity was bought to satisfy the company's outstanding pension obligations.

The company advised all retirees that their benefits would be terminated when the benefits for active employees were to cease under the shutdown agreement. The union lodged a grievance on behalf of the retired workers, demanding reinstatement of the benefits. The company refused to acknowledge this grievance and objected to the arbitrator's jurisdiction. In its opinion, there was no collective agreement in place when the grievance was lodged and it had no obligations to the retired workers on any basis but the collective agreement.

At the arbitration hearing the company renewed its objection to the grievance, and argued that the arbitrator had no jurisdiction because the collective agreement had ended. The arbitrator heard submissions on this point only, and then adjourned the hearing. In a written award, he rejected the company's arguments on jurisdiction, found that the matter before him was arbitrable, and ordered the arbitration to proceed on the merits at a later date. The company applied for judicial review of the arbitrator's decision, and the Divisional Court set aside the award. An appeal to the Court of Appeal was allowed, thus reinstating the arbitrator's award. This appeal raises two issues. The first is the scope of judicial review of the arbitrator's decision. The remaining issue is the correctness of the arbitrator's finding that a promise to pay benefits to retired employees can survive the expiration of the collective agreement in which the promise is made.

The union sought to cross-appeal that portion of the Court of Appeal's order directing that the arbitration proceed before a different arbitrator. That order was made at the request of the company, in the belief that the arbitrator had in effect pre-judged the merits of the case in the course of determining his jurisdiction.

Held: The appeal and cross-appeal should be dismissed.

Per La Forest, Sopinka, Gonthier, McLachlin and Iacobucci JJ.: At this Court, the appellant only challenged the conclusion of the arbitrator on the general proposition that a promise in a collective agreement can survive the expiry of the collective agreement in which the promise is made. In answering the question the arbitrator [page232] was not acting within his jurisdiction in a strict sense. Rather he was deciding upon jurisdiction and as such was required to be correct.

Courts should, as a matter of policy, defer to the expertise of the arbitrator in questions relating to the interpretation of collective agreements. An arbitrator has jurisdiction stricto sensu to interpret the provisions of a collective agreement in the course of determining the arbitrability -- i.e., the arbitrator's jurisdiction -- of matters under that agreement. But here the viability and subsistence of the collective agreement is challenged. The collective agreement is the foundation of the arbitrator's jurisdiction, and in determining that it exists or subsists, the arbitrator must be correct. If the issue is arbitrable, then the arbitrator has jurisdiction, at least in the limited sense of being empowered to decide that question. The more difficult problem is whether the arbitrator, in making that inquiry, has the right to be wrong. This requires a pragmatic and functional analysis of the appropriate standard of review.

The wording of the precise grant of power in s. 44 of the Labour Relations Act is not determinative of the scope of an arbitrator's jurisdiction. In viewing the text of s. 44(2) as a whole, the power to determine arbitrability will for many "matters" connote a grant of jurisdiction stricto sensu. When the "matter" must be measured against the collective agreement to determine if it is arbitrable, the arbitrator will have the right to be wrong. This takes account of the entire purpose of the provision, which is to empower the arbitrator to deal with differences between the parties relating to the agreement. Moreover, this is in accord with the arbitrator's core area of expertise. But when there is a dispute over whether the grievance pertains to some other agreement or no agreement at all, then the board must determine its jurisdiction, and it must be correct in so doing.

The conclusions that emerge from the wording of the statute are confirmed by considering the role of the arbitrator within the arbitration scheme established by the Act. The phrase "final and binding upon the parties" in s. 44 has a limited privative effect on the issue in this appeal. Section 44 should be contrasted with the strong and explicit privative clause in s. 108 protecting decisions of the Labour Relations Board. If the legislature had intended to mandate the same judicial deference to an arbitrator as to the board, it could simply have brought the arbitrator under the shelter of s. 108.

[page233]

A consideration of the purpose of arbitration and the expertise of arbitrators indicates that an arbitration board falls towards the lower end of the spectrum of those administrative tribunals charged with policy deliberations to which the courts should defer. Tribunals vested with the responsibility to oversee and develop a statutory regime are more likely to be entitled to judicial deference. The Labour Relations Act clearly assigns a general supervisory role to the Ontario Labour Relations Board. In contrast, the arbitrator's role is confined to the resolution of grievances under a collective agreement. The relative expertise of board members and arbitrators must be presumed to be commensurate with the scope of these divergent statutory mandates.

The extent to which the present case turns on questions falling within that area of expertise must be considered. Here, the question to be decided requires consideration of concepts that are analogous to certain common law notions -- "vesting" and accrued contractual rights -- that fall outside the tribunal's sphere of exclusive expertise. Arbitrators can apply common law concepts but in these matters the arbitrator has no exclusive or unique claim to expertise.

The functional analysis of the jurisdiction of the arbitrator in this case indicates that in deciding whether a collective agreement continues to determine the rights and obligations between the parties, the arbitrator is required to be correct.

With respect to the substantive issue in this appeal, the arbitrator correctly found, as a general proposition, that it is possible for a promise of retirement benefits to survive the expiry of the collective agreement in which it is found. Guidance can be found by reference to certain analogous (and perhaps binding) concepts in the common law of contracts such as the common law notion of termination of a contract. A collective agreement is rather like a contract for a fixed term which expires by mutual agreement at the end of the term. It ceases to have prospective application, but the rights that have accrued under it continue to subsist.

Rights that have accrued under a collective agreement can remain enforceable. The new agreement "displaces" the old one, which is no longer in force. But this is with respect to the current employment relationship, and says nothing about the previously accrued rights of the parties. Nothing differentiates the promise to pay retirement health benefits from promises to pay regular wages or [page234] vacation pay. All of these can be enforced after the termination of the agreement.

The first step in analyzing the arbitrability of an expired collective agreement is to determine the general question of whether expiry forecloses the ability of parties to grieve matters that arose during the currency of the agreement. The proper focus is to examine when the rights being grieved had accrued, not the time of breach. The term "vested" must be taken to mean only that vested rights are not automatically extinguished by the expiry of the collective agreement. Vesting in this context says nothing of the ultimate indefeasibility or inviolability of the rights. This "weak form" of vesting is sufficient to determine the result in this case. Since the retirement benefits here were not withdrawn by any subsequent agreement between the parties, there was no opportunity for the retroactive

extinguishment of the rights which accrued under the expired agreement. The second phase of the arbitrator's analysis was really just an application of the general principle to the specific case of retirees' benefits.

American and Canadian jurisprudence indicates that retirement benefits are in the nature of accrued rights and those may (depending on the terms of the agreement) vest. The time of retirement is the time when certain rights granted under a collective agreement vest. The vested rights can be enforced by union grievance on behalf of retirees.

Retired workers fall outside the bargaining unit and are thereby excluded from the collective bargaining process. Statutory vesting protections have been extended to pension plans, but not welfare plans. The question of vested welfare benefits is to be determined by the contracting parties. While the retirees are outside the collective bargaining process, unions can (and frequently do) bargain on behalf of retired workers. But this does not affect the status of vesting. The American notion of retirement benefits as a permissive subject of bargaining, which either party to the negotiations can refuse to discuss, is largely irrelevant to the status of vesting of retirees' benefits. Vesting is determined by the contractual agreement between the parties, not the subsequent bargaining between them. In practical terms, vested rights are protected by the right to grieve the expired collective agreement, not by control over the subsequent bargaining process. An intention to vest benefits can be [page235] inferred as the retirees would not have wanted their benefits to depend upon the goodwill of the parties during future collective bargaining. This inference, as one measure of the context in which bargaining took place between the parties, is a useful tool that can be employed by arbitrators in Canada on a case-by-case basis.

The range of remedial choices available to individual retired workers may be the one area where there may be a crucial difference in the nature (but not the existence) of vested retirement benefits in Ontario as compared to the United States. Canadian retirees may find themselves in possession of a right without a remedy. The grievance procedure may be foreclosed because retirees may not be entitled to bring a claim against the union for unfair representation, as such rights in Ontario appear to be limited to current members of the bargaining unit. Ontario's Rights of Labour Act may foreclose the possibility of a court action by the retirees. There may be means for retirees to surmount these remedial roadblocks, but these need not be determined here because the union has brought the grievance for the retirees. The arbitrator was correct that retirement rights can, if contemplated by the term of the collective agreement, survive the expiration of that agreement, and that such rights vest at the time of retirement. The arbitrator should proceed to determine whether the terms of the specific agreement create such a vested right.

The cross-appeal was not argued during oral submissions to this Court and, in the absence of an order granting leave to cross-appeal, the issue was not properly before the Court. The cross-appeal could not therefore be considered.

Per Cory J.: The three basic grounds for judicial review provide protection for the parties from decisions made without jurisdiction, from patently unreasonable decisions and from failure to provide procedural fairness. As a general rule, they allow the whole system for the resolution of labour disputes to function expeditiously, simply and as inexpensively as possible.

[page236]

The arbitrator here had to be correct in his decision as to whether or not he had jurisdiction to resolve the question before him and the court had to intervene if he erred in this respect. It was not necessary to consider the standard of review by the courts of an arbitrator's decision on the merits because this case turned on the jurisdictional issue. Given jurisdiction, a court can only intervene if the decision reached was patently unreasonable. This deference has also been accorded to arbitrators acting in the same field.

Decisions whether made by tribunals, boards or arbitrators, should be final and binding unless patently unreasonable. No distinction as to the deference given should be drawn between "final and conclusive" and "final and binding". Litigation as to whether a privative clause is more privative or less privative should not be encouraged. The rules as to court review should remain simple, straightforward and easy to follow.

Per Lamer C.J.: The reasons of La Forest J. were agreed with, except as regards the effect of "quasi-privative clauses"; the reasons of Cory J. were agreed with in that regard.

Cases Cited

By La Forest J.

Applied: Bradburn v. Wentworth Arms Hotel Ltd., [1979] 1 S.C.R. 846, reversing (1976) 13 O.R. (2d) 56; considered: U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; Re Goodyear Canada Inc. and United Rubber Workers, Local 232 (1980), 28 L.A.C. (2d) 196; Metropolitan Toronto (Municipality) v. C.U.P.E., Loc. 43 (1990), 69 D.L.R. (4th) 268; Genstar Chemical Ltd. v. I.C.W.U., Local 721, [1978] O.L.R.B. Rep. 835; Re Red River Division Association and Red River School Division No. 17 (1972), 25 D.L.R. (3d) 106; John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); U.A.W. v. Yard-Man, Inc., 716 F.2d 1476 (1983), certiorari denied, 465 U.S. 1007 (1984); Canadian Paperworkers Union v. Pulp and Paper Industrial Relations Bureau (1977), 77 C.L.L.C. 675; distinguished: Hémond v. Coopérative fédérée du Québec, [1989] 2 S.C.R. 962; referred to: Volvo Canada Ltd. v. U.A.W., Local 720, [1980] 1 S.C.R. 178; Douglas Aircraft Co. of Canada v. McConnell, [1980] 1 S.C.R. 245; Re Bricklayers' & [page237] Masons' Union, Local 1, and Wilchar Construction Ltd. (1962), 12 L.A.C. 347; Re Fortune Footwear and United Textile Workers of Amercia, Local 369 (1980), 25 L.A.C. (2d) 350; Re Carpenters' District Council of Toronto and Vicinity and Engineering Structures and Components (1978), 19 O.R. (2d) 445; Re Bell Canada and Communication Workers of Canada (1980), 27 L.A.C. (2d) 163; CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983; Canada (Attorney General) v. Public Service Alliance Canada, [1991] 1 S.C.R. 614; Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644; Re De Havilland Aircraft and United Automobile Workers (1976), 13 L.A.C. (2d) 401; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718; In re De Havilland Aircraft of Canada Ltd. and U.A.W., Local 112 (1950), 2 L.A.C. 465; Re United Steelworkers, Local 5951 and Medland Enterprises Ltd. (1963), 14 L.A.C. 55; Re International Chemical Workers, Local 564 and Cyanamid of Canada Ltd. (1969), 20 L.A.C. 111; Re Ontario Public Service Employees Union and The Queen in right of Ontario (1985), 51 O.R. (2d) 474; Re Communications Union Canada and Bell Canada (1979), 23 O.R. (2d) 701; Hamilton Civic Hospitals v. Canadian Union of Public Employees, Local 794, [1983] O.L.R.B. Rep. 371; NOA v. Burns Meats Ltd. (1986), 74 A.R. 352; Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); United Food and Commercial Workers Int'l Union v. Dubuque Packing Co., 756 F.2d 66 (1985); Anderson v. Alpha Portland Industries, Inc. 836 F.2d 1512 (1988), certiorari denied 489 U.S. 1051 (1989); Anderson v. Alpha Portland Industries, 727 F.2d 177 (1984), rehearing en banc 752 F.2d 1293 (1988), certiorari denied, 471 U.S. 1102 (1985); Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984); St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R 704, affirming (1982), 142 D.L.R. (3d) 678; Turner v. Teamsters, 604 F.2d 1219 (1979); Bower v. Bunker Hill Co., 725 F.2d 1221 (1984); U.A.W. v. Cadillac Malleable Iron Co., 728 F.2d 807 (1984); United Paperworkers v. Champion International Corp., 908 F.2d 1252 (1990); Keffer v. H. K. Porter Co., 872 F.2d 60 (1989); United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499 (1988); Ryan v. Chromalloy American Corp., 877 F.2d 598 (1989); Merk v. Jewel Companies, Inc., 848 F.2d

761 (1988); Cominco Pensioners Union and Cominco Ltd., [1979] 2 Can. L.R.B.R. 322; Re Coulter Manufacturing Ltd. (1972), 1 L.A.C. (2d) 426; Century Brass Products, Inc. v. U.A.W., 795 F.2d 265 (1986); Philip Carey Mfg. Co. v. [page238] N.L.R.B., 331 F.2d 720 (1964), certiorari denied, 379 U.S. 888 (1964).

By Cory J.

Referred to: U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; Canadian Union of Public Employees v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; Volvo Canada Ltd. v. U.A.W., Local 720, [1980] 1 S.C.R. 178; Fraternité des policiers de la Communauté urbaine de Montréal Inc. v. Communauté urbaine de Montréal, [1985] 2 S.C.R. 74; Heustis v. New Brunswick Electric Power Commission, [1979] 2 S.C.R. 768.

Statutes and Regulations Cited

Employee Retirement Income Security Act, 29 U.S.C. ss. 1001, 1051, 1053.
Labor Management Relations Act, 29 U.S.C. ss. 185(a), 301.
Labour Code, S.B.C. 1973 (2nd), c. 122.
Labour Relations Act, R.S.O. 1980, c. 228, ss. 44, 103, 107, 108.
National Labor Relations Act, 29 U.S.C. s. 159(a).
Pension Benefits Act, R.S.O. 1990, c. P-8, ss. 10, 35-38, 75.
Rights of Labour Act, R.S.O. 1980, c. 456, s. 3(3).
Rules of the Supreme Court of Canada, SOR/83-74, s. 29(2), as am. by SOR/88-247.

Authors Cited

Adams, George W. Canadian Labour Law, 2nd ed. Aurora, Ont.: Canada Law Book, 1993.
Adell, B. L. The Legal Status of Collective Agreements in England, The United States and Canada. Kingston, Ont.: Queen's University Industrial Relations Centre, 1970.
Anson, William R. Anson's Law of Contract, 26th ed. By A. G. Guest. Oxford: Clarendon Press, 1984.
Atiyah, P. S. An Introduction to the Law of Contract, 4th ed. Oxford: Clarendon Press, 1989.
Brown, Donald J. M., Q.C., and David M. Beatty. Canadian Labour Arbitration, 3rd ed. Aurora, Ont.: Canada Law Book, 1992.
Palmer, Earl Edward and Bruce Murdoch Palmer. Collective Agreement Arbitration in Canada, 3rd ed. Toronto: Butterworths, 1991.

[page239]

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal allowing an appeal (with the direction that the matter be continued before another arbitrator) (1990), 74 O.R. (2d) 648, 40 O.A.C. 219, 73 D.L.R. (4th) 718, 90 C.L.L.C. (PP) 14,040, 47 Admin. L.R. 1, from a judgment of the Divisional Court (1987), 61 O.R. (2d) 207, 42 D.L.R. (4th) 456, quashing an arbitrator's award. Appeal and cross-appeal dismissed.

H. Lorne Morphy, Q.C., Geoffrey D. Creighton and Mark E. Geiger, for the appellant and H. Lorne Morphy, Q.C., in response on the cross-appeal.
Lennox A. MacLean, Q.C., for the respondents and G. James Fyshe on the cross-appeal.

Solicitors for the appellant: Blaney, McMurtry, Stapells, Toronto.

Solicitors for the respondents: Pollit, Arnold, MacLean, Toronto.

The following are the reasons delivered by

1 **LAMER C.J.**:-- I concur in the reasons of Justice La Forest, except as regards the effect of what some have coined as being "quasi-privative clauses", as a result of language such as "final and conclusive" or "final and binding" when referring to the tribunals' decisions, where I agree with Justice Cory.

The judgment of La Forest, Sopinka, Gonthier, McLachlin and Iacobucci JJ. was delivered by

2 LA FOREST J.:-- This appeal considers whether a labour arbitrator has jurisdiction to hear a grievance over benefits for retired workers despite the expiry of the collective agreement by which those benefits were created. The substantive issue to be determined is the status of retirement benefits upon the expiration of a collective agreement. A second issue is the scope of judicial review of the arbitrator's finding that he had jurisdiction pursuant to s. 44 of Ontario's Labour Relations Act, R.S.O. 1980, c. 228.

[page240]

Background

3 The appellant, Dayco (Canada) Ltd., operated a factory in Hamilton. In 1985 it transferred its operations to Mexico, and the Hamilton plant was closed. The work force at the plant had been represented by the respondent union since 1965, when the first of a series of biennial collective agreements had been signed. The last of these agreements was signed on April 27, 1983 and expired on April 21, 1985. Under this and previous agreements, the company provided certain group insurance benefits to its employees. The relevant provision of the last agreement is article 60:

> 60. GROUP INSURANCE
>
> Subject to the provisions hereof, the Company agrees to make available to employees who have personally worked at least thirty (30) days for the Company and who are actually on active payroll of the Company, but only while such employees are not on strike, lay-off, sick leave or other leave of absence, a so-called "Group Insurance Plan" to be financed by the Company .... Such Group Insurance Plan shall incorporate substantially the following schedule of benefits for the participating employees only;
>
> > [A list of eight benefits follows, two of which are life insurance and accidental death and dismemberment insurance. The list takes the form of subsections (i) to (viii). They are followed by subsection (ix) in the following form:]
> >
> > (ix) The Company agrees to provide all retirees with a paid-up $2,500.00 Life and Accidental Death and Dismemberment policy, and other benefits negotiated, unless coverage is provided by the Government.

By virtue of Article 60(ix), retired workers received not only the insurance policy explicitly mentioned,

but also four of the other group insurance benefits provided to current employees: O.H.I.P., semi-private hospital coverage, extended health care, and dental insurance. The company also established, in a separate document, a pension [page241] plan for retirees. This plan was incorporated by reference into the collective agreement.

4 In October 1983 the Hamilton factory was shut down, and was permanently closed in January 1985. Prior to the final closing, the company and the union negotiated a shutdown agreement, under which the group insurance benefits for active employees would be discontinued six months after the plant closed. However, the agreement did not mention the retirees' benefits. The collective agreement was formally terminated on May 29, 1985, after compliance with the procedures prescribed by the Labour Relations Act ("the Act"). At the same time the pension plan was wound up, and an annuity was purchased to satisfy the company's outstanding pension obligations.

5 Two days later, the company advised all retirees that their benefits under Article 60(ix) would be terminated as of June 30, 1985, the same day the benefits for active employees were to cease under the shutdown agreement. The union lodged a grievance on behalf of the retired workers, demanding reinstatement of the benefits. The company refused to acknowledge this grievance, because "there was no collective agreement in place at the time the said grievance was lodged, and the Company has no obligations to these retirees on any other basis." Despite this position, the company did subsequently provide the $2500 policy explicitly referred to in Article 60(ix). In the result, only the "other benefits negotiated" under Article 60(ix) remained in dispute.

6 The union took the grievance to arbitration, as contemplated by articles 20 and 21 of the collective agreement, which read:

> 20. ARBITRATION
>
> Each employee grievance which is not settled by the grievance procedure shall, at the request of either the Company or the Union ... be submitted for arbitration to an arbitrator to be selected as hereinafter provided. ... [page242] The decision of the arbitrator shall be final and binding upon the Company, the Union and all of the employees... .
>
> 21. Anything to the contrary contained herein, notwithstanding, the arbitrator shall have no power to add to, subtract from or modify any of the terms, conditions or provisions of this agreement or any agreement made supplementary thereto.

This arbitration process is mandated by s. 44 of the Act. It reads:

> 44.--(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.
>
> (2) If the collective agreement does not contain such a provision as is mentioned in subsection (1), it shall be deemed to contain the following provision:
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this

> agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation... . The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties... .

At the arbitration hearing the company renewed its objection to the grievance, and argued that the arbitrator had no jurisdiction because the collective agreement had ended. The arbitrator heard submissions on this point only, and then adjourned the hearing. In a written award, he rejected the company's arguments on jurisdiction, found that the matter before him was arbitrable, and ordered the arbitration to proceed on the merits at a later date. The company applied for judicial review of the arbitrator's decision, and the Supreme Court of Ontario (Divisional Court) set aside the award. An appeal to the Court of Appeal for Ontario was allowed, thus reinstating the arbitrator's award. [page243] Leave to appeal to this Court was granted on June 20, 1991, [1991] 1 S.C.R. viii.

Judgments

Arbitration Award (H. D. Brown)

7 After reviewing the facts and the submissions of the parties, the arbitrator thus summarized his view of the problem and his approach to its resolution:

> The issue to be determined at this point of the dispute is whether the grievance is arbitrable. If there is an allegation of a breach of terms of a collective agreement which both parties acknowledge has expired when the grievance was filed, that fact by itself, does not preclude the matter from being heard.... That then leads to the consideration of whether there is, as argued by the Union, a vested right in the retirees for the benefits claimed under Article 60 which extends beyond the term of the collective agreement.

For the arbitrator, then, the key issue was whether some right in favour of the retirees had vested during the currency of the collective agreement. On this point, the arbitrator turned first to the terms of the collective agreement, and after a careful analysis he concluded that Article 60(ix) was intended to vest benefits with the retirees. He stated:

> I find this specific provision to have been intended and drawn as such by the parties as a retirement benefit and not an employment benefit, which would be extinguished at the end of the collective agreement in the circumstances set out in Article 60. When these benefits are viewed in that manner and given the present state of negotiations for collective agreements in this province, the provision for these benefits in the same way as the provision for the pension plan could not be removed from retirees by the parties, although they might negotiate about the benefits but what was negotiated would be the result applicable to the retirees.

While the reasons of the arbitrator are not entirely clear, it would appear that he concluded that a retired worker's benefits can (depending on the terms of the collective agreement) vest indefeasibly at the time of retirement, i.e., the benefits could not be bargained away during subsequent negotiations between the company and the union, or be [page244] terminated unilaterally by the company. It should be noted that in reaching these general conclusions the arbitrator ventured well into the "merits" of the case by interpreting the terms of the agreement before him. Despite this, he expressly disclaimed any conclusion on the meaning of the agreement. He stated:

> It is not necessary for the purpose of this award to determine whether the claim has merit and that where the Company denied it [sic] there was a breach of the agreement, this decision goes only to the extent of finding that such issue can be dealt with at arbitration.

8 The arbitrator based his conclusions, in large measure, upon a series of American cases which hold that retirement benefits can vest. He acknowledged that these American cases were based on a different statutory structure, but concluded that they were nonetheless useful for "examining industrial relations' principles and concepts." After a review of this law, he concluded as follows:

> The principles referred to in these cases which are not contradicted to date by any Canadian jurisprudence, support a conclusion that benefits given to employees who retire are vested at the date of their retirement and continue for their benefit regardless of the collective bargaining relationship between the parties, therefore to extend beyond the expiry date of a collective agreement and the closure of the operations at which the retiree worked. These benefits are considered as earned benefits for service provided for the employer and are part of the retirement benefits to which the retiree is entitled. Such a conclusion is strengthened in the present case in consideration of Article 60 (ix) of the collective agreement. While the parties might negotiate changes to the other benefits referred to in that section from time to time, the right to those benefits came into effect on the retirement of the employee under the terms of the agreement then in effect and continued through to the last collective agreement between the parties and must be continued for their benefit as part of the bargain on their retirement. The collective agreement distinguishes [page245] between the benefits available to retirees and those of active employees, as set out in Article 60.

In the result, the arbitrator found the dispute arbitrable, and dismissed the company's objection to his jurisdiction.

> Supreme Court of Ontario (Divisional Court) (1987), 61 O.R. (2d) 207 (J. Holland, White and Bowlby JJ.)

9 On the company's application for judicial review, a majority of the Divisional Court found the arbitration award should be quashed. Writing for the majority, J. Holland J. first considered the standard of review for the application, and ruled at p. 213 that "[i]n determining the threshold question of arbitrability, the Arbitrator was required to be correct." As authority for this proposition he cited the majority judgment of this Court in Bradburn v. Wentworth Arms Hotel Ltd., [1979] 1 S.C.R. 846. Applying this standard, J. Holland J. concluded as follows at p. 217:

> The Arbitrator erred in law and jurisdiction when he found that the alleged breach of the retirees' benefits arose "if at all" during the currency of the last collective agreement between the parties and, as well, when he found that the collective agreement contemplated benefits to be available beyond the terms of that agreement. [Emphasis in original.]

J. Holland J. distinguished the American case law supporting the arbitration award on the ground that it rested on a concept of vested rights unknown to Canadian labour law. In his view, the company's termination of the retirees' benefits was an incident that arose after the expiry of the collective agreement, thereby foreclosing the arbitrator's jurisdiction.

10 In dissent, White J. was of the opinion that the award was rendered within the arbitrator's jurisdiction, and hence should only be reviewed to a standard of patent unreasonability. White J. found support for this view in the terms of the collective agreement and prevailing statutes, and in the [page246] minority judgment of Laskin C.J. in Bradburn, supra. Applying this standard, White J. concluded that the arbitrator's decision was not patently unreasonable. He found that Canadian case law supported an arbitrator's right to hear a grievance over accrued rights despite the expiry of the underlying collective agreement. His reasoning is encapsulated in the following passage at p. 230:

> There does not seem to be any escape from the likelihood that, unless the Company had promised to provide [the employees] with such retirement benefits, the rate of pay bargained for, while they were active members of the Union in the collective agreements, would have been higher. A promise to provide for an employee in his retirement years is a promise which, of its very nature, anticipates that he will enjoy the benefit of the promise when he no longer belongs to the Union. It is also a promise which, of its very nature, is not dependent upon the Union (which negotiated that benefit for the employee) and the Company (which promised that benefit) necessarily being in a continuing collective bargaining relationship. The promise of the Company, as expressed in art. 60(ix) of the last agreement and in predecessor agreements is not subject to the express condition subsequent that it shall no longer be effective if there is no longer extant a collective bargaining agreement between the Union and the Company.

Consequently, White J. would have dismissed the application for judicial review.

> Ontario Court of Appeal (1990), 74 O.R. (2d) 648 (Blair and Catzman JJ.A. and Craig J. (ad hoc))

11 The Court of Appeal overturned the decision of the Divisional Court, and reinstated the arbitration award. Blair J.A., writing for a unanimous court, identified three issues: the possible existence and effect of a privative clause, whether the arbitrator was acting within his jurisdiction, and whether the arbitrator's decision was patently unreasonable.

12 On the first issue, Blair J.A. found that the arbitrator's award was shielded from judicial review by s. 44(1) of the Act, because the phrase "final [page247] and binding" upon the parties found therein is a form of privative clause. As authority for this proposition he relied on Metropolitan Toronto (Municipality) v. C.U.P.E., Loc. 43 (1990), 69 D.L.R. (4th) 268 (Ont. C.A.), and he declined to follow the apparently contradictory decision of this Court in Bradburn, supra. In consequence, so long as the arbitrator was acting within his jurisdiction, the standard of review of his award would be patent unreasonability. The question of jurisdiction was, of course, the second issue identified by Blair J.A.

13 After considering the law on judicial review emanating from this Court, and in particular the "functional and pragmatic approach" established in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, Blair J.A. determined that the arbitrator in the present case had acted within his jurisdiction. He reasoned as follows at p. 660:

> The question before the arbitrator in this case was, in the language of s. 44(1) of the Act, a difference "between the parties arising from the interpretation, application ... or alleged violation of the (collective) agreement". The arbitrator was explicitly given jurisdiction by s. 44(1) to determine whether the question was

> arbitrable. The legislative purpose for giving the arbitrator this power is obvious. In order to achieve industrial peace, the legislature has established a special regime for dealing with labour disputes by a specialized tribunal and arbitrators. The legislature relies on this expertise to decide expeditiously questions of law and fact within the limits of their jurisdiction and in the best interests of the parties and the public.
>
> In this case, there can be no doubt that the arbitrator had jurisdiction to decide whether the grievance was arbitrable because he is specifically empowered to do so by s. 44(1) of the Act. In addition the legislative purpose for providing for prompt and fair settlement of labour disputes is manifest and must be respected....

In the result, the standard of review employed by the Court of Appeal was that of patent unreasonability. On that point, Blair J.A. reviewed with approval the case law relied upon by the arbitrator, and in particular he endorsed the arbitrator's reliance upon American case law. He rejected the [page248] approach of J. Holland J., which focused on whether the alleged breach of the collective agreement occurred during the currency of the agreement, finding instead that the relevant issue was whether an obligation had accrued that could survive the termination of the agreement. In the end, Blair J.A. found that the arbitrator's decision was not patently unreasonable. He stated at p. 664:

> The arbitrator was not required to decide at the preliminary stage of his inquiry whether the right of retirees to benefits survived the termination of the collective agreement. His task was simply to determine whether the survival of retiree benefits was an arbitrable question. He concluded that it was. In light of the considerations outlined above, the arbitrator's decision that he had jurisdiction to arbitrate the union's grievance in this case was not patently unreasonable.

Accordingly, the Court of Appeal ordered the matter to be remitted back to arbitration to proceed with the merits of the case.

14 With respect to that order, the company argued that a different arbitrator should be assigned to decide the merits, as the current arbitrator had effectively pre-judged that question in the course of deciding the jurisdictional issue. Blair J.A. accepted this argument with reluctance, stating at p. 665:

> While I see little merit in the company's objection, I recognize that the arbitrator, in deciding the dispute was arbitrable, had to satisfy himself that it was arguable that the parties intended benefits to survive the termination of the agreement. Accordingly, without in any way reflecting on the integrity of the arbitrator and for the purpose only of removing a ground for objection to the disposition of the second part of the arbitration, I would direct that the arbitration be continued by another arbitrator.

The union disputes the propriety of this direction, and cross-appealed to this Court on that issue.

Analysis

15 This appeal raises two issues. The first is the scope of judicial review of the arbitrator's decision, [page249] a point on which the various judgments in the courts below have differed. The Court of Appeal concluded that because of a privative clause there was only a narrow scope for review. In my view considerations of privity are premature in this case, as the real question is whether the arbitrator was acting within his jurisdiction. On this point, I must respectfully differ from the conclusion of Blair J.A. in the court below. In my view the arbitrator was not acting within his jurisdiction stricto sensu.

Rather he was deciding upon jurisdiction. As such, he was required to be correct.

16 The remaining issue, then, is the correctness of the arbitrator's finding. Keeping in mind the limited scope of the company's attack of that award (about which I shall have more to say later), I have concluded that the arbitrator was correct in adopting the general proposition that a promise to pay benefits to retired employees can, depending on the wording of that promise, survive the expiration of the collective agreement in which the promise is made. In the result, I would dismiss this appeal and uphold the arbitration award.

1. The Scope of Judicial Review

17 At the outset it is important to understand exactly what the arbitrator decided in this case, and the scope of the issue brought before this Court. When the union's grievance was submitted to arbitration, the company objected because "there was no collective agreement in place at the time the said grievance was lodged, and the Company has no obligations to these retirees on any other basis." Conceivably, this objection could encompass a jurisdictional challenge on two levels. First, the company could (and did) advance the general proposition that a promise in a collective agreement to pay retirement benefits, no matter how strongly worded, cannot survive the expiration of that agreement. However, the company could also argue the narrower point that the specific terms of the agreement under grievance did not provide for vesting of retirement benefits. Unfortunately, it is not entirely clear from the arbitrator's ruling whether the company pursued its case on both [page250] these levels, although it seems that the hearing was focused on the former question. It may be, however, that submissions were made on the narrower question, which would explain the arbitrator's digression into the specifics of the agreement before him.

18 In any event, the case comes to this Court only on the first issue outlined above. Leave to appeal was sought only on the question of the survivability of retirement benefits in general, and counsel for the company confined his submissions to that issue. The Court was not asked to review the arbitrator's interpretation of the agreement at hand. Had that issue properly been before this Court, I have no doubt that the scope of our review of that aspect of the arbitration award would have been a narrow one -- we would have embarked on a patent unreasonability enquiry. However, on the more general level at which the jurisdictional debate was engaged in this Court, I am of the view that the appropriate scrutiny of the arbitrator's decision is to a standard of correctness. My reasons for this position are set out below, but at this juncture I should perhaps comment on this stratified approach to the issues arising from the arbitrator's award.

19 To begin, I would not wish my conclusions on the standard of review in this case to be taken as a retreat from the deferential approach to judicial review of administrative tribunals since the decision of this Court in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227. Nor are the conclusions here inconsistent with the previous statements by this Court as to the appropriate scope of judicial review of arbitration awards made pursuant to s. 44 of the Act. This Court has stated in previous cases that courts should, as a matter of policy, defer to the expertise of the arbitrator in questions relating to the interpretation of collective [page251] agreements; see Volvo Canada Ltd. v. U.A.W., Local 720, [1980] 1 S.C.R. 178 and Douglas Aircraft Co. of Canada v. McConnell, [1980] 1 S.C.R. 245. This development is traced in the dissenting reasons of Wilson J. in National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, at pp. 1340-42. It is clear that an arbitrator has jurisdiction stricto sensu to interpret the provisions of a collective agreement in the course of determining the arbitrability of matters under that agreement. In that case the arbitrator is acting within his or her "home territory", and any judicial review of that interpretation must only be to a standard of patent unreasonableness. But this is a different case. Here, the viability and subsistence of the collective agreement is challenged. The company alleges that regardless of the interpretation of the

agreement, it cannot survive to serve as the basis for this arbitration. The collective agreement is the foundation of the arbitrator's jurisdiction, and in determining that it exists or subsists the arbitrator must be correct.

20 I should also observe that my bifurcated analysis is made necessary by the fact that the arbitrator's decision intermingled deliberations on the specific terms of the collective agreement before him with his more general conclusions on jurisdiction. In saying this, I do not mean to impugn the methodology of the arbitrator. Arbitrators are often required to delve into the "merits" of the case to determine jurisdiction. Since jurisdiction depends upon an alleged breach of a collective agreement, the arbitrator must, in some instances, interpret the agreement even in the course of determining the question of jurisdiction. As in the present case, this inquiry may result in a duplication of the arbitrator's eventual examination of the merits of the grievance. This apparent conundrum is described in Palmer's Collective Agreement Arbitration in Canada (3rd ed. 1991), at p. 6:

[page252]

> ... it must be stressed that in determining whether an issue is arbitrable reference must be made to the particular collective agreement involved. In so doing, a distinction must be drawn between procedural provisions in the collective agreement leading to arbitration and substantive provisions. Such procedural provisions do not give a right to have an issue determined through arbitration unless it also involved an alleged breach of a substantive provision of the collective agreement. In short, a matter only becomes arbitrable if a provision of the collective agreement has been violated.

So, an alleged violation of the agreement is a condition precedent of jurisdiction. The result, as Palmer notes at p. 27, is that "often the merits of a case are inextricably interwoven with its jurisdictional aspects." Indeed, a discrete body of arbitration law has evolved to guide arbitrators through this problem; see Palmer, at pp. 25-28. Thus, while the arbitrator in this case has quite properly addressed these interwoven aspects, this Court can untangle the strands and focus solely on the more general aspects of the question. Again, this is possible only because the company chose to restrict its appeal to the abstract question posed above.

21 In sum, the aspect of the arbitrator's decision that is challenged in this appeal is his finding that retirement rights are, in theory, capable of surviving the expiry of a collective agreement so as to provide a basis for a union grievance filed after its expiration. The union argues that the arbitrator was acting within his jurisdiction in making this decision, and that the decision should be reviewed only to a standard of patent unreasonability. It bases this argument on the statutory arbitration clause in s. 44 (2) of the Act, which for convenience I will repeat here:

44... .

> (2) ...
>
> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made [page253] that this agreement has been violated, either of the parties may, after exhausting any grievance procedure

> established by this agreement, notify the other party in writing of its desire to submit the difference or allegation .... The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties ... .

This clause is imported into the collective agreement by the operation of s. 44 of the Act. The union contends that the arbitrator here determined a "question as to whether a matter is arbitrable", and as such was acting within the jurisdictional confines of s. 44. In short, the argument is that the statute confers on the arbitrator the jurisdiction to decide his or her own jurisdiction, a view accepted by Blair J.A. in the court below. The company advances a competing interpretation of s. 44(2), focusing on the requirement that any dispute referred to arbitration must be a "difference [that] arises between the parties relating to the interpretation, application or administration of this agreement" (emphasis added). The company argues that the existence of a collective agreement is thereby a condition precedent to the arbitrator's jurisdiction, and that the arbitrability provisions in the section cannot prevail until there is a determination that a collective agreement is in existence. This argument must be considered with caution, as it appears to invoke the much-criticized "preliminary question" doctrine of judicial review. Underlying the argument, however, is the sound proposition that the meaning of the term "arbitrable" should be determined in part by the context in which it is found, a point to which I will return.

22 It is not necessary, however, to be preoccupied with the meaning of the term "arbitrable". The issue does not hinge on that term, rather it depends on a clear understanding of the term "jurisdiction". It is clear that the term "arbitrable" is generally used by labour lawyers as a synonym for "within jurisdiction", but this begs the question; as I will discuss below, and as this Court recognized in U.E.S., Local 298 v. Bibeault, supra, at p. 1087, "jurisdiction" itself is a fluid term. I would agree that the term "arbitrable" encompasses, in a restricted sense, a determination of whether the [page254] collective agreement under arbitration is in force. The decision of this Court in Bradburn, supra, is authority for this proposition. However, it is the import of that conclusion that is the real issue in this case. If the issue is arbitrable, then the arbitrator has jurisdiction, at least in the limited sense of being empowered to decide that question. The more difficult problem is whether that inquiry is within the arbitrator's jurisdiction stricto sensu. That is, does the arbitrator have the right to be wrong? That is the question on which this Court divided in Bradburn, and it is the question that falls to be decided here.

23 It may be helpful at this point to consider a brief review of arbitral jurisprudence under the Act prior to the Bradburn case, which will bring these jurisdictional questions into clearer relief. This history is traced by Palmer, supra, at pp. 95-98, and in Brown and Beatty's Canadian Labour Arbitration (3rd ed. 1992) at p. 4-1. Until 1961, the Act had assigned to the Labour Relations Board the exclusive jurisdiction to determine "whether a collective agreement has been made or as to whether it is in operation": The Labour Relations Act, R.S.O. 1960, c. 202, s. 79(1)(d). Although this provision was repealed in 1962 (An Act to amend The Labour Relations Act, S.O. 1961-62, c. 68, s. 13), arbitrators continued to refuse to proceed with an arbitration when one of the parties challenged the existence of the collective agreement at issue: see Re Bricklayers' & Masons' Union, Local 1, and Wilchar Construction Ltd. (1962), 12 L.A.C. 347; Re Fortune Footwear and United Textile Workers of Amercia, Local 369 (1980), 25 L.A.C. (2d) 350. The prevailing view was that arbitrators did not even have the power to decide the question, and the right to be wrong was never reached. This view may perhaps have been a carryover from the period when s. 79(1)(d) was in force, although the practice continued for some time. As late as 1978 the courts seemed obliged to state that exclusive jurisdiction for the board was "no longer the case"; see Re Carpenters' District Council of Toronto and Vicinity and Engineering Structures and Components (1978), 19 O.R. (2d) 445 (Div. Ct.), at p. 447; [page255] see also Re Bell Canada and Communication Workers of Canada (1980), 27 L.A.C. (2d) 163, at pp. 170-71. However, during this period some arbitrators developed the practice of pressing forward with the merits of a grievance, despite a challenge to jurisdiction. It was this practice that was approved in Bradburn, first by the

Ontario Court of Appeal (1976), 13 O.R. (2d) 56, and ultimately by this Court. The grievance in that case was triggered by a strike that, according to the employer, was waged during the currency of a collective agreement. The issue for the arbitrator was whether the collective agreement was in fact in existence, which in turn required an interpretation of both the agreement and the Act. The arbitrator decided that point, a practice which was approved by the Court of Appeal, at pp. 61-62:

> The final argument on behalf of the appellant was that a board of arbitration does not have the power to determine the very existence of the collective agreement. But here the board had to determine that threshold question and make the necessary preliminary assumption. It assumed that the agreement continued in operation and then proceeded with the hearing. It was a correct assumption and the proceedings were valid.

This method of proceeding, couched in terms of a "preliminary assumption", indicates the limited capacity then thought to exist for the arbitrator to decide such "threshold questions". As well, it is evident from these comments that there was no question but that the correctness of such assumptions would be open to judicial review.

24 This Court was unanimous in finding that the arbitrator in Bradburn had the power to determine the existence of the collective agreement, but divided on the appropriate scope of judicial review. Estey J., writing for the majority, endorsed the finding of the Court of Appeal, at pp. 854-55:

> The threshold problem which reared its head at each level on which this debate has occurred is whether or not an arbitration board may properly interpret a collective agreement so as to determine whether the agreement was in effect at the time of the arbitration; in other words to determine whether or not the Board itself was properly constituted and was acting within the contractually [page256] conferred jurisdiction. Counsel for the appellant, in fairness to him, did no more than present the argument which I find sufficiently answered by the terms of s. 37(1) [now s. 44(1)] of The Labour Relations Act which make all matters subject to arbitration including "any question as to whether a matter is arbitrable." There is no other practical solution to this question because if the Board cannot determine whether the agreement continues in effect and hence its own proper existence, it is difficult to find the jurisdiction elsewhere. Of course if the Board is wrong in law as to the pendence of the collective agreement, its decision is a nullity, and thus within the reach of a court of law. [Emphasis added.]

Estey J. found that the board had jurisdiction in the sense of having the authority to decide the question of whether a collective agreement was in existence, and such authority was granted by the arbitrability provisions of s. 44(1). However, the board's determination was reviewable to a standard of correctness.

25 Laskin C.J., writing for the minority, took a different view of the task of the reviewing courts. He stated at pp. 848-50:

> To me the threshold question is the scope of review of the decision of the arbitration board to which was referred the employers' claim for damages for an allegedly unlawful strike. Although review of the arbitration board's decision for error of law on the face of the record is open in the absence of a privative statutory provision, the concept of error of law is a very elusive one where it turns on the interpretation of words of a collective agreement which are involved in the arbitration. That is why courts generally, and certainly this Court, have taken the position that if the

> arbitration board has given the relevant words of the collective agreement an interpretation which those words could reasonably bear, they will not interfere with the arbitration board's determination.
>
> There are two limitations on the policy of non-interference. The first is where a question of jurisdiction is involved, and the second is where a statute falls to be construed by the board of arbitration... .
>
> The present case appears, at first blush, to involve both of the limitations on non-interference which I have mentioned. The grievance before the arbitration board was brought under the very collective agreement whose [page257] continued existence during the period of the strike was the only issue before the tribunal. Further, the effect of articles 13.01 and 13.02 of that collective agreement engaged, in the view of the arbitration board and of the Ontario Divisional Court and the Ontario Court of Appeal, certain provisions of The Labour Relations Act, R.S.O. 1970, c. 232 and especially s. 44 [now s. 52].
>
> ...
>
> The parties here provided however, in their collective agreement that arbitrability should itself be within the jurisdiction of a board of arbitration, as indeed is directed by s. 37(1) of The Labour Relations Act. I consider the question of the duration or subsistence of the collective agreement under its termination terms to be subsumed under the issue of arbitrability confined to the board. It may be that prior to the enactment of s. 37(1) an issue of arbitrability, although one that a board could properly determine (lest it be stultified by a mere objection to its right to proceed), was fully reviewable as raising a jurisdictional question, but I do not regard this as any longer true in the light of s. 37(1) and of the provisions of a collective agreement which, as here, bring arbitrability expressly within the scope of authority of an arbitration board. [Emphasis added.]

As an aside, I note that Laskin C.J. was of the view that the arbitrator's decision was not protected by a privative clause, a conclusion that is implicit in the reasons of Estey J. However, what is more important in the present context is his conclusion that the language of s. 44 brings questions of arbitrability fully within the jurisdiction of the arbitrator, so that any decision could only be reviewed to a standard of patent unreasonability.

26 The decision of this Court in Bradburn is directly applicable to the present case and, despite the dissenting views of Laskin C.J., it would appear that the arbitrator's finding should also be reviewed to a standard of correctness. In Bradburn, the arbitrator was required to determine whether a collective agreement was in force at the time the employer's grievance arose. The same conceptual problem faced the arbitrator in the present case. Although the issue here is not whether the agreement is "in force" -- it is undisputed that the agreement expired prior to the grievance -- the [page258] broader question is the same as in Bradburn; does the collective agreement continue to determine the rights and obligations of the parties on the matter being grieved? As such, Bradburn appears to determine the proper scope of review, and it is for the union to demonstrate why we should disregard the majority judgment in that case in favour of the approach favoured by Laskin C.J. The union, though it did not argue the point in these terms, appears to rely on the argument that Bradburn has been overtaken by developments in the area of judicial review and should no longer be followed. I recognize, of course, that the law of judicial review has evolved since Bradburn, which was decided before the seminal judgment of Dickson J. (as he then was) in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., supra.

Cases decided under the old paradigm remain relevant, but must now be examined in the light of the "pragmatic and functional approach" to judicial review since adopted by this Court; see U.E.S., Local 298 v. Bibeault, supra, at p. 1095.

27 I turn, then, to a consideration of the case from a pragmatic and functional perspective. To begin with, it may be helpful to recast the judgments of this Court in Bradburn in the newer terminology of the post-Bibeault era. In Bradburn both the majority and the minority found that the arbitrability provisions in the Act had some effect on the jurisdiction of the arbitrator. For Estey J., the provision enabled the arbitrator to decide the question but did not grant the power to be wrong. In the words of Beetz J. in Bibeault, the arbitrator in Bradburn did not have jurisdiction "stricto sensu". This notion was explained by Beetz J. as follows in Bibeault, at p. 1083:

> S.A. de Smith (Judicial Review of Administrative Action (4th ed. 1980), at p. 114) defines a preliminary question as follows: "A preliminary or collateral question is said to be one that is collateral to 'the merits' or [page259] to 'the very essence of the inquiry'; it is 'not the main question which the tribunal has to decide'" (footnote references omitted). In so far as the determination of whether the prerequisite has been met (the preliminary or collateral question) is not the main question which the tribunal has to decide, it is not within its jurisdiction stricto sensu. I say stricto sensu because the tribunal is generally required to decide the preliminary or collateral question as well, before exercising the powers it has, but as this question determines its jurisdiction it cannot err in deciding it. Any error in the matter amounts to a refusal to exercise its jurisdiction stricto sensu or an excess of jurisdiction stricto sensu by the Court, and makes its decision illegal and void. [Emphasis added.]

Employing this terminology, Laskin C.J. was of the view that s. 44 of the Act gave the arbitrator jurisdiction stricto sensu. This, then, is the fundamental point of departure between the two judgments, as stated in the terms employed in Bibeault. Of course, this terminology is drawn from the theoretical discussions in Bibeault, and as Beetz J. noted there at p. 1086, the theoretical basis of the preliminary or collateral question doctrine is "unimpeachable". But Bibeault instructs us to move beyond these theoretical constructs to a more functional and pragmatic analysis, focusing on the intent of the legislature. The question becomes, as Beetz J. stated at p. 1087: "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" This is the new light by which the Bradburn decision should now be considered.

28 This Court has now applied the pragmatic analysis, with its various indicia of jurisdiction, in three cases: Bibeault itself, CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, and Canada (Attorney General) v. Public Service Alliance of Canada, [1991] 1 S.C.R. 614. Two other recent judicial review cases did not squarely address jurisdictional issues. In National Corn Growers Assn. v. Canada (Import Tribunal), supra, the jurisdiction of the import tribunal was assumed by the majority, as is noted in Wilson J.'s dissenting judgment. In Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the [page260] Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644, jurisdiction of the tribunal was doubted by McLachlin J., but she proceeded on the assumption that the tribunal was acting within its jurisdiction. Consideration of the factors enumerated by Beetz J. can, therefore, be informed by reference to these decisions.

29 The starting point in this analysis is the wording of the statute. As is apparent from the discussion above, the wording of the precise grant of power in s. 44 is not determinative of the scope of an arbitrator's jurisdiction. Bradburn demonstrates that rendering a matter "arbitrable" under s. 44 does not thereby determine the jurisdictional content of that grant of power. We must look further afield, considering first the context of these words in s. 44, and the broader structure of the statute. In viewing

the text of s. 44(2) as a whole, I have no doubt that the power to determine arbitrability will for many "matters" connote a grant of jurisdiction stricto sensu. Specifically, when the "matter" must be measured against the collective agreement to determine if it is arbitrable, the arbitrator will have the right to be wrong. This takes account of the entire purpose of the provision, which is to empower the arbitrator to deal with differences between the parties relating to the agreement. Moreover, this is in accord with the arbitrator's core area of expertise. After all, the most frequent challenge of an arbitrator's jurisdiction is an assertion by one of the parties that the incident underlying a grievance is not contemplated by the collective agreement. These issues are resolved by the arbitrator's application of the facts to the agreement as he or she interprets it, and this process is clearly intended to be left to the expertise of the arbitrator. However, when it comes to determining whether a collective agreement governs the rights and obligations of the parties irrespective of the interpretation of that agreement, the arbitrator has no benchmark; the existence or subsistence of the collective agreement itself is called into question. Although the arbitrator has the power to decide [page261] these questions, he or she must be correct in doing so.

30 To summarize, while the concepts of arbitrability and jurisdiction will frequently overlap, they are not synonymous. This distinction is illustrated by the reasons of the arbitration board in Re Goodyear Canada Inc. and United Rubber Workers, Local 232 (1980), 28 L.A.C. (2d) 196. There, the union alleged the breach of three successive collective agreements, in that the employer wrongfully deprived its employees of premium pay during the continuance of these agreements. The employer argued that the arbitration board had jurisdiction only as regards the current agreement, and the board accepted that position, clarifying the scope of its decision in the following manner, at p. 197:

> The parties agreed that the board should determine the preliminary issue of its jurisdiction before proceeding to the merits of the grievance. This award is therefore restricted to that issue. For the purposes of clarity, it should be emphasized that the issue is whether this board is properly constituted to hear the grievance in relation to the expired collective agreements. That is a question separate and distinct from whether the grievances should, having regard to delay, the conduct of the parties or any other factor, be found to be arbitrable by a board of arbitration properly constituted to hear them. [Emphasis added.]

Thus "arbitrability" did not go to the larger jurisdictional question before the arbitration board in that case. In the course of its reasons, the board made the following comments, at p. 200:

> ... it is entirely proper for a board of arbitration constituted by the parties under an agreement or its statutory extension to rule on its own jurisdiction to hear a grievance arising out of the same agreement.
>
> ...
>
> When a board of arbitration that has been constituted by the agreement of the parties under a given collective agreement rules on its own jurisdiction to hear a grievance arising under the same agreement it does no procedural violence to the statutory scheme whereby disputes between the parties are to be resolved. The question is [page262] whether it does so when it goes beyond the bounds of that agreement. [Emphasis added.]

The board answered its own question in the affirmative. In other words, an arbitration board can properly take jurisdiction over grievances as they pertain to the collective agreement under which it is appointed, but when there is a dispute over whether the grievance pertains to some other agreement (or

as the company alleges here, that it pertains to no agreement at all) then the board must determine its jurisdiction, and it must be correct in so doing.

31 The conclusions that emerge from the wording of the statute are confirmed by considering the role of the arbitrator within the arbitration scheme established by the Act. I have already reviewed the historical unwillingness of arbitrators to even consider the kind of question that arises in this case. It is important to note that this reluctance was not out of some sense of deference to the courts, but out of deference to the Labour Relations Board, which was thought for a time to have exclusive jurisdiction in the area. It will be recalled that until 1961 the Act reserved to the board the jurisdiction stipulated in what was then s. 79(1) in the following terms:

> 79.--(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act, and, without limiting the generality of the foregoing, if any question arises in proceedings,
>
> ...
>
> (d) as to whether a collective agreement has been made or as to whether it is in operation or as to who the parties are or who are bound by it or on whose behalf it was made;
>
> ...
>
> the decision of the Board thereon is final and conclusive for all purposes ... .

With the repeal of this provision in 1961, the jurisdiction over determinations of the status of collective agreements was uncertain. However, practice [page263] belied any uncertainty, as arbitrators continued to defer to the board: see Re De Havilland Aircraft and United Automobile Workers (1976), 13 L.A.C. (2d) 401, at pp. 404-7. A significant development occurred in 1975, with the addition of s. 112a to the Act; see An Act to amend The Labour Relations Act, S.O. 1975, c. 76, s. 30. This provision, which today is s. 124, gives the board power to hear grievances in the construction industry in exactly the same fashion as grievances filed with arbitrators under s. 44. In effect a "parallel jurisdiction" was established; see Re Carpenters' District Council, supra.

32 Thus, arbitrators would often defer to the board on questions pertaining to the existence of a collective agreement. Indeed, it is useful to compare the roles of the board and the arbitrator under the Act, and the different jurisdictional grants arising therefrom. A good starting point is to recall the strong privative clause in s. 108 which shields the board from jurisdictional review. It may at first glance seem inappropriate to consider the question of privity in the context of jurisdiction, but I do not think the scope of judicial review should be approached in a purely linear analysis of considering first jurisdiction and then searching for privative clauses shielding that jurisdiction. The process is more fluid than this, and the presence or absence of privative words is an indication of the scope of jurisdiction intended by the legislature; see, Paccar, supra, at pp. 1003 et seq., and Public Service Alliance of Canada, supra, at p. 661. Here, the privative clause in s. 108 applies only to the board, and there is no comparable provision with respect to the arbitrator. The union contends, however, that the phrase "final and binding ... between the parties" in s. 44 constitutes a privative clause, a contention accepted by the Court of Appeal. However, the most that can be said for the phrase is that it has limited privative effect on the issues in this appeal. That, indeed, may be going further than past decisions of this Court. In Douglas Aircraft, supra, a case involving s. 44 of the Act, Estey J. discussed the question of privity at p. 264 and [page264] apparently refused to even consider s. 44 as a privative clause:

> This case raises the difficult and fundamental question as to the scope for judicial review of a labour arbitration board's decision. Such an arbitration board is not, by the terms of The Labour Relations Act, R.S.O. 1970, c. 232 as amended, protected from judicial review by certiorari or otherwise as is the Ontario Labour Relations Board established under that Act, because the section in question, generally referred to as a privative clause, is limited to the Ontario Labour Relations Board. Vide s. 97, The Labour Relations Act.

Although Estey J. was dissenting in Douglas Aircraft, the majority appears to have concurred with his approach to the interpretation of the Act. As such, this Court has, by inference at least, ruled against the privative effect of s. 44.

33 Whatever the status of the clause in s. 44, the section should be contrasted with the strong and explicit privative clause in s. 108 protecting decisions of the Labour Relations Board. Clearly, if the legislature had intended to mandate the same judicial deference to an arbitrator as to the board, it could simply have brought the arbitrator under the shelter of s. 108. That is not the case, and I am left with the conclusion that the legislation contemplates a more limited shield against judicial review for decisions of an arbitrator. The Court of Appeal came to a very different conclusion based on certain jurisprudence in Ontario, culminating with Metropolitan Toronto (Municipality) v. C.U.P.E., Loc. 43, supra, which has found that the "final and binding" clause, and like terminology in other statutes, constitutes a "form of privative clause" (at p. 275). As I understand the reasoning in this case law, it is based on a combination of the words themselves and a judicial policy of deference to the decisions of labour arbitrators. However, I have grave doubts as to the merits of this approach, at least in so far as it is used (as here) to elevate statutory words to a privative status not intended by the [page265] legislature. In this regard, I recognize that in National Corn Growers, supra, this Court found privative effect in the following phrase in s. 76 of the Special Import Measures Act, S.C. 1984, c. 25: "... every order or finding of the Tribunal is final and conclusive." But the findings in National Corn Growers involved different words in a different statutory setting. One could quibble over the distinctions between the phrases "final and conclusive" and "final and binding upon the parties", and to me the latter phrase does import less privative effect. But the important point is that the driving factor in that decision was not the clause alone but deference to the relative expertise of the administrative tribunal over the specialized questions involved. I do not think that decision precludes a determination that s. 44 of the Act in this case does not have privative effect.

34 Thus far, I have undertaken a functional analysis with respect to the wording of the statute and by comparing the jurisdictional grant with that afforded the board under the Act. A final factor I wish to address is the purpose of arbitration and the expertise of arbitrators. This is perhaps a mélange of several factors identified by Beetz J. in Bibeault, supra: the purpose of the statute, the reason for the tribunal's existence, the expertise of its members, and the nature of the problem before it. In this case at least, I find these factors so intertwined as to be most conveniently considered in one analysis.

35 The jurisprudence of this Court, along with others, is clear on the purpose behind statutory arbitration of collective agreements -- it is to provide for the speedy resolution of disputes over the administration of a collective agreement with minimal judicial intervention; see Public Service Alliance of Canada, supra, at pp. 634 and 661. More generally, administrative tribunals exist to allow decisions to be made by a specialized tribunal with [page266] particular expertise in a relevant area of law; see National Corn Growers, at p. 1346. What, then, is the expertise of a labour arbitrator? Undoubtedly it is the interpretation of collective agreements, and the resolution of factual disputes pertaining to them. An arbitrator's expertise is in a limited sense related to labour relations policy, but it must be conceded that it falls short of the wide ranging policy-making function sometimes delegated to labour boards, as in Paccar, supra. In short, an arbitration board falls towards the lower end of the spectrum of those

administrative tribunals charged with policy deliberations to which the courts should defer. Similarly, tribunals vested with the responsibility to oversee and develop a statutory regime are more likely to be entitled to judicial deference: see Paccar, at p. 1003, and Public Service Alliance of Canada, at pp. 662-63. By contrast, in Bibeault the labour commissioner whose jurisdiction was at issue was not charged with the implementation of a statutory scheme, a factor mitigating against the commissioner's jurisdiction.

36 In the present case, the Labour Relations Act clearly assigns a general supervisory role to the Ontario Labour Relations Board. Its mandate is set out in s. 103 under 11 heads of power, including the right to inquire into any alleged contravention of the Act. Moreover, the board may decide references from the Minister of Labour, pursuant to s. 107. As already discussed, the decisions of the board are shielded by a strong privative clause, s. 108. In contrast, the arbitrator's role is confined to the resolution of grievances under a collective agreement. In my view, the relative expertise of board members and arbitrators must be presumed to be commensurate with the scope of these divergent statutory mandates.

37 Having considered the statutory mandate and expertise of an arbitration board, the next step is to evaluate the extent to which the present case turns [page267] on questions falling within that area of expertise. In Paccar, for example, I found that the question there at issue fell within the expertise of the board. In particular, I rejected the argument that certain common law principles were in play, thereby closing the gap between the expertise of the tribunal and the overseeing courts. This result can be contrasted with Bibeault where the question to be decided turned on an evaluation of the civil law and, as such, fell outside the tribunal's exclusive expertise. In my view, the present case is like Bibeault. Here, the question to be decided requires consideration of concepts that are analogous to certain common law notions -- "vesting" and accrued contractual rights -- that fall outside the tribunal's sphere of exclusive expertise. I do not wish to suggest that arbitrators are not competent to apply common law concepts -- they obviously tap into common law principles every day in the course of their decision making. But in these matters the arbitrator has no exclusive or unique claim to expertise.

38 In conclusion, a functional analysis of the jurisdiction of the labour arbitrator in this case leads to the same conclusion as was reached by this Court in Bradburn, supra; in deciding whether a collective agreement continues to determine the rights and obligations between the parties, the arbitrator is required to be correct. The remaining question, then, is whether the arbitrator was in fact correct in determining that he had jurisdiction to hear this grievance.

39 In the course of these reasons, I have commented only in a tangential way on the proper standard of review for questions clearly within the jurisdiction of the arbitrator. I have now had the advantage of reading the reasons of my colleague, Justice Cory, which for the most part relate to this issue. I have not dealt with this point at length because the entire focus of this part of my reasons has been to deal with the sometimes difficult issue of whether the question is a jurisdictional question or one that is a question within jurisdiction, using [page268] the pragmatic and functional approach from Bibeault, supra. A careful consideration of whether a question goes to jurisdiction is required if the objective, shared by Cory J., is to be reached of limiting excessive review of administrative tribunals. Cory J. suggests at p. 311 that the rules related to the standard of review should be "simple, straightforward and easy to follow". While this would appear to be a desirable objective, as Beetz J. quite properly recognized in Bibeault, what is apparent in theory is sometimes complex in practice; what is or is not a jurisdictional question sometimes requires more effort and elaboration.

40 On issues within jurisdiction, I do not attach the importance to the difference in the wording of "final and conclusive" and "final and binding" that Cory J. attributes to me. I do not believe that one is simply privative and the other not. The difference between these phrases is much less significant than that between either of them and the expansive privative clause in s. 108 that protects decisions of the

Labour Board. More importantly, this small distinction is more significant in determining whether a question is a jurisdictional one or within jurisdiction than in considering the standard of review for questions within jurisdiction. I cannot accept that courts should mechanically defer to a tribunal simply because of the presence of a "final and binding" or "final and conclusive" clause. These finality clauses can clearly signal deference, but they should also be considered in the context of the type of question and the nature and expertise of the tribunal.

41 I should mention one final matter on this point. The classification of the error in this case as one of jurisdiction is the ground on which the company sought review on the basis of correctness. Having found the argument on this point convincing, we need not assess whether there are other questions [page269] of law on which the arbitrator needs to be correct. As I noted in Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, while courts will defer to arbitrators or other tribunals on certain determinations of law having regard to their relative expertise or to the role or functions accorded to them under their constituent legislation (including issues relating to efficiency), other more general questions of law unrelated to these factors do not call for the same level of judicial deference. For the purpose of deciding whether a question is one on which deference should be shown, the courts may have recourse to many of the same factors that have been used in a pragmatic and functional approach to jurisdiction. These issues do not, however, arise in this case and I shall make no further comment about them.

2. The Survivability of Retired Workers' Group Insurance Benefits

42 I turn now to the substance of the decision under review. The arbitrator found, as a general proposition, that it is possible for a promise of retirement benefits to survive the expiry of the collective agreement in which it is found. For the reasons that follow, I think he was correct in so doing.

43 The arbitrator's analysis was in two phases. First, he found that the mere expiry of a collective agreement, without more, does not preclude the arbitrability of a grievance alleging a breach after that expiry. So long as the grievance is grounded in that collective agreement, the matter remains arbitrable. Second, he considered whether retirement benefits are capable of vesting so as to form the requisite basis for a grievance after the agreement's expiry. In my view the first step in the arbitrator's methodology is unimpeachable. I also agree with the second phase, although I would state two provisos.

[page270]

44 First, it may be that the arbitrator strayed further than necessary into the merits of the particular agreement before him in determining the general question of whether retirement benefits are capable of vesting. I have already considered the possible reasons for this, but in any event I do not think that this overreaching (if it was that) impugns his conclusions on the more general question at issue in this appeal. While the arbitrator did not establish a distinction between a general and specific level of analysis with complete clarity, it is nonetheless possible to assess most of his reasons from the perspective of the more general question here at issue. My second proviso is with respect to the use of the term "vested right" by the arbitrator. I will consider this term in some detail below, but I would for now mention that the term must be used advisedly, as it can carry many different meanings. In the end, I agree with the arbitrator's finding to the extent that retirement benefits can (depending on the wording of the collective agreement) vest in a collective sense for the benefit of retired workers, and any reduction in those benefits would be grievable at the instance of the union. Whether this vesting also creates a personal right actionable by individual retirees is a question that need not be decided in this appeal.

45 Before delving into the details of the arbitrator's decision, several general comments should be made. First, it seems to me that the question at issue is an abstract one for which guidance can be found by reference to certain analogous (and perhaps binding) concepts in the common law of contracts. I am aware, of course, that common law principles do not automatically apply in every instance in the interpretation of a collective agreement: see McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718. However, I do not think the law of contracts need be (or can be) disregarded altogether in determining the status of a collective agreement: see Palmer, supra, at pp. 142-43. The analogy I would draw is to the common law notion of termination of a contract. A collective agreement is rather like a contract for a fixed term. At [page271] the end of the term, the contract or agreement is said to "expire" by mutual agreement. But the contract is not thereby rendered a nullity. It ceases to have prospective application, but the rights that have accrued under it continue to subsist. This termination or expiration can be contrasted with the contractual notion of rescission, whereby the contract is rendered null and void, and the parties have no obligations thereunder: see Anson's Law of Contract (26th ed. 1984), at pp. 428-39; Atiyah, An Introduction to the Law of Contract (4th ed. 1989), at pp. 411-32. Thus it should not be seen as a novel concept that grievances can arise after the expiration of a collective agreement that relate to rights accruing under that agreement. It seems to me that it would take very clear words to demonstrate that the parties intended to rescind their agreement by agreeing to enter into a succeeding agreement. Rather, the presumed intention is only that the prospective relationship between the parties is to be governed by the new agreement, and that the old agreement ceases to have any relevance to that ongoing relationship.

46 Counsel for the company submitted that the concept of "vested rights" has no place in a collective bargaining context, where every collective agreement is viewed as a fresh start, revoking the agreement that came before. This view, commonly stated by labour lawyers, must be restricted to the context of the prospective relationship between the parties. Terms such as "revoking" or "displacing" the prior collective agreement should be taken to mean simply that the old agreement ceases to have prospective effect. An example of the use of the terminology in its proper context is found in an early arbitral decision of Gale J. (as he then was), writing for an arbitration panel in In re De Havilland Aircraft of Canada Ltd. and U.A.W., Local 112 (1950), 2 L.A.C. 465, at p. 468:

> The very purpose of the new Agreement was to set up the Contract between the Company, the Union and the individual employees and it is perfectly apparent that it [page272] was intended to displace any Contract or Contracts which had theretofore existed. If it were otherwise, all parties would be constantly in doubt as to whether they were bound by the terms of Contracts apparently no longer in force. It is our view that the whole theory of collective bargaining demands that the current Collective Agreement is to contain and represent the whole Agreement between the parties.

The new agreement "displaces" the old one, which is no longer in force. But this is with respect to the current employment relationship, and says nothing about the previously accrued rights of the parties; see also Re United Steelworkers, Local 5951 and Medland Enterprises Ltd. (1963), 14 L.A.C. 55. Another example of the importance of context is seen in Brown & Beatty, supra, where the authors speak of a new agreement "extinguishing" the terms of the old agreement. This may be an unfortunate term, which suggests some retroactive rescission of contractual obligations between the parties. However, it is clear from the cases cited by the authors that any extinguishment has prospective effect only. Other cases on this point are reviewed below, and I have found no case that suggests that accrued rights are expunged once a new collective agreement is negotiated. Moreover, I see nothing differentiating the promise to pay retirement health benefits from promises to pay regular wages or vacation pay. All of these can be enforced after the termination of the agreement. Any other conclusion would render meaningless a wide

range of promises to employees that might extend beyond the expiration of a collective agreement. In addition to unpaid wages and retirement benefits, disability benefits owing to former employees and pension benefits to retired workers would also be placed in jeopardy.

47 It goes without saying that these propositions do not affect the prospective relationship between the parties to a collective agreement. During the interregnum, if any, between collective agreements, the parties are free to govern their current employment relationship in any way they choose; see Paccar, supra. The employer is free to disregard the terms of previous collective agreements and set new [page273] terms of employment. As such, it is certainly true that in the vacuum that may arise between collective agreements workers have no subsisting rights from the collective agreement that govern their current employment relationship. However, the old collective agreement is not rendered a nullity. Rights that have accrued under that agreement remain enforceable.

48 I should refer at this point to a recent decision of this Court, Hémond v. Coopérative fédérée du Québec, [1989] 2 S.C.R. 962, in which we ruled that seniority rights granted to a worker in a collective agreement do not vest in that worker. That is, a later collective agreement can derogate from rights granted to individuals under a previous agreement. In that case, workers were promoted into management, and were thereby excluded from the bargaining unit. When they were demoted some years later, and resumed their place in the bargaining unit, the collective agreement then in force provided seniority rights weaker than those in the collective agreement when they left. Gonthier J., writing for the Court, rejected arguments that the previous seniority rights had vested in the workers. He stated at p. 975:

> It cannot be said that the union in the case at bar did not have the right to alter respondents' seniority rights by means of a subsequent collective agreement... .
>
> Though it is possible in some cases to interpret a collective agreement so as to give seniority rights to certain workers, one cannot simply ignore the terms of such an agreement in order to give employees vested rights in the matter. Seniority rights are subject to the collective bargaining process like any other employee right. In the context of labour relations it would be singular, to say the least, for these rights to be absolutely and irremediably raised to the level of vested rights. When a collective agreement exists, individual rights are for all practical purposes superseded. [Emphasis in original.]

[page274]

In my view, there is nothing in the judgment of Gonthier J. that is inconsistent with the concept of vested retirement rights, and I would distinguish Hémond on the following basis. First, there is no doubt that the prospective employment relationship can only be governed by one collective agreement, and that the most current. While an employee continues to be a part of the bargaining unit, he or she is of necessity subject to the vicissitudes of the collective bargaining process. However, on retirement a worker withdraws from that relationship, and at that point his or her accrued employment rights crystallize into some form of "vested" retirement right. It is quite possible that this right may only be enforceable through collective action by the union on the retirees' behalf. However, if that is the case, this arises out of structural peculiarities of our labour law system rather than any apparent point of principle.

49 Keeping these general observations in mind, I turn to consider the arbitrator's two propositions in

detail.

(i) The Arbitrability of Grievances that Accrue During the Currency of an Expired Collective Agreement

50 The first step in analyzing the arbitrability of an expired collective agreement is to determine the general question of whether such expiry forecloses the ability of parties to grieve matters that arose during the currency of the agreement. The parties advance two distinct approaches to this problem. The company urges an approach that focuses on the incident by which the collective agreement was breached, and contends that any breach that occurs after the expiry of an agreement is not arbitrable. The respondent counters that the proper focus is the time at which the rights being grieved had accrued. Under this approach, the time of breach is irrelevant, so long as the right being breached accrued during the currency of the collective agreement. In my view, this latter approach is the [page275] only feasible means of determining an arbitrator's jurisdiction.

51 The respondent's position is supported by the case law, as developed both by labour tribunals and lower courts. The leading case is perhaps an Ontario Labour Relations Board Decision, Genstar Chemical Ltd. v. I.C.W.U., Local 721, [1978] O.L.R.B. Rep. 835. There, one union displaced another as bargaining agent after a certification battle between the unions. The effect of the change of bargaining agents was to terminate the existing collective agreement. The employer had withheld union dues under the old agreement, and sought to pay them over to the winning union as the current bargaining agent. The old union grieved the matter under the expired collective agreement, and the board upheld the jurisdiction of an arbitrator to hear the grievance. Its conclusion, at pp. 837-38, is as follows:

> Our conclusion is that the policy mandated by section 37 [now s. 44] of the Act requires that all grievances which relate to events arising during the term of a collective agreement may be submitted to arbitration, even though the grievance is not filed until after the agreement has expired. In the Board's view, rights which accrue to a party during the life of a collective agreement are in the nature of vested rights which are not automatically extinguished by the termination or expiry of the collective agreement under which they arose. To hold otherwise would be to, in effect, give both employers and unions a licence to violate the terms of collective agreements in the period immediately preceding their expiration. [Emphasis added.]

Similar conclusions can be found in other tribunal decisions; see Re Goodyear Canada Inc. and United Rubber Workers, Local 232, supra; and Re International Chemical Workers, Local 564, and Cyanamid of Canada Ltd. (1969), 20 L.A.C. 111 at p. 114.

52 The context in which the board in Genstar employed the term "vested rights" should be noted at this juncture. Given the nature of the dispute [page276] there, the term "vested" as used by the board must be taken to mean only that vested rights are not automatically extinguished by the expiry of the collective agreement. Vesting in this context says nothing of the ultimate indefeasibility or inviolability of the rights. As we shall see, this "weak form" of vesting is sufficient to determine the result in this case. Since the retirement benefits here were not withdrawn by any subsequent agreement between the parties, there was no opportunity for the retroactive extinguishment of the rights which accrued under the expired agreement. This conclusion determines the result in this case, but I prefer to go beyond this minimum to explore the true nature of vesting in the context of retirement benefits.

53 The decisions of lower courts are consistent with the Genstar approach. The leading case is Re Red River Division Association and Red River School Div. (1972), 25 D.L.R. (3d) 106 (Man. Q.B.). There, a teachers' union grieved a series of past collective agreements over salary disputes. The school board

objected to the arbitrator's jurisdiction, but the union obtained a mandamus order to compel the arbitrator to hear the case. Wilson J. considered and rejected the school board's argument that the arbitrator lacked jurisdiction. At page 109 he stated:

> Denial of jurisdiction rests on the argument that, the collective agreements under which the board was convened and under which the disputes arose having terminated, their effect is wholly spent. Hapless indeed, then, the plight of a teacher whose difference arises sometime in the afternoon of December 31st; and what if, say, a dispute arises touching her December salary, her earliest awareness of such grievance coming with receipt of a cheque for the wrong amount, on January 2nd? Counsel for the division says that such differences would disappear as would those which gave rise to the application itself, had the parties written into their agreement a clause to provide that, notwithstanding the termination date of their contract, the provisions for arbitration [page277] would be deemed to continue in effect for settlement of disputes prior to the expiry date of the contract.

Wilson J. then advanced the following proposition in support of the arbitrator's jurisdiction, at p. 112 and at pp. 113-14:

> No one suggests that with the expiry of the contract the rights of either party accrued thereunder are at an end, and in particular the right to payment of the salary earned under such contract. And, if the right persists, why should the collateral right of resort to the machinery which the contract provides for the settlement of the dispute, i.e., to fix the salary, not persist also?
>
> ...
>
> To close, then, expiry of the contract out of which the claim arises does not, without more, put an end to the right of either of the parties to the agreement to call for settlement of a dispute arising thereunder in accordance with the arbitration procedure to that end established by their contract, when the dispute concerns the existence of a benefit allegedly vested during the term of the agreement in question, and is within the terms of reference of the arbitration clause. [Emphasis added.]

This finding was applied in Re Ontario Public Service Employees Union and The Queen in right of Ontario (1985), 51 O.R. (2d) 474 (Div. Ct.), a similar case.

54 The company, as I have noted, argues that the real issue in this debate is the timing of the breach of the collective agreement. To understand the thrust of the company's argument on this point, it is necessary to appreciate what the court below found. For the company, the key reasons of Blair J.A. are found in the following passage at pp. 661-62:

> The company conceded that grievances based on events which occurred during the currency of a collective agreement were arbitrable even if the grievance was lodged after the termination of the agreement, as the Ontario Labour Relations Board held in Genstar... .
>
> However, courts have gone further in holding that arbitrators have jurisdiction to deal with grievances [page278] based on events occurring after the termination of collective agreements. [Emphasis added.]

Blair J.A. went on to review Re Red River Division Association, supra, and Re O.P.S.E.U., supra, as authority for this proposition. It is this second (underlined) proposition that troubles the company, as it appears to refute its "incident of breach" theory. As such, counsel devoted a considerable portion of his written and oral argument to refuting it. I will not delve into the intricacies of this argument. It is sufficient to say that I agree that the cases do not stand for the proposition advanced by Blair J.A. That being said, I do not see how a refutation of this proposition assists the company. What the cases clearly state, and the company appears to concede this point, is that certain rights vest or accrue during the currency of the collective agreement and do not expire on the agreement's termination.

55 In my view, the law as stated in Genstar and Re Red River Division Association is correct. As a simple principle of contract law, the enforcement of a contract can take place well after the contract itself has expired. What is at issue in these cases is exactly that -- the enforcement of the collective agreement to rectify damage appearing after the expiration of the agreement. Accepting the thrust of the law established in Genstar, I can deal quickly with the company's arguments on this point. In its written submissions it argues that "under Canadian law, the parties to a collective agreement may not provide in the collective agreement for any rights or benefits to endure beyond the term of the collective agreement." This, of course, is contrary to the position taken in Genstar. The company's other key argument is that "[t]he Union has cited no Canadian case in which a term of a collective agreement was found to survive the expiry of the agreement." This is true enough, but I think it is a mischaracterization of the union's position. It is not the survival of the term per se that allows for arbitrability -- no one disputes that the term is extinguished in the sense that it has no prospective application. Rather it is that the rights created by that term vest or accrue. This rather [page279] fundamental distinction was simply not addressed by the company.

56 I should at this point turn to the cases in support of an "incidents" approach to an arbitrators' jurisdiction. The company submits that these cases focus on the time of the breach rather than the accrual of rights as the date for determining arbitrability. However, I am satisfied that these cases, while employing the terminology of "incidents", are referring to the incident or event out of which the rights accrued, rather than the time at which these rights are breached. What must be emphasized is that in the cases cited on behalf of the company, the two time periods happen to coincide. For example, in Re Communications Union Canada and Bell Canada (1979), 23 O.R. (2d) 701 (Div. Ct.), the grievance involved a wildcat strike. In that instance the right accrued and was breached at the time of the strike, and in that context there was no need to distinguish a time of accrual -- the issue simply did not arise. Accordingly it was appropriate for Henry J., at p. 709, to state that arbitrability was determined by the time at which "the grievance arose".

57 The company relies on Hamilton Civic Hospitals v. Canadian Union of Public Employees, Local 794, [1983] O.L.R.B. Rep. 371, where the Ontario Labour Relations Board considered the following question referred by the Minister of Labour, at p. 371: "whether or not the Minister has the authority to appoint a single arbitrator where no collective agreement is in operation between the employer and the trade union." The board couched its response to the question in "incidents" terminology. After reviewing Genstar with approval, the board stated the law in this way, at p. 380:

> ... where the incident or event giving rise to a grievance occurs during the life of a collective agreement, the [page280] parties to that agreement have a "vested right" in its enforcement even though the request for the appointment of an arbitrator is not made until after the agreement expires. [Emphasis added.]

The fact that this statement was made after a review and approval of Genstar suggests to me that the board intended the term "incident or event giving rise to a grievance" to refer to the time at which the

right accrued.

58 A final case cited for the company is NOA v. Burns Meats Ltd. (1986), 74 A.R. 352 (Q.B.), a case of wrongful dismissal. Once again, this kind of breach is coincident with the accrual of the underlying right. As such, it is understandable that the decision uses the language of an "incident" or a "breach". By contrast, the Red River cases involve the accrual of rights over a period of time. Different language is required in that instance, but the underlying concept in both lines of cases is the same.

59 I should note that there is strong American authority for the concept of vested collective agreement rights, the leading case being John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). I will consider this decision in some detail later under the analysis of vested retirement rights, but for now I would note that the case affords persuasive support for the Canadian position advanced in the tribunal and court decisions discussed above.

60 In summary, then, the case law is clear that workers' rights under a collective agreement can survive the expiry of that agreement. As I have noted, the acceptance of this proposition may of its own accord enable this Court to conclude that the arbitrator was correct: the second phase of his analysis is really just an application of the general principle to the specific case of retirees' benefits. However, as the nature of these particular rights is important, I will go on to assess that more specific question.

[page281]

(ii) Vesting of Retirement Benefits Promised in a Collective Agreement

61 The question of vested retirement benefits is relatively novel in Canada, but there is a substantial body of American case law on point. The leading case appears to be U.A.W. v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), certiorari denied, 465 U.S. 1007 (1984), which is relied upon by the union as a case with similar facts in which retirement benefits were found to have vested in the hands of retired workers despite the termination of the underlying collective agreement. However, in the courts below and in argument before this Court, the company contended that the American jurisprudence should not be followed, as it is grounded in certain statutory elements unique to American labour law. This argument was rejected by Blair J.A. in the court below, who concluded that the American cases were of persuasive value. He stated at pp. 663-64:

> The difference between the governing statutes in United States and Canadian labour law were discussed in argument. It is obvious that United States decisions under the Wagner Act cannot bind Canadian courts because of the difference in the statutory treatment accorded retiree benefits. In the United States, such benefits are subjects of permissive bargaining as opposed to other matters for which bargaining is mandatory. This mandatory-permissive dichotomy does not exist in Canada where all provisions of a collective agreement are subjects of mandatory bargaining. However, much of what was said by the Court of Appeal in Yard-Man is unrelated to that distinction.
>
> ...
>
> While jurisprudence from foreign countries is not binding on this court, the logic expressed in it can be of great assistance particularly in analyzing new problems.

62 For the reasons that follow, I am in substantial agreement with Blair J.A. on this point, although I

find it necessary to delve somewhat further into the American law to determine more precisely the applicability of the American position in a Canadian [page282] context. In my view, the different labour relations structures in the two countries point to only one potential difference in the conception of "vested" retirement benefits. This difference aside, the following propositions hold true in both countries: retirement benefits are in the nature of accrued rights; those benefits may (depending on the terms of the agreement) vest; and the vested rights can be enforced by union grievance on behalf of retirees. The sole difference is remedial in nature. In the United States the term "vested retirement benefits" connotes a right that is enforceable at the instance of an individual retiree, without resort to assistance from his or her former bargaining agent. Such enforceability may not be available in Canada, although I find it unnecessary to decide that point in this appeal.

(a) American Law

63 The American position on retirement benefits must, no doubt, be understood in the context of their laws. However, I agree with Blair J.A. that much of the American position is unrelated to any distinction that can be drawn between Canadian and American labour statutes. A useful, although somewhat dated, comparison of the systems in these countries is found in B. L. Adell's, The Legal Status of Collective Agreements in England, The United States and Canada (1970). Three American statutes must be considered. First, of course, is the National Labor Relations Act ("the NLRA"), which stipulates certain issues that management and labour must, as a minimum, bargain over in the course of arriving at a collective agreement. These mandatory subjects of bargaining are "rates of pay, wages, hours of employment, or other conditions of employment": 29 U.S.C. s. 159(a). This list encompasses welfare benefits for active employees, but benefits for retirees are permissive rather than mandatory subjects of bargaining; see Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). The parties are free to bargain about such permissive subjects, but a party can refuse to discuss a permissive subject, and the other cannot insist upon discussing that issue as a [page283] condition precedent to a collective agreement. The dichotomy between mandatory and permissive subjects for bargaining has not been adopted in Canada, which requires good faith bargaining on all issues. The company argues that this difference serves to distinguish the American case law. In its submission, the permissive nature of bargaining over retirement benefits in the United States results in a greater entrenchment of such rights -- a union can refuse to even discuss the issue, leaving the existing benefits untouched. In my view, this is a mischaracterization of the American position, and even if it were accurate it would not assist the company in this case, as the argument implicitly accepts the notion that retirement benefits are not automatically extinguished on the expiration of a collective agreement. I will return to this issue in greater detail below.

64 A second statute to note is the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. s. 1001 et seq., enacted by Congress in 1974. ERISA governs private pension plans in the United States, much like provincial Pension Benefits Acts in Canada. ERISA divides employee benefit plans into two distinct categories: "welfare plans" and "pension plans". The former encompasses the benefits in question in this appeal. ERISA stipulates that pension plans be "nonforfeitable" upon the attainment of normal retirement age: 29 U.S.C. s. 1053. That is, the pension must vest. However, welfare plans are explicitly exempted from this requirement: 29 U.S.C. s. 1051. This exemption does not prohibit an employer from extending welfare benefits beyond the expiration of the collective bargaining agreement; it merely leaves that possibility to be determined by the parties during collective bargaining; see United Food and Commercial Workers Int'l Union v. Dubuque Packing Co., 756 F.2d 66 (8th Cir. 1985), at p. 70. The cases that consider the distinction between welfare and pension benefits cite it as evidence that there is no federal labour policy favouring the vesting of [page284] welfare benefits, thereby refuting any argument by retirees that an intention to vest such benefits should be inferred; see Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512 (8th Cir. 1988), at p. 1516.

65 The final legislative provision of some consequence is s. 301 of the Labor Management Relations Act (the "LMRA"), 29 U.S.C. s. 185 (a), which reads:

> Suits for violation of contracts between an employer and a labour organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labour organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

This provision gives the federal courts jurisdiction to hear suits for breach of a collective agreement. The provision is not restricted to the parties to the collective agreement, and third parties can sue for breach of an agreement that affects them. As such, retired employees can sue either their former employer or their former bargaining agent for breach of the terms of a collective agreement; see Pittsburgh Plate Glass Co., supra. As a general rule litigants must first exhaust arbitration remedies available under the collective agreement before turning to the courts, but retired workers, who are no longer part of the bargaining unit, are exempted from this requirement, and they are free to sue in the courts without first seeking a union's assistance to file a grievance; see Anderson v. Alpha Portland Industries, Inc., 727 F.2d 177 (8th Cir. 1984), rehearing en banc 752 F.2d 1293 (1988), certiorari denied, 471 U.S. 1102 (1985); see also Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (8th Cir. 1984). This is a significant difference from Canadian law, which has [page285] strictly curtailed recourse to the courts for resolution of collective agreement disputes; see St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R 704. A useful review of the development of s. 301 is found in Adell, supra, at pp. 125-35.

66 This brief overview of American legislation suggests a legal setting for the negotiation of retirement benefits that is different, but not entirely distinct, from our own. Canadian labour law does not recognize the distinction between mandatory and permissive subjects of bargaining, but this does not directly impact on the vesting of retirement benefits. Canadian jurisdictions do not provide for an explicit dichotomy between pension and welfare benefits for retirees, but provincial pensions legislation, to varying degrees, protects the vested nature of pension plans; see, for example, Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 10, 35-38, 75. To my knowledge there is no equivalent legislative protection for welfare benefits, thus mirroring the American position. As discussed above, the remedial differences with respect to access to the courts is significant, and may differentiate the nature and scope of vested benefits in the two countries. However, even this difference does not impair the underlying concept of vesting in Canada.

67 I turn now to a review of the American cases, keeping the legislative provisions outlined above in mind. An appropriate starting point is John Wiley & Sons v. Livingston, to which I have already referred in the context of vested rights in general. Wiley is not a retirement benefits case, but it does establish the concept of accrued rights surviving the expiry of a collective agreement. In Wiley, a unionized company (Interscience) merged with a larger non-union company (Wiley), which had the effect of terminating the collective agreement [page286] at Interscience. The union claimed that certain rights under that collective agreement survived its expiry -- questions of seniority status, severance pay, etc. The union argued that in the new union-free entity, certain rights negotiated under the old agreement remained "vested" in the Interscience employees. The company challenged the arbitrability of the dispute, and the union sued under s. 301 of the LMRA to compel arbitration. The U.S. Supreme Court took note of the limited nature of the union's action. It stated, at p. 551: "This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement" (emphasis added). Writing for the court, Harlan J. commented on the action in this way, at pp. 554-5:

> It is true that the Union has framed its issues to claim rights not only "now" -- after the merger but during the term of the agreement -- but also after the agreement expired by its terms. Claimed rights during the term of the agreement, at least, are unquestionably within the arbitration clause; we do not understand Wiley to urge that the Union's claims to all such rights have become moot by reason of the expiration of the agreement. [Wiley apparently conceded the possibility that a right to severance pay might accrue before the expiration of the contract but be payable "at some future date"]. As to claimed rights [after expiry], it is reasonable to read the claims as based solely on the Union's construction of the Interscience agreement in such a way that, had there been no merger, Interscience would have been required to discharge certain obligations notwithstanding the expiration of the agreement. We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired... .

[page287]

> Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction.

Wiley, then, confirmed the proposition that certain rights in a collective agreement could accrue and be realized after the expiration of the agreement.

68 A second U.S. Supreme Court decision should be considered before assessing the Yard-Man cases. This is Pittsburgh Plate Glass Co., supra, which considered the relationship between active and retired employees. In that case, a collective agreement provided certain health insurance benefits for retired workers. The company wanted to alter these benefits, and made a proposal directly to the retired employees. The union filed unfair labour practice charges, alleging that the company was required to bargain only with the union over these benefits. The Supreme Court rejected these allegations, by ruling that retirement benefits are not a mandatory subject of bargaining. As I have noted, the duty to bargain in good faith in the United States extends only to "mandatory subjects of collective bargaining" under the NLRA. Thus the company did not breach its obligations to the union by bargaining with the retirees individually. The court rejected arguments that retirement benefits were merely deferred compensation for active employees, which would have triggered the duty to bargain in good faith. The reasoning of Brennan J. on this last point is important in understanding the American view of the status of retired workers. He stated at p. 181:

> Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obliged to negotiate in behalf of retirees again. To the contrary, they are free to decide, for example, that current income is preferable to greater certainty in their own retirement benefits or, indeed, to their retirement benefits altogether. [page288] By advancing pensioners' interests now, active employees, therefore, have no assurance that they will be the beneficiaries of similar representation when they retire. [Emphasis added.]

I have highlighted the distinction between active and retired workers, as this would appear to go to the heart of the court's decision. Under American law, it seems, the focus of the analysis is on the date of retirement. Before this time, the active employee is completely at the mercy of the collective bargaining process. He or she might work a lifetime on the premise that retirement benefits will be forthcoming, yet be deprived of those rights if they are bargained away in reaching the collective agreement under which he or she retires. This may seem harsh, but it is of the essence of the collective bargaining process. As a member of the bargaining unit, the employee is in a position to influence the course of bargaining, and thus ensure that the bargaining agent does not consent to the expropriation of a lifetime of foregone income which has been sacrificed in return for the promise of retirement benefits. But the position of retired employees is different, a point which Brennan J. emphasized in a footnote to the passage quoted above:

> Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer... .
>
> This does not mean that when a union bargains for retirees -- which nothing in this opinion precludes if the employer agrees -- the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent... . The retiree, moreover, would have a federal remedy under s. 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed.

69 In sum, the union is free to bargain on behalf of retired employees to increase welfare benefits for retired workers, but any bargaining that decreases such benefits would be at the peril of both the employer and the union. The retirees would have a range of options for redress. If the benefits had [page289] been reduced unilaterally by the employer, then the retirees would prevail upon the union to grieve the reduction on their behalf under the collective agreement under which the benefits had vested. Alternatively the retirees could sue the employer without resorting first to the arbitration process; see Anderson v. Alpha Portland Industries, Inc., supra. The union may have been a willing party to the reduction in retirement benefits, by trading off retirement benefits for higher current wages. In that case the retirees could pursue an unfair representation charge against the union, and could also sue both the employer and the union under s. 301. Given this range of remedies, retirement rights in the United States can vest in the strongest sense of that term. The development of the American conception of vested rights is traced by Adell, supra, at pp. 135-40.

70 I turn, then, to the spate of decisions in the past decade on the very issue with which we are here concerned. As I have noted, the leading decision is the Yard-Man case, although the issue was considered in earlier cases: see Turner v. Teamsters, 604 F.2d 1219 (9th Cir. 1979). The facts in U.A.W. v. Yard-Man, Inc., supra, are typical of these cases, and are quite similar to those in the present case. There, a plant closing prompted the termination of a collective agreement, and the company advised retirees that life and health insurance benefits would be cut off at that time. The collective agreement purportedly promised that these benefits would continue beyond the term of the collective agreement, and the union sued under s. 301 on behalf of the retirees, seeking specific performance of that purported obligation.

71 The Sixth Circuit Court of Appeals reviewed the case law stemming from Wiley, citing it as authority for the proposition that parties to a collective [page290] agreement can contract for rights that extend beyond the term of a collective agreement. Whether such vesting had in fact occurred would depend, of course, on the intent of the parties, and the court found that many of the basic principles of contractual interpretation are appropriate for discerning such intent. As such, the court established the

following approach for determining whether retirement benefits have vested. It suggested that courts should look first to the disputed language in the collective agreement, interpreting each provision as part of an integrated whole. If ambiguities exist, courts should then look to other provisions of the agreement, and to the context in which the agreement was negotiated. Finally, the interpretation of the agreement should be consonant with federal labour policy.

72 Applying this approach, the court concluded that the clause before them respecting retirement benefits was ambiguous as to vesting. The clause read as follows: "The Company will provide insurance benefits equal to the active group benefits ... for the former employee and his spouse." The agreement did not explicitly contemplate the eventuality of the termination of the collective agreement, and as such was unclear on whether retirees' rights would survive that event. Accordingly, the court reviewed other provisions of the agreement, finding several instances in which the text was indicative of an intent to vest retirement benefits. Finally, it considered the context in which the benefits were negotiated, reasoning as follows, at p. 1482:

> Finally, examination of the context in which these benefits arose demonstrates the likelihood that continuing insurance benefits for retirees were intended. Benefits for retirees are only permissive not mandatory subjects of collective bargaining ... . As such, it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations... . The employees are presumably aware that the union owes no obligation to bargain for continued [page291] benefits for retirees. If they forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements. Contrary to Yard-Man's assertions, the finding of an intent to create interminable rights to retiree insurance benefits in the absence of explicit language, is not, in any discernible way, inconsistent with federal labor law.
>
> Further, retiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of this agreement itself.

In the result, the court granted specific performance, ordering the company to continue to pay retirement benefits to its former employees.

73 The central proposition of Yard-Man, that parties to a collective agreement can provide for "interminable" retirement benefits, has not since been challenged in the numerous cases that have considered it. The approach was immediately followed in Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984), at p. 1222, and in U.A.W. v. Cadillac Malleable Iron Co., 728 F.2d 807 (6th Cir. 1984), at p. 808. In Cadillac the Sixth Circuit clarified that [page292] the inference of an intention to vest benefits

does not reverse the onus of proof, which remains with the union as the party asserting that benefits have vested. The Eighth Circuit, while accepting the concept that retirement benefits can vest, has rejected the notion that an inference of vesting arises from the fact that such rights are "status benefits"; see Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512 (8th Cir. 1988), certiorari denied 489 U.S. 1051; and see United Food and Commercial Workers Int'l Union v. Dubuque Packing Co., supra, at p. 70. The split between the Sixth and Eighth circuits was considered in United Paperworkers v. Champion International Corp., 908 F.2d 1252 (5th Cir. 1990), where the court observed, at p. 1261, that at a minimum the cases agree that vesting of benefits can take place if the collective agreement so provides. It put it:

> In none of these cases did the court assume as a general principle of law that the termination of a collective bargaining agreement terminates the retirement benefits conferred by that agreement. In each case the court looked to the specific agreement in question to discern whether there was an intent to confer lifetime health insurance benefits on the covered retirees.

As to the disputed point, the court concluded in a footnote at pp. 1261-62 as follows:

> To the extent that Yard-Man held that there is, as a general proposition, an inference of an intent to vest retirement benefits (because they are "status" benefits), we find merit in the Eighth Circuit's criticism in Anderson of this aspect of Yard-Man and find no basis in logic or federal labor policy for such a broad inference. However, we note that this would not prevent the district court from considering, as some evidence of intent, for example, the fact that retirees have no voice in negotiating a new collective bargaining agreement, a fact of quite general applicability to cases where the vesting of [page293] retirement benefits is at issue. In other words, this matter must be determined on a contract-by-contract basis.

Thus, the Fifth Circuit stakes out a compromise position. But other courts appear to endorse the inferential approach; see Keffer v. H. K. Porter Co., 872 F.2d 60 (4th Cir. 1989). Recent decisions continue to endorse the basic propositions of Yard-Man: United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988); Ryan v. Chromalloy American Corp., 877 F.2d 598 (7th Cir. 1989). An apparently contradictory decision from the Seventh Circuit, Merk v. Jewel Companies, Inc., 848 F.2d 761 (7th Cir. 1988), in fact deals with a different issue, whether employees who retire in the midst of collective bargaining can complain about a reduction in benefits in the agreement under negotiation when they retired.

74 In argument before this Court, the company branded the Yard-Man cases as a divergent strand of jurisprudence emerging solely from the Sixth Circuit. However, as the cases applying Yard-Man reveal, the decision has gained general acceptance across the United States, and any differences have been confined to a debate over how to ascertain the intent of the parties. Moreover, these cases are entirely consistent with the earlier Supreme Court authorities supporting the concept of vested rights for retirees. Taken as a whole, I find the American jurisprudence to be highly persuasive of the approach this Court should adopt. The American courts have properly focused on the time of retirement as the moment at which certain rights granted under a collective agreement vest. While distinctions can be drawn with respect to the enforceability of the right in Canada, such distinctions, in my view, have no bearing on the present appeal.

(b) The Law in Canada

75 The status of retirement benefits has received comparatively little attention by Canadian courts

[page294] and labour tribunals, and there is almost no case law on the status of retired workers under Canadian collective bargaining regimes. A useful starting point, and a case that can be considered the leading Canadian authority on the question, is the decision of the British Columbia Labour Relations Board in Canadian Paperworkers Union v. Pulp and Paper Industrial Relations Bureau (1977), 77 C.L.L.C. 675. Unfortunately, the decision has not been widely reported, was not cited in argument before this Court, and was apparently not considered by the courts below. At issue in the case was the question of whether unions could legitimately bargain on behalf of retired workers. The board analyzed this issue in an admirably comprehensive fashion, drawing on the then emergent American case law in the area.

76 In that case, the employer had refused to bargain on improvements to retirees' pension rights, claiming that the union was not legally entitled to bargain on behalf of the retirees on this issue. The union complained to the Labour Relations Board, alleging bad faith bargaining by the employer, contrary to British Columbia's Labour Code, S.B.C. 1973 (2nd), c. 122. The complaint was ultimately dismissed. The board found that the duty to bargain in good faith does not attach to specific issues (although the refusal to bargain on any one issue was evidence going to overall conduct contravening the global duty to bargain in good faith). The board commenced its reasons by expressing disbelief at the position taken by the employer, citing evidence, at p. 678, of "a widespread practice of negotiating the issue in major collective bargaining relationships right across North America." The employer, however, adopted the position that this "widespread practice" was merely permissive bargaining, and that employers could not be compelled to bargain on the issue. The employer thus advocated adoption of the American distinction between mandatory and permissive subjects of bargaining, citing Pittsburgh Plate Glass Co., supra, in support. However, the board rejected this [page295] dichotomy, commenting as follows at p. 690 and at p. 691:

> In our judgment, it is inconsistent with the objectives of the B.C. Labour Code to start this Board down that path of overseeing, even to this limited extent, substantive discussions of the parties at the bargaining table.
>
> ...
>
> The legal duty to bargain imposed by the Labour Code is a single, global obligation to negotiate a settlement of an entire collective agreement.

In rejecting the dichotomy, the board thereby had no option but to dismiss the union's claim of bad faith bargaining, as the union (at p. 679) "assumes that the legal duty to bargain attaches to particular topics which one party wants to place on the bargaining agenda", a proposition the board found to be "hardly tenable." In the course of reaching these conclusions, the board considered several issues touching on retired employees and the status of their benefits, the very questions at issue in the present case.

77 First, the board declined to rule on whether retired workers could be "employees" under the Code, finding it unnecessary to resolve that question. However, its comments on this subject suggest that it was of the view that the term "employee" could be expansively interpreted to include retired workers. The board did not need to decide the question, as it found that nothing in the Labour Code prohibited parties agreeing to provisions having an effect on persons not within the statutory term of "employee". In other words, unions can bargain on behalf of non-employees, including retired workers. The next issue considered by the board, which is of particular significance for the present case, was the question of vesting of retirement benefits. The employer had argued that retirement rights vested in the retired [page296] employee, thus disentitling the union to bargain over these benefits. The board responded in this way at p. 682:

> True, the normal legal expectation is that pension benefits are vested as of a certain point in time; and that upon retirement a pensioner has a legal entitlement to his pension which cannot be touched by collective bargaining between a union and an employer. But that would appear to be the product of the typical legal arrangements for pension plans: which require the payment of the employer (and any employee) contribution into a pension trust, which in turn guarantees pension of a certain amount to retirees as beneficiaries under the trust. But the legal situation is not so clear for other kinds of contract benefits. For example, suppose a collective agreement has extended a prescription drug plan to retirees. If a government program has made that benefit redundant, and the parties want to eliminate it and put the money elsewhere, presumably they would be entitled to do so, even in respect of retirees. Undoubtedly, they would be authorized to do so ... if they built that condition into the contract benefit right from the outset. The reason is that these benefits rest on the private collective agreement and, in the final analysis, the parties who negotiated the contract which created the benefit can also reserve to themselves the authority either to modify or to terminate the benefit. Thus if the parties to a pension plan agreement anticipate this problem, and write into their trust document their mutual authority to alter the level of benefits, one way or the other, then the legal result is that these benefits are no longer absolutely vested in the retiree.
>
> ...
>
> In any event, suppose it were true that a union could not reduce pension benefits for retirees. The union's response might well be "So what?" The parties are still perfectly capable of bargaining for an increase in the benefits. Nor is it unheard of to find collective bargaining about an issue which has a statutory floor... . [Emphasis in original.]

[page297]

In this comparison of pension benefits with welfare benefits for retirees, the board reached the conclusion that these benefits had an equivalent legal status as to vesting. Both could vest, depending upon the terms by which the benefit was created. Moreover, the only manner in which the benefits could be divested would be if the parties had anticipated this problem at the outset, and provided for such divesting in the terms by which the benefit is promised. This position would appear to be exactly the same as that adopted in the American cases.

78 Shortly after its decision in Canadian Paperworkers, the board returned to the question it had declined to answer there; i.e., the status of retirees as "employees" under the Labour Code. In Cominco Pensioners Union and Cominco Ltd., [1979] 2 Can. L.R.B.R. 322, the board refused to certify a group of retired workers as a bargaining unit, finding that retired workers were not "employees" under the Act. The board commented at p. 329:

> How does the situation of the retired worker compare to the common conception of an employee? The fact is that practically all elements of the usual employer-employee relationship are missing in the case of retired workers. As retirees, they are not paid a wage in return for current service; they are not required to perform any tasks assigned by an employer for his benefit; they are no longer subject to control or direction by the employer; and they are wholly unconcerned about such

> things as promotion, discipline and discharge. In short, once an employee has retired, all obligations to the employer come to an end. Conversely, for the most part, the employer's obligations end as well. There are, perhaps, a couple of exceptions: first, the employer must comply with pension arrangements or other benefits which are guaranteed by contract; secondly, recently retired workers may be entitled to a retroactive wage payment upon the execution of a new collective agreement... . [Emphasis added.]

In the board's view, even though retirees were no longer part of the collective bargaining process, the employer's contractual obligations to retirees [page298] continued. This position is identical to that found in the United States cases.

79 One additional decision should be referred to in this context, the arbitration ruling in Re Coulter Manufacturing Ltd. (1972), 1 L.A.C. (2d) 426. The facts of that case are somewhat similar to those before us. There the company announced plans to phase out its operations, and, during the currency of the collective agreement, discontinued insurance benefits for retired workers. The union filed a grievance on behalf of the retired workers prior to the expiration of the agreement. As such, the case differs from the present appeal, as the employer there could not argue that the agreement had expired before the grievance was laid. However, the employer did argue that as retirees were not "employees" as defined in the collective agreement, the retirees could not benefit from the agreement, and any reference to retirees was merely (at p. 427) a "gratuitous statement of company policy." The arbitrator rejected this distinction, ruling as follows, at pp. 428-29:

> Clearly, the retired employees are not employees within the strict meaning of that term. The same may of course be said of employees who are laid off for any substantial period of time. In each case, however, the question is not whether or not such a person is an employee within the strict meaning of the term (obviously he is not), but rather what are the rights which such person may have pursuant to the collective agreement. That is, the collective agreement has provided certain benefits for persons who are not in fact members of the bargaining unit at the time they seek to exercise such benefits ... . While it may be that a question might arise as to the entitlement of a person who is no longer in the employ of the company in the strict sense of the term to avail himself of the grievance and arbitration provisions of the collective agreement ... the trade union party to the collective agreement may certainly seek to enforce such rights on behalf of the persons entitled thereto... . If this were not so, then the benefits won by the union in negotiation and agreed to by the company would be illusory.

[page299]

In the result, the arbitrator ordered the employer to reinstate the retirement benefits, but only for the remaining term of the collective agreement. He ruled that the union had not established that the agreement contemplated the survival of retirement benefits beyond the expiration of the agreement itself. These findings are in complete accord with the Canadian Paperworkers decision, and with the American position.

80 This would appear to be the extent of the Canadian case law on point, but it does reveal a substantial similarity to the American approach to retirement benefits, despite the different legislative settings. In both countries, retired workers fall outside the bargaining unit and are thereby excluded from

the collective bargaining process. In both countries, statutory vesting protections have been extended to pension plans, but not welfare plans. As in the United States, Canadian law would appear to leave the question of vested welfare benefits to be determined by the contracting parties. While the retirees are outside the collective bargaining process, unions can (and frequently do) bargain on behalf of retired workers. The United States classifies such bargaining as permissive, and the employer can refuse to discuss the question. The concept of permissive subjects of bargaining has not been adopted in Canada, but this does not affect the status of vesting. However, it was on this point that the company rested its distinction of the American cases, and I turn now to these submissions.

81 As I understand the company's argument, it is this: once retirees' rights have been recognized in an American collective agreement, the permissive nature of those rights renders them immune from re-negotiation in the course of reaching a new agreement. That is, if an employer attempted to negotiate for a reduction in those benefits, the union could legitimately refuse to even discuss the issue. In my view, this submission is both inaccurate and self-defeating. First, the submission overlooks the fact that ongoing bargaining over [page300] mandatory and permissive subjects affects only the prospective relationship between the parties -- it cannot affect vested rights. It may be that from a procedural point of view retirees' benefits are paid on the basis of the arrangements in the current collective agreement, and as we have seen the parties are free to increase such benefits in their ongoing bargaining. But the retirees' substantive rights are found in the old collective agreement, and are left untouched by the ongoing bargaining between the parties. If anything, the permissive nature of retirement benefits precludes their entrenchment in ongoing bargaining -- the employer can refuse to include any benefit in the current agreement, even though past agreements promise such rights. Current retirees would then lose their accrued pension benefits altogether; but the benefits of those who retired under prior collective agreements would remain untouched. Moreover, the company's argument impliedly concedes that retirement rights survive the expiration of an agreement, albeit only to be negotiated away during the next round of collective bargaining. The latter point is inaccurate, but even if it were true the result would support the union's claims in the present case. That is, under the company's approach the benefits in question would survive the expiration of the last collective agreement, pending future bargaining. But there was no such future bargain -- the shutdown agreement is silent on retiree's benefits. As such, even accepting the company's thesis, it fails to carry the day.

82 But in my view the company's submissions are flawed. As I see it, both Canadian and American retirees enjoy a form of vesting considerably stronger than that argued by the company. Specifically, the company's distinction based on the American notion of retirement benefits as a permissive subject of bargaining is largely irrelevant to the status of vesting of retirees' benefits. Vesting [page301] is determined by the contractual agreement between the parties, not the subsequent bargaining between them. It may well be easier for an American union to disassociate itself from an employer's attempt to strip away vested retirement benefits. The union can refuse to bargain on that permissive subject, and indeed in some contexts the union could insist upon retirees having independent representation before agreeing to a collective agreement purporting to divest benefits; see Century Brass Products, Inc. v. U.A.W., 795 F.2d 265 (2nd Cir. 1986). But this advantage is, in practical terms, slight. Vested rights are protected by the right to grieve the expired collective agreement, not by control over the subsequent bargaining process. In any event the right to refuse to bargain on an issue is somewhat illusory, as the other party can insist on bargaining on a permissive subject so long as it is not the sole cause of a bargaining impasse; see Philip Carey Mfg. Co. v. N.L.R.B., 331 F.2d 720 (6th Cir. 1964), certiorari denied, 379 U.S. 888 (1964).

83 The practical insignificance of the American dichotomy to the question of vesting was noted in the Canadian Paperworkers decision, supra. After discussing the question of whether such benefits were a "mandatory" or "permissive" subject for bargaining, the board commented as follows, at pp. 679-80:

> Our second observation is that the choice between these two legal characterizations of the issue of retiree pensions may not make that much practical difference in the long run... . [The union] admits that even if the [employer] is bound to bargain about the subject, it certainly is not required to agree. The [employer] could listen politely to the proposals made by the [union] and say: we are sorry but it is a matter of principle with us that this subject should not be part of the collective agreement, and we are not prepared to pursue the matter further. In that case, the [union] admits that it could not lodge a valid complaint with the Labour Board and [page302] instead would have to take strike action to try to change the [employer's] mind. Here the [employer] would respond with the proposition that the Union could not strike solely about such a "permissive" issue in negotiation. But again the [employer] admits that an astute union could easily save one or two "mandatory" items, strike about all of them, and agree only to a memorandum of settlement which has acceptable terms on each of the items, retiree benefits included.

The board thus concluded that "the legal label might not ultimately make that much practical difference". However, as noted earlier, the board explicitly declined to adopt the American dichotomy.

84 The company argues that the permissive nature of retirement benefits was a key feature of the reasoning of the Sixth Circuit Court of Appeals in Yard-Man. However, as the excerpts cited earlier reveal, the fact that retirement benefits are permissive subjects for bargaining was referred to by the court as a mere contextual factor to aid in the interpretation of the collective agreement. The court's point was simply that one could infer an intention to vest benefits, as the retirees would not have wanted their benefits to depend upon the goodwill of the parties during future collective bargaining. That is, if retirement benefits had not been promised in a vested form, then the retirees' ongoing benefits would have been dependant upon each successive agreement containing the promise to pay all retirees' benefits for the term of that collective agreement, and this uncertainty would have been unacceptable to the retiring workers. It seems to me that the same argument can be made in Canada: it has little to do with the dichotomy between permissive and mandatory subjects, and has everything to do with the realities of collective bargaining in both countries. As we have seen, this "inferred" intention to vest has been the most controversial element of the Yard-Man case. However, it seems to me that such an inference, as one measure of the context in which bargaining took place between the parties, is a useful tool that can be employed by arbitrators in Canada on a case-by-case [page303] basis. In that respect, I would endorse the middle-of-the-road approach suggested by the Fifth Circuit in Champion International Corp., supra.

85 I turn now to the one area in which there may be a crucial difference in the nature (but not the existence) of vested retirement benefits in Ontario as compared to the United States. This is the range of remedial choices available to individual retired workers. In the United States there is an independent right to sue in a court of law when benefits promised in a collective agreement are withdrawn, even if that withdrawal occurs pursuant to a new collective agreement between management and labour. As well, retired workers, although no longer part of the bargaining unit, can bring an unfair representation complaint against a union that fails to consider the interests of retired workers during the course of bargaining. In Canada, it is unclear whether either of these routes is open to retired workers, who may be completely reliant upon their former bargaining agent to bring a grievance on their behalf when an employer unilaterally revokes vested benefits. And the grievance route may be foreclosed, as the union may be unwilling to grieve the issue on behalf of the retirees. This may arise because of an inevitable conflict of interest facing the union. If it were successful in grieving under an old collective agreement on behalf of retired workers, the employer would face increased overall labour costs, perhaps leading to harder bargaining over current employees' compensation. The union may well be reluctant to carry forward a grievance on behalf of retirees, as success on that front might well be contrary to the interests of current members of the bargaining unit.

86 In these circumstances, Canadian retirees may well find themselves in possession of a right without a remedy. The grievance procedure may be [page304] foreclosed, as described above. Retirees may not be entitled to bring a claim against the union for unfair representation, as such rights in Ontario appear to be limited to current members of the bargaining unit: see s. 68 of the Act. Finally, Ontario's Rights of Labour Act, R.S.O. 1980, c. 456, s. 3(3), and like provisions in other jurisdictions, may foreclose the possibility of a court action by the retirees; see Adams, Canadian Labour Law (2nd ed. 1993), at ss. 7.40-7.90. This problem does not arise in this case, as the union here did pursue a grievance on behalf of the retired workers. But in another case it seems to me that such a remedial vacuum, arising because the retirees are not party to the arbitration procedures guaranteed by the Act, may possibly be justification for allowing a court action to proceed; see St.-Anne Nackawic Pulp Co. & Paper v. Canadian Paper Workers Union, Local 219 (1982), 142 D.L.R. (3d) 678 (N.B.C.A.), at p. 686 and at p. 691; and see [1986] 1 S.C.R. 704, at p. 713 and at p. 721. Indeed, counsel for the company submitted that a court action was not only possible, but that the courts were the only forum available to these retirees. But this submission was made in passing, and was not developed in argument. As such I do not propose to go into the issue, except to say that it would appear to be irrelevant in this case. Assuming a court action is available, I know of no reason or authority that would preclude arbitration as an alternative forum for the retirees.

87 There may, as well, be other means by which retirees could surmount the remedial roadblocks that appear to face them. The term "employee" in the Act may well encompass retired workers in some contexts, thereby allowing retirees to take advantage of the Act's fair representation provisions. Finally, there is a possibility that the relationship between retired members of a bargaining unit and the bargaining agent for that unit is fiduciary in nature. If a union failed to consider the interests of retirees during collective bargaining, or refused to process a grievance on behalf of [page305] those retirees, such conduct might form the basis of a claim for breach of fiduciary duty.

88 To summarize, I am of the view that retirement rights can, if contemplated by the terms of a collective agreement, survive the expiration of that agreement. Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining that purported to divest such rights. As such, I have concluded that the arbitrator's general propositions in this respect were correctly stated, and the arbitrator had jurisdiction to hear the union's grievance. Of course, I make no comment on whether the terms of the agreement between the company and the union do in fact create such a vested right. That is a question for the arbitrator to decide when the arbitration hearing proceeds on the merits.

The Cross-Appeal

89 The union sought to cross-appeal that portion of the Court of Appeal's order directing that the arbitration proceed before a different arbitrator. That order was made at the request of the company, and in the belief that the arbitrator had in effect pre-judged the merits of the case in the course of determining his jurisdiction. In written submissions, the company argued that the cross-appeal should be rejected because the union did not seek leave to cross-appeal, as required by s. 29(2) of the Rules of the Supreme Court of Canada, SOR/83-74, as am. by SOR/88-247. Moreover, the company stands by the merits of the decision of the court below, arguing that the present arbitrator is biased with respect to the merits of the arbitration and should not be allowed to continue. The cross-appeal was not argued during oral submissions to this Court, and in the absence of on order granting leave to cross-appeal the issue was not properly before us. As such, without commenting on the merits of the [page306] issue, it is not open to me to consider the cross-appeal.

Disposition

90 I would dismiss the appeal with costs in this Court and in the courts below. I would also dismiss the cross-appeal with costs.

The following are the reasons delivered by

91 CORY J.:-- I am in substantial agreement with the excellent reasons of Justice La Forest and would dispose of the appeal in the same manner that he has suggested. To some degree we differ on the approach that should be taken by the courts in reviewing the decisions of boards, tribunals and arbitrators acting in the field of labour relations.

92 This appeal arises from a difference of opinion between labour and management as to the nature and extent of pension rights of former employees. The union supports the position of the former employees and management takes a contrary view.

93 Unresolved disputes fester and spread the infection of discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of the issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and violence. Both the members of the work force and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long running labour disputes and strikes. Thus society as a [page307] whole, as well as the parties, has an interest in their prompt resolution.

94 Legislators have recognized the importance of speedy determination of labour disputes. By the enactment of labour codes they have sought to provide a mechanism for a fair, just and speedy conclusion of the issues. The legislators have gone further and attempted to insulate the decisions of the various labour boards, tribunals and arbitrators from review by the courts. In earlier times, the courts resisted legislative attempts to restrict their ability to review the decisions of various labour boards. However, over a period of time they have accepted the vital importance of labour tribunals and adopted a more restrained approach in reviewing their decisions.

The Basis for the Courts' Review of a Decision of a Labour Tribunal or Arbitrator

95 Despite the recognition of the importance and reliability of the decisions of labour boards and arbitrators, the courts must retain the ability to review their decisions. In broad terms the review can be founded on any one of the following bases:

(1) if, during the course of its proceedings, the tribunal has failed to provide procedural fairness the court may intervene;
(2) if the tribunal exceeded the bounds of the jurisdiction conferred upon it by its enabling legislation intervention by the court will be appropriate;
(3) if the tribunal acted within the purview of its enabling legislation but rendered a decision that is patently unreasonable the court may intervene.

96 In this case there is no suggestion that there was any lack of procedural fairness. Rather the issue on this appeal is whether the arbitrator acted within the bounds of jurisdiction conferred upon him by the empowering legislation.

[page308]

97 An arbitrator must be correct in his or her decision as to whether or not he or she had jurisdiction to resolve the question before him or her. If the arbitrator erred then the court must intervene. The manner in which the courts should approach this question is set out in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048. There it was explained that the court must review a number of factors in determining the standard of deference to be accorded to an administrative decision maker. At page 1088 Beetz J. wrote:

> ... the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reasons for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

Did the Arbitrator Act Within the Bounds of the Jurisdiction Conferred upon Him by his Enabling Statute?

98 In this case, the appellant objected to the grievance brought by the union. It took the position that there was no longer a collective bargaining agreement in place when the grievance was launched. It was contended that in the absence of a current collective agreement there was no other basis upon which the employer's obligation could be based. In the absence of a current collective agreement dealing with the pension issue, it was said that the arbitrator had no jurisdiction to consider the question. It was on this initial objection of the appellant's that the arbitrator had to rule.

99 There can be no question that the appellant's objection required the arbitrator to address the issue raised on this appeal. Namely, did he have jurisdiction to consider the rights of retired workers which arose from a collective bargaining agreement that had expired. Since the objection questioned the arbitrator's jurisdiction his ruling with regard to it had to be correct. I agree with La Forest J. that in this case the arbitrator was correct in concluding that he had jurisdiction to deal with the question put to him.

[page309]

The Approach that Should be Taken to the Decision of the Tribunal or Arbitrator on the Merits.

100 This case turns on the issue of whether the arbitrator had jurisdiction to consider the pension question that was put before him. It is therefore not necessary for the resolution of this appeal to consider the standard of review by the courts of an arbitrator's decision on the merits. However, this matter has been considered at length by my colleague La Forest J. and it is for that reason that I will make the following very brief remarks concerning that issue.

101 Once it has been determined that a tribunal was correct in concluding that the issue to be decided was properly before it according to its enabling legislation, then a court can only intervene if the decision reached was patently unreasonable. It was in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227 ("CUPE") that this high standard of curial deference to decisions of labour tribunals was established. Since then it has always been maintained by this court.

102 Further, that same deference has been accorded not only to labour tribunals and boards but also to arbitrators acting in the same field. In Volvo Canada Ltd. v. U.A.W., Local 720, [1980] 1 S.C.R. 178, it

was held that the same high standard of curial deference should be applied to decisions of arbitrators. Pigeon J. writing for the majority (Martland, Ritchie, Beetz and Pratte JJ. concurring) summarized his position at p. 213 in these words:

> ... the question is not whether the construction reached is the correct one in the view of the Court, but whether it is one which the agreement would reasonably bear. In my view judged by this standard, the construction of the agreement adopted by the Arbitrator cannot be rejected.

He went on to say at p. 214:

> On a grievance under a collective labour agreement, the grievor does not choose arbitration, he has no other [page310] remedy. The other party has no choice either but to submit to his obligation to allow the grievance to be arbitrated. On the other hand, the arbitration is not meant to be an additional step before the matter goes before the courts, the decision is meant to be final. It is therefore imperative that decisions on the construction of a collective agreement not be approached by asking how the Court would decide the point but by asking whether it is a "patently unreasonable" interpretation of the agreement. [Emphasis by underlining added.]

103 In Fraternité des policiers de la Communauté urbaine de Montréal Inc. v. Communauté urbaine de Montréal, [1985] 2 S.C.R. 74, Chouinard J., writing for the court, without citing CUPE, supra, emphasized the deference that should be given to an arbitrator's decision concerning a collective bargaining agreement. He relied, inter alia, on the reasons of Dickson J., as he then was, in Heustis v. New Brunswick Electric Power Commission, [1979] 2 S.C.R. 768. At pages 80-81 he wrote:

> In Heustis ... Dickson J... . wrote at pp. 781-82:
>
> There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may by maintained.
>
> It is only where the decision of the arbitrator constitutes an abuse of power amounting to fraud and capable of producing a flagrant injustice that the courts may intervene in a case such as the one at bar.

104 It is particularly appropriate that this high standard of deference should be applied to administrative decisions made in the field of labour relations, whether they be made by tribunals, boards or arbitrators. In this volatile and sensitive field, the decision of either an arbitrator selected by the parties or of a labour board, which is often composed of [page311] representatives of both labour and management with wide experience in the field, should be final and binding unless the decision is indeed patently unreasonable.

105 My colleague in his reasons, has contrasted language such as "final and conclusive", which he would interpret as being privative and thus warranting deference, with "final and binding" which words he describes as having a "less privative effect". I cannot agree with this approach. To open the way to many and varied judicial interpretations of the words of any privative clause as to whether it was more or less privative in nature can do little but encourage a proliferation of litigation and interminably delay

a final resolution. It would defeat the aim of the legislators who no matter what the words chosen, whether they be "final and binding" or "final and conclusive", were seeking to have the courts refrain from interfering with the decisions of the statutory labour boards or tribunals. Indeed, the speedy and final resolution of these disputes should be the paramount concern. That restraint would, of course, be subject to the right and obligation of the courts to review these decision on any of the three fundamental bases outlined earlier.

106 There is another aspect that should be recognized. It is not unusual for executives of a union who have no formal legal training to review decisions of tribunals, boards or arbitrators so that union members can be advised of the decision and whether it may be reviewed by the courts. Both the union executive, acting on behalf of the employee, and management should know the rules pertaining to court review. Those rules should be simple, straightforward and easy to follow.

107 The three basic grounds for judicial review provide protection for the parties from decisions made without jurisdiction, from patently unreasonable decisions and from failure to provide procedural fairness. Yet, as a general rule, they would allow the whole system for the resolution of labour disputes [page312] to function expeditiously, simply and as inexpensively as possible.

108 In the instant decision the arbitrator concluded that he had jurisdiction to deal with the issue but he did not deal with the merits. If he had, since he was correct in determining that he had acted within the scope of the jurisdiction conferred upon him by the statute, then it would have been necessary to determine whether his decision was patently unreasonable. Only had his decision been patently unreasonable could a court have intervened.

Disposition

109 The arbitrator was correct and acted within the powers conferred upon him by the enabling legislation when he concluded that he should consider the issue. In the result, like La Forest J, I would dismiss the appeal with costs in this court and in the courts below. I would also dismiss the cross-appeal with costs.

TAB 5

Case Name:

British Columbia (Minister of Forests) v. Okanagan Indian Band

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, appellant;
v.
Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A57614, respondents, and
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, interveners.
And between
Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, appellant;
v.
Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his
personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band, and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2, respondents, and
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf

and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, interveners.

[2003] S.C.J. No. 76

[2003] A.C.S. no 76

2003 SCC 71

2003 CSC 71

[2003] 3 S.C.R. 371

[2003] 3 R.C.S. 371

233 D.L.R. (4th) 577

313 N.R. 84

[2004] 2 W.W.R. 252

J.E. 2004-59

189 B.C.A.C. 161

21 B.C.L.R. (4th) 209

[2004] 1 C.N.L.R. 7

43 C.P.C. (5th) 1

114 C.R.R. (2d) 108

REJB 2003-51166

127 A.C.W.S. (3d) 214

File Nos.: 28988, 28981.

Supreme Court of Canada

Heard: June 9, 2003;
Judgment: December 12, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

(88 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Costs -- Interim costs -- Principles governing exercise of court's discretionary power to grant interim costs -- Minister of Forests serving Indian Bands with stop-work orders for logging on Crown land without authorization -- Bands claiming aboriginal title to lands -- Minister applying to have proceedings remitted to trial list -- Bands arguing that matter of aboriginal title should not go to trial as they lack financial resources to fund action or in alternative, requesting order that Crown pay interim costs to fund action in advance and in any event of cause -- Whether Court of Appeal's decision to grant interim costs should be upheld -- Whether Court of Appeal had sufficient grounds to review exercise of chambers judge's discretion -- Rules of Court, B.C. Reg. 221/90, ss. 52(11)(d), 57(9).

Summary:

In 1999, members of the four respondent Bands began logging on Crown land in B.C. without authorization under the *Forest Practices Code of British Columbia Act*. The Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging the Code as conflicting with their constitutionally protected aboriginal rights. The Minister then applied to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The Bands argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order and to make orders as to costs, should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. The B.C. Supreme Court held that the case should be remitted to the trial list and declined to order the Minister to pay the Bands' costs in advance of the trial. The Court of Appeal allowed the Bands' appeal. The decision to remit the matter of the Bands' aboriginal rights or title to trial was upheld. The court concluded, however, that although the Bands did not have a constitutional right to legal fees funded by the provincial Crown the court did have a discretionary power to order interim costs. It ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that it imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation.

Held (Iacobucci, Major and Bastarache JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ.: The Court of Appeal's decision to grant interim costs to the Bands should be upheld. The discretionary power to award interim costs in appropriate cases has been recognized in Canada. Concerns about access to justice and the desirability of mitigating severe inequality between litigants feature prominently in the rare cases where such costs are awarded. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. Several conditions must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case; the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit; and there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

In public interest litigation special considerations also come into play. Public law cases, as a class, can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the special circumstances that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as special by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate. The criteria that must be present to justify an award of interim costs in this kind of case are as follows: the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; the claim to be adjudicated is *prima facie* meritorious; and the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Each of these criteria is met in this case. The Bands are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward; the issues sought to be raised at trial are of profound importance to the people of B.C., both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme. The conditions attached to the costs order by the Court of Appeal ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown, and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the Crown.

The Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court. Discretionary decisions are not completely insulated from review. An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues and erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Second, his finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

Per Iacobucci, Major and Bastarache JJ. (dissenting): The chambers judge interpreted the applicable principles correctly and there is no basis for reversing his discretion. Traditionally, costs are awarded after the ultimate trial or appellate decision and almost always to the successful party. However, the common law on interim costs has been more confined and interim costs have been awarded in two circumstances: in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. Courts may also award interim costs in child custody cases. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits and the objectivity of the court making such an order will almost automatically be questioned. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. The new criteria endorsed by the majority broaden the scope of interim costs to an undesirable extent and are not supported in the case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion. A case must be exceptional in order to attract interim costs; however, the majority accept that most public interest cases would satisfy this

criterion and leave to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. Even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. Further, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal. The *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs: the party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case; there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and it is presumed that the party seeking interim costs will win some award from the other party. The chambers judge committed no error of law nor a palpable error in his assessment of the facts. Deference should be given to his decision not to exercise his discretion to grant interim costs.

Cases Cited

By LeBel J.

Referred to: Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. (1985), 51 O.R. (2d) 23; Ryan v. McGregor (1925), 58 O.L.R. 213; Fellowes, McNeil v. Kansa General International Insurance Co. (1997), 37 O.R. (3d) 464; Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201; Kendall v. Hunt (No. 2) (1979), 16 B.C.L.R. 295; Canadian Newspapers Co. v. Attorney-General of Canada (1986), 32 D.L.R. (4th) 292; Re Lavigne and Ontario Public Service Employees Union (No. 2) (1987), 60 O.R. (2d) 486, rev'd (1989), 67 O.R. (2d) 536, aff'd [1991] 2 S.C.R. 211; Rogers v. Sudbury (Administrator of Ontario Works) (2001), 57 O.R. (3d) 467; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, aff'g (1992), 10 O.R. (3d) 321, aff'g [1989] O.J. No. 205 (QL); Jones v. Coxeter (1742), 2 Atk. 400, 26 E.R. 642; Organ v. Barnett (1992), 11 O.R. (3d) 210; McDonald v. McDonald (1998), 163 D.L.R. (4th) 527; Woloschuk v. Von Amerongen, [1999] A.J. No. 463 (QL), 1999 ABQB 306; Roberts v. Aasen, [1999] O.J. No. 1969 (QL); Amcan Industries Corp. v. Toronto-Dominion Bank, [1998] O.J. No. 3014 (QL); Turner v. Telecommunication Workers Pension Plan (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76; New Brunswick (Minister of Health and Community Services) v. G. (J.) (1995), 131 D.L.R. (4th) 273, rev'd [1999] 3 S.C.R. 46; Earl v. Wilhelm (2000), 199 Sask. R. 21, 2000 SKCA 68; Benson v. Benson (1994), 120 Sask. R. 17; R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12; Pelech v. Pelech, [1987] 1 S.C.R. 801; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.

By Major J. (dissenting)

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; R. v. Van der Peet, [1996] 2 S.C.R. 507; McDonald v. McDonald (1998), 163 D.L.R. (4th) 527; Randle v. Randle (1999), 254 A.R. 323, 1999 ABQB 954; Roberts v. Aasen, [1999] O.J. No. 1969 (QL); Watkins v. Olafson, [1989] 2 S.C.R. 750; R. v. Salituro, [1991] 3 S.C.R. 654; Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925.

Statutes and Regulations Cited

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 248, 249.

Canadian Charter of Rights and Freedoms, s. 15.

Company Act, R.S.B.C. 1996, c. 62, s. 201.

Constitution Act, 1982, s. 35.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131(1).

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, ss. 96, 123.

Queen's Bench Rules, Man. Reg. 553/88, r. 49.10.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 49.10, 57.01(1)(d), (2).

Rules of Court, B.C. Reg. 221/90, rr. 1(12), 37(23) to 37(26), 52(11)(d), 57(9).

Authors Cited

Orkin, Mark M. The Law of Costs, 2nd ed. Aurora, Ont.: Canada Law Book, 1987 (loose-leaf updated November 2002).

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 95 B.C.L.R. (3d) 273, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, 92 C.R.R. (2d) 319 (sub nom. British Columbia (Ministry of Forests) v. Jules), [2002] 1 C.N.L.R. 57, [2001] B.C.J. No. 2279 (QL), 2001 BCCA 647, allowing in part an appeal from a decision of the British Columbia Supreme Court, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135. Appeal dismissed, Iacobucci, Major and Bastarache JJ. dissenting.

Counsel:

Patrick G. Foy, Q.C., and Robert J. C. Deane, for the appellant.

Louise Mandell, Q.C., Michael Jackson, Q.C., Clarine Ostrove and Reidar Mogerman, for the respondents.

Cheryl J. Tobias and Brian McLaughlin, for the intervener the Attorney General of Canada.

Lori R. Sterling and Mark Crow, for the intervener the Attorney General of Ontario.

René Morin, Gilles Laporte and Brigitte Bussières, for the intervener the Attorney General of Quebec.

Written submissions only by Gabriel Bourgeois, Q.C., for the intervener the Attorney General of New Brunswick.

Written submissions only by George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.

Written submissions only by Margaret Unsworth, for the intervener the Attorney General of Alberta.

Robert J. M. Janes and Dominique Nouvet, for the interveners the Songhees Indian Band et al.

Joseph J. Arvay, Q.C., and David M. Robbins, for the intervener Chief Roger William.

The judgment of McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ. was

delivered by

LeBEL J.:--

I. Introduction

1 These two appeals concern the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause (I will refer to a cost award of this nature as "interim costs"). Such a jurisdiction exists in British Columbia. This discretionary power is subject to stringent conditions and to the observance of appropriate procedural controls. In this case, for the reasons which follow, I would uphold the granting of interim costs to the respondents by the British Columbia Court of Appeal, and I would hold that the Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court.

II. Background

2 In the fall of 1999, members of the four respondent Indian bands (the "Bands") began logging on Crown land in British Columbia without authorization under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "Code"). The Bands' respective tribal councils had purportedly authorized the harvesting of the timber, which was to be used to construct housing on the Bands' reserves. The appellant Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging ss. 96 and 123 of the Code as conflicting with their constitutionally protected aboriginal rights.

3 The Minister then applied under Rule 52(11)(d) of the *Rules of Court* of the Supreme Court of British Columbia, B.C. Reg. 221/90 , to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The respondents argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial -- which, given the evidentiary challenges of proving a claim of aboriginal title, this would almost undoubtedly be. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order under Rule 52(11)(d) and to make orders as to costs pursuant to Rule 57(9), should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. In support of this position, they raised constitutional arguments on three grounds: a general right of access to justice that is implicit in the *Canadian Charter of Rights and Freedoms* and flows from the primacy of the rule of law; the protection of aboriginal rights, as affirmed by s. 35 of the *Constitution Act, 1982*; and equality rights under s. 15 of the *Charter*.

4 The respondents filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. The evidence indicated that the Bands were all in extremely difficult financial situations. The chiefs deposed that their communities face grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to education. Many members of the respondent Bands who live off-reserve would like to return to their communities, but are unable to do so because there are not enough jobs and homes even for those who live on the reserves now. The Bands have been forced to run deficits to finance their day-to-day operations. The chiefs of the Spallumcheen and Neskonlith Bands deposed that they are close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits are so high.

5 The Bands' counsel estimated that the cost of a full trial would be $814,010. The Bands say that

they had no way to raise this much money; and that even if they did, there are many more pressing needs which would have to take priority over funding litigation. One of the most urgent needs is new housing -- the very purpose for which, they say, they want to harvest timber from the land to which they claim title.

III. Relevant Legislative Provisions

6 Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90

> 1(12) When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.
>
> 52(11) On an application the court may
>
> (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.
>
> 57(9) ... costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

IV. Judicial History

A. *British Columbia Supreme Court*, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135

7 Sigurdson J. held that the case could not be decided on the basis of documentary and affidavit evidence alone, and should therefore be remitted to the trial list. The evidence submitted by the Bands of their historical connection to the land was not sufficient in itself to dispose of the issue. Proving the Bands' aboriginal rights claims, which were contested by the Crown, would require historical, anthropological and archaeological evidence to be given by live witnesses and subjected to the detailed and rigorous testing of the trial process. The just resolution of the dispute required a trial and pleadings.

8 Sigurdson J. went on to consider whether he should impose a condition that the Minister pay the Bands' legal fees and disbursements. He began with the question of whether the court retained a general jurisdiction to award interim costs in a proceeding. He noted that costs usually follow the event and are awarded at the conclusion of the proceedings. Referring to a line of Ontario cases where a narrow jurisdiction to award interim costs has been recognized, Sigurdson J. held that such a discretion also existed in British Columbia in exceptional circumstances. He noted that he was unaware of any cases where substantial amounts had been awarded prior to trial where a liability or right was seriously in issue.

9 Turning to the Bands' argument that constitutional norms applied to the exercise of his discretion over costs, Sigurdson J. held that those norms did not require an order of interim costs to be made in the Bands' favour. He acknowledged that the Bands would need to retain experienced counsel and experts, and that a trial would be complex and expensive. He also recognized that the Bands' poverty would make it difficult for them to put their case forward. In his view, however, these obstacles resulted from the nature of the case and from the Bands' financial circumstances, not from any interference with their constitutional rights. The Bands' s. 35 argument failed, he held, because there were no specific circumstances giving rise to a fiduciary obligation on the part of the Crown to negotiate with the Bands or to fund the litigation of their land claim.

10 Sigurdson J. declined to order the Minister to pay the Bands' costs in advance of the trial. He found that his jurisdiction to make such an order was very narrow and was limited by the principle that he could not prejudge the outcome of the case. In this case, liability was still in issue, and Sigurdson J. held that ordering the payment of costs in advance would involve prejudging the case on the merits. For this reason, he was of the view that he was precluded from making such an order. Sigurdson J. added a recommendation that the federal and provincial Crown consider providing funding to ensure that the cases, which had elements of test cases, would be properly resolved at trial. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

B. *British Columbia Court of Appeal* (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647

11 Newbury J.A., writing for a unanimous panel, allowed the Bands' appeal of Sigurdson J.'s decision.

12 At the outset, Newbury J.A. noted that the Bands' claims, if they went to trial, would be the first to try aboriginal claims to title and other rights in respect of logging in British Columbia. She also summarized some of the affidavit evidence setting out the dire financial circumstances of the Bands.

13 Newbury J.A. upheld the chambers judge's decision to remit the matter of the Bands' aboriginal rights or title to trial. She agreed with him that the just determination of these issues required a trial. This holding was not raised on appeal to this Court.

14 On the question of funding the litigation, Newbury J.A. distinguished between a constitutional right to full funding of legal fees and disbursements, on the one hand, and on the other, the court's discretion to make orders as to "costs" as that term is used in the rules of court and in general legal parlance -- meaning a payment to offset legal expenses, usually in an amount set by statutory guidelines, rather than payment of the actual amount owed by the client to his or her solicitor.

15 As far as a constitutional right to funding of the Bands' legal expenditures was concerned, Newbury J.A. substantially agreed with the reasons of the chambers judge. She held that the principle of access to justice did not extend so far as to oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit. She also agreed with Sigurdson J. that s. 35 of the *Constitution Act, 1982* did not place an affirmative obligation on the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. Nothing in the specific circumstances of this case gave rise to a fiduciary expectation on the Bands' part that their legal fees would be funded. (She did not address the Bands' s. 15 arguments, which were not raised on appeal.) Newbury J.A. concluded that the Bands did not have a constitutional right to legal fees funded by the provincial Crown.

16 Newbury J.A. came to a different conclusion, however, on the matter of the court's discretion to order interim costs in favour of the Bands. She agreed with Sigurdson J. that this discretion existed, and that it was narrow in scope and restricted to narrow and exceptional circumstances. In her view, however, the circumstances of this case were indeed exceptional. Newbury J.A. held that the chambers judge had placed too much emphasis on concerns about prejudging the outcome, which in her view were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. She held that constitutional principles and the unique nature of the relationship between the Crown and aboriginal peoples were background factors that should inform the exercise of the court's discretion to order costs. Newbury J.A. held that the chambers judge had erred in failing to recognize that the case involved exceptional and unique circumstances which outweighed concerns about prejudging the outcome of the case.

17 Newbury J.A. held that, although the court had no discretion to order full funding of the Bands' case by the Crown, the chambers judge did have a discretionary power to order interim costs. She held that such an order should be made with conditions designed to provide concrete assistance to the Bands without exposing the Minister to unreasonable or excessive costs. She ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that she imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation. These terms, as found in the Court of Appeal Order dated November 5, 2001, are best stated in full:

> AND THIS COURT FURTHER ORDERS that the Crown, in any event of the cause, pay such legal costs of the Bands, as that term is used and as the Chambers judge orders from time to time in accordance with the following:
>
> (a) Costs, as is referenced in paragraph [10] of the *Reasons for Judgment*;
> (b) Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation;
> (c) Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose;
>
> (d) The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way;
>
> (e) If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these *Reasons*.

V. Issues

18 This case raises two issues: first, the nature of the court's jurisdiction in British Columbia to grant costs on an interim basis and the principles that govern its exercise; and second, appellate review of the trial court's discretion as to costs. The issue of a constitutional right to funding does not arise, as it was not relied on by the respondents in this appeal.

VI. Analysis

A. *The Court's Discretionary Power to Grant Interim Costs*

(1) Traditional Costs Principles -- Indemnifying the Successful Party

19 The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common

law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

20 In the usual case, costs are awarded to the prevailing party after judgment has been given. The standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23, at p. 32, as follows:

> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
> (4) They are *not* payable for the purpose of assuring participation in the proceedings. [Emphasis in original.]

21 The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1925), 58 O.L.R. 213 (App. Div.), at p. 216, as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought".

(2) Costs as an Instrument of Policy

22 These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach. For some time, however, courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award. Orkin, *supra*, at p. 2-24.2, has remarked that:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexations [*sic*] litigation and to discourage unnecessary steps.

23 The indemnification principle was referred to as "outdated" in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Gen. Div.), at p. 475. In this case the successful party was a law firm, one of whose partners had acted on its behalf. Traditionally, courts applying the principle of indemnification would allow an unrepresented litigant to tax disbursements only and not counsel fees, because the litigant could not be indemnified for counsel fees it had not paid. Macdonald J. held that the principle of indemnity remained a paramount consideration in costs matters generally, but was "outdated" in its application to a case of this nature. The court should also use costs awards so as to

encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps in the litigation. These purposes could be served by ordering costs in favour of a litigant who might not be entitled to them on the view that costs should be awarded purely for indemnification of the successful party.

24 Similarly, in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, the British Columbia Court of Appeal stated at para. 28 that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated". The court held that self-represented lay litigants should be allowed to tax legal fees, overruling its earlier decision in *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295. This change in the common law was described by the court as an incremental one "when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant" (para. 44).

25 As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia *Rules of Court*, Rule 37(23) to 37(26); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba *Queen's Bench Rules*, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

26 Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

(3) Public Interest Litigation and Access to Justice

27 Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

28 Courts have referred to the importance of this objective on numerous occasions. In *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.J.), Osler J. opined that "it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (pp. 305-6), while at the same time cautioning that "the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged" (p. 306). In *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486 (H.C.J.), White J. held that "it is desirable that Charter litigation not be beyond the reach

of the citizen of ordinary means" (p. 526). He awarded costs to the successful *Charter* applicant in spite of the fact that his representation had been paid for by a third-party organization (so that he would not, on the traditional approach, have been entitled to any indemnity). This case was overturned on the merits on appeal (*Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (C.A.), aff'd [1991] 2 S.C.R. 211), but neither the Ontario Court of Appeal nor this Court expressed any disapproval of White J.'s remarks on costs. Referring to both *Canadian Newspapers* and *Lavigne* in *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467 (S.C.J.), Epstein J. concluded at para. 19 that "costs can be used as an instrument of policy and ... making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective".

29 In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, the applicants, who were Jehovah's Witnesses, unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections. Instead of granting costs in the cause, the District Court judge directed the intervening Attorney General to pay the applicants' costs. Whealy Dist. Ct. J. cited Osler J.'s statement in *Canadian Newspapers, supra*, that *bona fide* challenges should not be deterred, and observed that the case before him was an unusual one involving a matter of province-wide importance (see [1989] O.J. No. 205 (QL) (Dist. Ct.)). His costs order, although unconventional, was upheld on appeal by the Ontario Court of Appeal, and subsequently by this Court. At the Court of Appeal, Tarnopolsky J.A. noted that this case, in which "the parents rose up against state power because of their religious beliefs", was one of national, even international significance ((1992), 10 O.R. (3d) 321, at pp. 354-55). La Forest J. stated at para. 122 of this Court's judgment that the costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases", but that the case "raised special and peculiar problems". He allowed Whealy Dist. Ct. J.'s order to stand.

30 The *B. (R.)* case illustrates that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party. It should be noted that Whealy Dist. Ct. J. applied Rule 57.01(2), a provision of Ontario's *Rules of Civil Procedure* that expressly authorized the court to award costs against a successful litigant and specified that the importance of the issues was a factor to be considered (see Rule 57.01(1)(d)). Although these principles are not spelled out in the Supreme Court of British Columbia *Rules of Court*, in my view they are generally relevant in guiding the exercise of a court's discretion as to costs. They form part of the background against which a British Columbia court exercises its inherent equitable jurisdiction, confirmed by Rule 57(9), to depart from the usual rule that costs follow the event.

(4) <u>Interim Costs</u>

31 Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. That costs orders can be used in this way in a narrow class of exceptional cases was recognized early on by the English courts. In *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642 (Ch.), the Lord Chancellor found that "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time". Invoking the "intirely discretionary" equitable jurisdiction to order costs, he ordered costs to be paid to the plaintiff "to empower her to go on with the cause" (p. 642).

32 The discretionary power to award interim costs in appropriate cases has also been recognized in Canada. An extensive discussion of this power is found in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Gen. Div.) . Macdonald J. reviewed the authorities, including *Jones, supra*, and concluded that "the

court *does* have a general jurisdiction to award interim costs in a proceeding" (p. 215 (emphasis in original)). She also found that that jurisdiction was "limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue" (p. 215).

33 As Macdonald J. recognized in *Organ, supra*, at p. 215, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases. In *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A.), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her position (para. 18). This was because husbands usually controlled all the matrimonial property. Since the wife had "no means to pay lawyers, her side of the litigation would not be advanced, and this position was patently unfair" (para. 20). Interim costs will still be granted in family cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward. See, e.g., *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306, where the Alberta Court of Queen's Bench ordered a lump sum payment of $10,000 to the mother in a custody action by way of interim costs, finding that the father's financial position was "significantly better than that of the [mother] in terms of funding this protracted lawsuit" (para. 16); and *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.), also a custody case, where the court held that the father was unlikely to succeed at trial and that the mother lacked the resources to pay her legal fees and disbursements, and ordered the father to pay $15,000 as interim costs. Orkin, *supra*, at p. 2-23, observes that in the modern context "the *raison d'tre* [*sic*] of such awards is to assist the financially needy party pending the trial; they are made where the spouse is without resources and would otherwise be unable to obtain relief in court" (citations omitted).

34 Interim costs are also potentially available in certain trust, bankruptcy and corporate cases, where they are awarded for essentially the same reason -- to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed. *Organ* was a corporate case involving, among other causes of action, an action under the oppression remedy set out in s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. The statute also provided in s. 249(4) that interim costs could be awarded in an oppression case. Macdonald J. held that, in addition to this express statutory power, the court also had an inherent jurisdiction to award interim costs. In the particular circumstances of this case, however, she held that the order should not be granted, because by their own admission the plaintiffs were not impecunious and would be able to proceed to trial without it. In *Amcan Industries Corp. v. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL) (Gen. Div.), a bankruptcy case, Macdonald J. acknowledged "the inherent unfairness that arises in choking a plaintiff's action if access to funds is not permitted" (para. 39); in this case, again, interim costs were not awarded because impecuniosity was not established. In *Turner v. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76, an action for breach of fiduciary duty in respect of a pension fund, the British Columbia Court of Appeal recognized that the court had the power to award interim costs, but held that the interests of justice did not require it to do so on the facts of the case. Newbury J.A. noted that the financial position or impecuniosity of a party is not in itself reason enough to depart from the usual rules as to costs (para. 18).

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". Indeed, the power to order interim costs may be specifically stipulated, as in the Ontario *Business Corporations Act* or similar legislation in other jurisdictions. Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes such as the Supreme Court of British

Columbia *Rules of Court*, which provides that the court may make orders varying from the usual rule that costs follow the event.

36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the Ontario *Business Corporations Act*; see *Organ, supra*, at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

37 Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties. If the court does decide to award interim costs in such circumstances, it will in a sense be predetermining triable issues, since it will have to decide that one side will receive its costs before it is known who will win on the merits (and since the winner is usually entitled to costs). As a result, concerns may arise about fettering the discretion of the trial judge who will eventually be called upon to adjudicate the merits of the case. This in itself should not, however, preclude the granting of interim costs if the relevant criteria are met. As Macdonald J. noted in *Organ, supra*, the court's discretion must be exercised with particular caution where it is being asked to predetermine an issue in this sense, but it does not follow that the court would be going beyond the limits of its discretion if it were to grant the order. I therefore disagree with the conclusion of the New Brunswick Court of Queen's Bench in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273, that costs cannot be ordered at the commencement of a proceeding in the absence of express statutory authority to award costs regardless of the outcome of the proceeding (p. 283) (this case was eventually overturned by this Court in [1999] 3 S.C.R. 46, but the interim costs issue was a secondary one that was not dealt with on appeal). As I stated above, the power to order costs contrary to the cause is always implicit in the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

(5) Interim Costs in Public Interest Litigation

38 The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the unsuccessful party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

40 With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

B. *Appellate Review of Discretionary Decisions*

42 The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68, at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it is not to be interfered with lightly.

43 As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene

where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech,* [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

44 Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues. In a case of this kind, as I have indicated, this consideration is of less weight than in the ordinary case; in fact, the allocation of the costs burden may, in certain cases, be determined independently of the outcome on the merits. Sigurdson J. erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Secondly, Sigurdson J.'s finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and I agree with Newbury J.A. that the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

C. *Application to the Facts of this Case*

45 It is unnecessary to send this case back to the chambers judge to apply the criteria set out here, because it is apparent from his reasons that, had he done so, he would have ordered interim costs in favour of the respondents. Sigurdson J. found as a fact that the Bands were in extremely difficult financial circumstances and could not afford to pay for legal representation. The only alternative which he suggested might be available for funding the litigation was a contingent fee arrangement, which, as I have stated, was not feasible. He found the Bands' claims of aboriginal title and rights to be *prima facie* plausible and supported by extensive documentary evidence; although the claim was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit. Finally, Sigurdson J. found the case to be one of great public importance, raising novel and significant issues resolution of which through the trial process was very much in the interests of justice. He even went so far as to urge the executive branches of the federal and provincial governments to provide funding so that the respondents' claims could be addressed.

46 Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.

47 The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown (see *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, at para. 186), and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the appellant. I would uphold her disposition of the case.

VII. Disposition

48 The appeal is dismissed with costs to the respondents.

The reasons of Iacobucci, Major and Bastarache JJ. were delivered by

49 MAJOR J. (dissenting):-- At issue in this appeal is how trial courts should be guided in their award of interim costs. When are these advance costs appropriate? How much deference should appellate courts give to the trial judge's discretion in the matter?

50 Four Indian bands are suing the Crown in right of British Columbia, to establish aboriginal title over land they wish to log. Because this litigation will be expensive, they seek interim costs -- that is, advance costs awarded whether or not they are successful at trial. By any standard, this is an extraordinary remedy.

51 The chambers judge could not find a supporting precedent and in the exercise of his discretion he chose not to grant interim costs. The British Columbia Court of Appeal, and now my colleague LeBel J., reversed the chambers judge on what appears to be a new rule for interim costs. With respect for the contrary view, I conclude that Sigurdson J. interpreted the applicable principles correctly and can find no basis for reversing his discretion. I would therefore allow the appeal.

52 The appeal raises difficult questions. In particular, how may impoverished parties sue to establish what is submitted to be constitutionally supported rights? Constitutional issues, however, were not pursued in this appeal. The respondents rely solely on the common law rules on costs.

53 Traditionally, costs -- usually party and party costs -- are awarded after the ultimate trial or appellate decision and almost always to the successful party. Party and party costs in all Canadian jurisdictions are only partial indemnification of the litigants' legal costs. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce. The *ratio* of the matrimonial cases is clear: a spouse usually owns or is entitled to part of the matrimonial property; some success on the merits is practically assured. Thus, the traditional purpose of costs -- indemnification of the prevailing party -- is preserved.

54 But to award interim costs when liability remains undecided would be a dramatic extension of the precedent. Furthermore, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications.

55 The common law is said to evolve to adapt prevailing principles to modern circumstances. But the common law of costs should develop through the discretion of trial judges. This equitable trial-level discretion, developed over centuries, is essential to the primary traditional use of the discretionary costs power by courts: to manage litigation and case loads. It may be that there are public law questions where access to justice can be provided through the discretionary award of interim costs. Even so, such cases must lie closer to the heart of the interim costs case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion.

I. Background

56 My colleague has fairly characterized the facts of this litigation. However, some highlighting of those facts may be useful.

57 In 1999, the four respondent Indian bands (the "Bands") began logging Crown land. Funds from that activity were to be used for housing and other desperately needed social services. The British Columbia Minister of Forests served the Bands with stop-work orders and commenced proceedings to prevent further logging. The Bands challenged the orders and claimed aboriginal title to the lands.

58 At the British Columbia Supreme Court, Sigurdson J. ruled that the question of aboriginal title was

sufficiently complex that a trial was necessary. The Bands stated that they could not afford to litigate and even if they could, they would have preferred to use such funds to provide social services. The Bands claimed that they had been unable to find any governmental or *pro bono* sources of aid. They therefore petitioned for interim costs -- costs in advance of trial. The Bands' motions were originally grounded in the constitutional question of title. They now seek interim costs on the basis of the trial court's inherent and statutory cost power.

59 The chambers judge conducted a thorough examination of the case law on interim costs and, in the exercise of his discretion, concluded:

> I find that the respondents' argument that its trial costs be paid in advance must fail. The issue of liability is very much in dispute and the trial costs are substantial. To order the payment of trial costs would require prejudging the case on the merits which, of course, I cannot do. Although I have a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area. I recognize that these respondents are in a difficult position. However, counsel may be prepared to represent them on a contingency basis and, if successful, the respondents will undoubtedly receive significant indemnity for their costs. I recommend, however, that the Federal and Provincial Crown consider providing some funding so that these disputes, which have some elements of test cases, if they cannot be settled, can be properly resolved at trial.
>
> ([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, at para. 129)

II. Analysis

A. *The Law of Costs*

60 The standard rule on party and party costs is that they are generally awarded to the successful litigant at the end of litigation. These costs are a contribution to the successful party's actual expense. Full indemnification by way of solicitor-client costs is infrequently ordered in Canada. Such costs require unusual and egregious conduct by the losing party. On rare occasions the court may award solicitor-client costs where equity is met by doing so.

61 My colleague points to what he describes as a modern trend in the law on costs -- its use as an instrument to encourage litigation in the public interest. With respect, I think this proposition mistakes public funding to pursue *Charter* claims as an exercise in awarding costs. It is a separate function. Although the trial judge retains a discretion on the question of costs in such cases, they have always been awarded at the conclusion of the litigation.

B. *The Law of Interim Costs*

62 As a matter of public policy as reflected in federal and provincial rules of court, costs are usually awarded at the conclusion of trial as a contribution to the successful party's legal expenses. However, the common law on interim costs -- costs in advance of trial -- has been more confined and almost exclusively restricted to family law litigation to allow the impecunious spouse and children access to the court. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits. While there is limited jurisdiction to award interim costs, it is logical that the party who must pay them and informed members of society might, in the absence of compelling reasons, have a reasonable apprehension of bias in favour of the recipient. The objectivity of the court making such an order will almost automatically be questioned.

63 The award of costs before trial is a more potent incentive to litigation than the possibility of costs after the trial. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs are useful in family law, but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.

64 LeBel J. concludes from his review of the case law on interim costs that they may be granted when (i) the party seeking the costs would be unable to pursue the litigation otherwise; (ii) there is a *prima facie* case of sufficient merit; and (iii) there are present "special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate" (para. 36). He finds that such special circumstances may exist if the case is in the public interest and is a test case. With respect, I come to a different result.

65 I agree that the case must be exceptional in order to attract interim costs. Of necessity, the proposition that extraordinary circumstances practically always exist where the public interest is invoked is too broad to meet the exceptional requirement. LeBel J. accepts that most public interest cases would satisfy this criterion (para. 38). This is why he leaves to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. To say simply that the issues transcend the individual interests in the case and have not yet been resolved (para. 40) does not assist the trial judge in deciding what is "special enough". An examination of past *Charter* cases will demonstrate that dilemma.

66 Test cases are referred to by LeBel J. and involve situations where important precedents are sought. In my view, the proposition that "it [would be] contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40), without more, is not sufficient. A trial judge can draw no direction from this proposal.

67 But even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. On the contrary, the litigation here is likely to involve the application of principles enunciated by this Court in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, and *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There is no evidence to establish that these land claims should be considered exceptional. Nor is there anything to establish how the new criteria would apply in a different way between one impecunious aboriginal party and another.

68 It is worth noting that the honour of the Crown is not at stake in this appeal and that there is no reason to distinguish the aboriginal claimants from any other impecunious persons claiming rights under the Constitution with regard to the availability of costs. The new definition of extraordinary circumstances must therefore apply generally and its impact measured accordingly. There is no doubt that the conclusions of LeBel J. will result in an increase of interim costs applications while offering little in the way of guidance to trial judges.

69 The interim costs case law suggests narrow guidelines. Interim costs have been awarded in two circumstances: (i) in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and (ii) in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. In those cases it is still necessary that the party seeking advanced costs show that they would otherwise be unable to proceed with litigation.

70 The matrimonial cases involving the division of assets upon divorce comprise the oldest line of interim costs jurisprudence. At common law, a wife could be awarded interim costs to help her maintain

her divorce action. This rule has been generally recognized in statute and Canadian case law. See *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A.). See also *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954, where interim costs were granted in an action concerning the division of property between common law spouses.

71 There are three legal characteristics that explain why the post-marital contest serves as the exception to the standard rule that costs "follow the event". These three characteristics are guidelines for the exercise of discretion in the award of interim costs.

72 First, at common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. See *McDonald, supra*, at para. 20. Therefore, the first required element of an interim cost award is that the party seeking the award is impoverished, and would not be able to pursue the litigation without such an award. It is acknowledged in this appeal that each of the bands are without funds.

73 Second, the marital relationship is perhaps unique in the mutual support owed between spouses. Thus, generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where, as in this appeal, no right under s. 35 of the *Constitution Act, 1982* is implicated and the matter involves the provincial Crown rather than the federal Crown, this special relationship cannot automatically be presumed.

74 But third, and dispositive to this appeal, in the marital cases <u>there is a presumption that the property that is the subject of the dispute is to be shared in some way</u>. See *Randle, supra*, at para. 22. Generally, it is the <u>distribution</u> of assets and <u>extent</u> of support that are at issue in a divorce action, not whether such a division and such support are owed. In a sense, <u>some liability is assumed</u>; all that is to be litigated is the <u>extent</u> of the liability. LeBel J. blunts the bite of this element, reducing it to the modest requirement that "[t]he claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40). The traditional roots of the costs power require more than *prima facie* merit. The costs power originally provided indemnification -- the prevailing party won costs. In a divorce action, however, it was assumed that the spouse, usually the wife, would be awarded something; the question was how much.

75 The matrimonial cases can therefore be seen as exceptional not because they dispensed with the rule that the prevailing party won costs (and the related principle that judges not predetermine the merits of the case), but because they dispensed with the need to wait for the end of trial to decide which party prevailed, for some liability was presumed.

76 In this appeal, Sigurdson J.'s reluctance to "prejudg[e] the case on the merits" was appropriate. Unlike the divorce cases, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal.

77 In summary, in my opinion the *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs:

1. The party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case.
2. There is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate.
3. It is presumed that the party seeking interim costs will win some award from the other party.

78 In my view, a court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances", the distinction between the traditional purpose of awarding costs and concerns over access to justice has been blurred.

79 As noted earlier, certain corporate and trust actions form another line of interim costs cases with a different *ratio*. In those cases, a litigant sues on behalf of a corporation or trust, and seeks interim costs. Such cases are an exception to the general rule on costs because the court makes the costs order on behalf of the corporation or trust. For example, where a shareholder sues directors on behalf of the corporation, it is presumed that the corporation, which in many ways is owned by the shareholders, although under the control of the directors, consents to the paying of the interim costs. It is important to note that in the corporate context, interim costs are specifically addressed by legislation. See British Columbia *Company Act*, R.S.B.C. 1996, c. 62, s. 201; Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 249.

80 Courts may also award interim costs in child custody cases. See *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.). Child custody litigation focuses on the best interests of the child for whose welfare both parents are responsible. The purpose of the interim costs award is not merely to aid one side or the other in funding their litigation but, commensurate with the parents' duty, to help the court find the result most beneficial to the child.

81 The value in considering the derivative and related child custody cases is simply to concede that there are circumstances beyond the matrimonial cases in which interim costs may be appropriate. The cases on appeal do not fit these exceptions.

C. *The Trial Judge's Discretion*

82 I agree with LeBel J. that a trial judge's discretionary decision on interim costs is owed great deference, and should be disturbed only if "the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (para. 43). I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

83 LeBel J. concludes that because Sigurdson J. failed to apply the newly enunciated criteria of impecuniosity, *prima facie* merit, and public importance, an error of law was (understandably) committed. LeBel J. saw no need to return the case to the chambers judge, and held that Sigurdson J. would have exercised his discretion to grant the award had he had the benefit of what is described as new criteria.

84 If this Court enlarges the scope for interim costs it should be seen as a new rule and not an adaptation of existing law. On the basis of the law on costs at the time of this application the chambers judge properly exercised his discretion.

85 Sigurdson J. was correct in his assessment that liability remains an open question in this appeal and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that "[a]lthough [he had] a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area" (para. 129).

III. Conclusion

86 The common law is to advance by increments while generally staying true to the purposes behind

its rules. The new criteria endorsed by my colleague broaden the scope of interim costs to an undesirable extent and are not supported in the case law. In my view, the common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

87 Since Sigurdson J. committed no error of law and did not commit a "palpable error" in his assessment of the facts, I would defer to his decision not to exercise his discretion to make the extraordinary grant of interim costs.

88 I would allow the appeal, with each side to bear its own costs.

Solicitors:

Solicitors for the appellant: Borden Ladner Gervais, Vancouver.

Solicitors for the respondents: Mandell Pinder, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Department of Justice of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitors for the interveners the Songhees Indian Band et al.: Cook, Roberts, Victoria.

Solicitors for the intervener Chief Roger William: Woodward & Company, Victoria.

cp/e/qw/qllls

TAB 6

Case Name:

Fraser Papers Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36. as amended
AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement with respect to Fraser Papers Inc., FPS Canada Inc., Fraser Papers Holdings Inc., Fraser Timber Ltd., Fraser Papers Limited and Fraser N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

[2009] O.J. No. 4287

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

September 17, 2009.

(20 paras.)

Pension and benefits law -- Private pension plans -- Civil procedure -- Parties -- Motions for appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of Fraser Papers allowed in part -- USW should be appointed as the representative for its former members who were retired since the union already had a relationship with the USW retirees -- No need for separate representation of the Steering Committee of Salaried Employees -- This group to be represented by same firm as Committee of Salaried Employees and Retirees.

Motions for the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of Fraser Papers. Fraser Papers was insolvent and was under significant financial pressure. Their largest unsecured claims related to the pension plans and the supplementary employee retirement programs

HELD: All motions except that of the Steering Committee of Fraser Papers' Salaried Retirees Committee allowed. The employees and retirees not otherwise represented were a vulnerable group who required assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favoured the granting of such an order and it was in the interests of justice to do so. The USW should be appointed as the representative for its former members who were retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already had a relationship with the USW retirees. De facto, the USW was already the representative of the USW retirees pursuant to the law in the US. There was no need for separate

representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only the Davies law firm avoided excessive fragmentation and duplication and minimized costs. Davies was proposing to represent all unrepresented employees, former employees and their successors, whereas Nelligan/Shibley was only proposing to represent retirees. Absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding was only ordered to be provided by Fraser Papers with respect to the Davies representation.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, C-36,

Counsel:

M. Barrack and D.J. Miller for the Applicants.

R. Chadwick and C. Costa, for the Monitor.

D. Wray and J. Kugler, for the Communications, Energy, and Paper Workers Union of Canada and as agent for Pink Larkin.

C. Sinclair, for the United Steelworkers.

T. McRae and S. Levitt, for the Steering Committee of Fraser Papers' Salaried Retirees Committee.

M.P. Gottlieb and S. Campbell, for the Committee for Salaried Employees and Retirees.

M. Sims, for Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Business of New Brunswick.

Chris Burr, for CIT Business Credit Canada Inc.

D. Chernos, for Brookfield Asset Management Inc.

ENDORSEMENT

S.E. PEPALL J.:--

Relief Requested

1 There are four motions before me that request the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of the Applicants ("Fraser Papers"). With the exception of the motion of the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

2 The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current

members.

(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.

(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.

(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

3 A third union, the CMAW, did not bring a motion but Mr. Wray, counsel for the CEP, acted as agent for CMAW's counsel, Pink Larkin on these motions. He advised that the CMAW will represent its current members but not its retirees who are approximately 25 in number.[1] These retirees therefore would only be encompassed by the Davies proposed retainer.

<u>Discussion</u>

4 The Applicants employ approximately 2,500 personnel. They are located in Canada and the U.S. A substantial majority is unionized. Of the 2,500, 1,729 employees participate in five defined benefit pension plans. In addition, 3,246 retirees receive benefits from these plans. Fraser Papers maintains certain other plans and benefits including supplementary employee retirement programmes ("SERPs").

5 On June 18, 2009, the Applicants obtained an Initial Order pursuant to the provisions of the *CCAA*. On July 13, 2009, the U.S. Bankruptcy Court for the District of Delaware designated these proceedings as foreign main proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code.

6 Fraser Papers is insolvent and is under significant financial pressure. Absent the DIP financing, a restructuring would be impossible. The Applicants have not generated positive cash flow from operations for three years. Their largest unsecured claims relate to the pension plans and the SERPs. Their accrued pension benefit obligations in these plans and the SERPs exceed the value of the plan assets by approximately USD $171.5 million as at December 31, 2008.

7 Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(a) USW and CEP Motions

8 Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")[2]. The evidence filed by the USW suggests that a labour organization that negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that,

although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

9 In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

10 Although CEP plays no role in Fraser Papers' U.S. operations, with that exception, for similar reasons and in the interests of consistency, the CEP should be appointed as the representative for its former members who are retirees subject to the aforementioned opt out provision. The Monitor and the Applicants are supportive of this position. Counsel for the CEP indicated that while it is unclear as a matter of law that the union is bound to represent former members in circumstances such as those facing Fraser Papers, the CEP would represent them with or without funding. Given Fraser Papers' insolvency, it seems to me that funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation. The request for funding by CEP is refused.

(b) Nelligan/Shibley and Davies

11 Turning to the requests of the Steering Committee of Fraser Papers Salaried Retirees Committee which favours the appointment of Nelligan/Shibley and the Committee for Salaried Employees and Retirees which favours Davies, firstly commonality of interest should be considered. In *Nortel Networks Corp. (Re)*[3], Morawetz J. applied the Court of Appeal's decision in *Re Stelco*[4] and the decision of *Re Canadian Airlines Corp.*[5] to enumerate the following principles applicable to an assessment of commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

12 Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated

costs.

13 Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.

14 I am not persuaded that there is a need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only Davies avoids excessive fragmentation and duplication and minimizes costs. In addition, no one will be excluded unless he or she so desires. Davies is also the only counsel whose retainer would extend to the CMAW retirees.

15 Davies has already received a broad mandate in that it has close to 700 retainers from employees in each facet of Fraser Papers' operations and from all current and former employee groups. It has the necessary legal expertise and has offices in Toronto, Montreal and New York. It also has the necessary language capability.

16 In contrast, Nelligan/Shibley is only proposing to represent retirees. It has a mandate of approximately 211 retirees. Clearly it has the requisite legal and language expertise but does not have the benefit associated with having offices in as many relevant jurisdictions. One may reasonably conclude from the evidence before me that the proposed fee structure would be less than that advanced by Davies although the scope of the retainer is more limited. Davies' appointment is not diminished because initially they were identified by the Applicants as appropriate counsel unlike Nelligan/Shibley whose group grew organically to use its counsel's terminology. Nor am I persuaded that Davies will be enfeebled as a result of the composition of the Steering Committee or due to past unrelated retainers by Brookfield Asset Management Inc. The Monitor supports the appointment of Davies as do the Applicants and the DIP lenders.

17 In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.

18 Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding request is supported by the Monitor, the Applicants and the DIP lenders.

19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

20 In summary, the USW, CEP and Davies representation requests are granted. Only the Davies

funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

S.E. PEPALL J.

cp/e/qlafr/qljxr/qlaxw

1 This is contrary to the contents of paragraph 24 of the Monitor's 4th Report but, being more recent, I accept counsel's oral representation as being accurate.

2 29 U.S.C.

3 [2009] O.J. No. 2166.

4 *15 C.B.R. (5th) 307 (Ont. C.A.)*

5 *(2000) 19 C.B.R. (4th) 12 Alta Q.B.*

TAB 7

** Preliminary Version **

Case Name:

Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771

Her Majesty The Queen ex rel. Linda Merk, appellant;
v.
International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, respondent.

[2005] S.C.J. No. 72

[2005] A.C.S. no 72

2005 SCC 70

2005 CSC 70

[2005] 3 S.C.R. 425

[2005] 3 R.C.S. 425

260 D.L.R. (4th) 385

341 N.R. 357

[2006] 5 W.W.R. 114

J.E. 2005-2197

275 Sask.R. 1

47 C.C.E.L. (3d) 1

[2005] CLLC para. 210-051

143 A.C.W.S. (3d) 1031

67 W.C.B. (2d) 430

EYB 2005-97905

2005 CarswellSask 768

File No.: 30090.

Supreme Court of Canada

Heard: February 10, 2005;
Judgment: November 24, 2005.

Present: McLachlin C.J. and Major, Binnie, LeBel, Deschamps, Abella and Charron JJ.

(61 paras.)

Labour law -- Unfair labour practices -- By employer -- Prohibited dismissal.

Labour legislation -- Provincial legislation.

Appeal by Merk from a decision of the Saskatchewan Court of Appeal upholding the dismissal of her action against the union, her former employer. Merk was a bookkeeper and office manager for the union. She claimed that she was fired because she informed union officials about financial misconduct committed by her immediate supervisors. According to the Saskatchewan Labour Standards Act, an employer was prohibited from discharging an employee because the employee reported an offence, or any activity that was likely to result in an offence, to a lawful authority. The trial judge held that the term "lawful authority" was limited to agents of the state, and did not include employers. The Summary Conviction Appeal Court and the Court of Appeal upheld that decision.

HELD: Appeal allowed. "Lawful authority" included individuals who worked for the employer and exercised lawful authority over the employee or the activity that constituted an offence or was likely to result in an offence. This interpretation followed the plain meaning of the expression "lawful authority", and was consistent with its purpose and context. Whistleblower laws sought to reconcile an employee's duty of loyalty with the public interest in precluding unlawful activity. These interests were best reconciled by having the problem dealt with by persons within the employer organization who had lawful authority. The Court of Appeal's narrow interpretation of what constituted "lawful authority" discouraged the internal resolution of alleged misconduct.

Statutes, Regulations and Rules Cited:

Act respecting labour standards, R.S.Q., c. N-1.1, s. 122

Criminal Code, R.S.C. 1985, c. C-46, s. 40, s. 279, s. 294, s. 369, s. 425.1

Election Act, R.S.A. 2000, c. E-1, s. 161

Employment Rights Act 1996 (U.K.), 1996, c. 18, s. 43C(1)a)

Employment Standards Act, R.S.B.C. 1996, c. 113, s. 83

Employment Standards Act, R.S.P.E.I. 1988, c. E-6.2, s. 35

Employment Standards Act, R.S.Y. 2002, c. 72, s. 108

Employment Standards Act, S.N.B. 1982, c. E-7.2, s. 28

Employment Standards Act, 2000, S.O. 2000, c. 41, s. 74

Employment Standards Code, R.S.A. 2000, c. E-9, s. 125

Employment Standards Code, S.M. 1998, c. 29, C.C.S.M. c. E110, s. 133

Federal-Provincial Agreements Act, R.S.S. 1978, c. F-13, s. 9

Forest and Range Practices Act, S.B.C. 2002, c. 69, s. 58

Highway Traffic Act, R.S.N.L. 1990, c. H-3, s. 109

Interpretation Act, 1995, S.S. 1995, c. I-11.2, s. 10, s. 36

Labour Standards Act, R.S.N.L. 1990, c. L-2, s. 78

Labour Standards Act, R.S.N.W.T. 1988, c. L-1, s. 67.1

Labour Standards Act, R.S.S. 1978, c. L-1, s. 74, s. 74(1)(a)

Labour Standards Act (Nunavut), R.S.N.W.T. 1988, c. L-1, s. 67.1

Labour Standards Act, S.S. 2005, c. 16, s. 8

Labour Standards Act, 1969, S.S. 1969, c. 24, s. 64

Labour Standards Code, R.S.N.S. 1989, c. 246, s. 30

Mental Health Act, R.S.N.B. 1973, c. M-10, s. 1(1)

Mental Health Services Act, S.S. 1984-85-86, c. M-13.1, s. 28.2(1)

Mines and Minerals Act, S.M. 1991, c. 9, s. 232(1)

Privacy Act, R.S.N.L. 1990, c. P-22, s. 4

Privacy Act, R.S.S. 1978, c. P-24, s. 3

Protected Disclosures Act 2000 (N.Z.), 2000/7

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Catchwords:

Labour law -- Employee protection -- Whistleblower -- Provincial legislation providing that no employer can discharge employee who "has reported ... to a lawful authority any activity that is or is likely to result in an offence" -- Employee fired for reporting to union officials alleged financial abuse by supervisors -- Whether "lawful authorities" limited to persons capable of exercising authority with respect to offences -- The Labour Standards Act, R.S.S. 1978, c. L-1, s. 74.

Summary:

The appellant, M alleges that she was fired as bookeeper and office manager of the respondent trade union because she blew the whistle by informing International Union of Iron Workers representatives of alleged financial misconduct committed by her immediate supervisors at Local 771. Under s. 74(1)(a) of the Saskatchewan *Labour Standards Act*, no employer can discharge an employee because the employee "has reported ... to a lawful authority any activity that is or is likely to result in an offence". While the trial judge was satisfied that the financial misconduct amounted to "an offence" and that M was terminated because she reported it, she nevertheless concluded that M had not complained to a "lawful authority". In her view the expression "lawful authority" should be limited to a person or institution authorized by law to deal with the activity as an offence and did not include employers. Both the summary conviction appeal judge and the majority of the Court of Appeal agreed with the interpretation of "lawful authority" adopted by the trial judge.

Held (Deshamps J. dissenting): The appeal should be allowed and a conviction entered.

Per McLachlin C.J. and Major, **Binnie**, LeBel, Abella and Charron JJ.: The expression "lawful authority" in s. 74 of *The Labour Standards Act* includes not only the police or other agents of the state having authority to deal with the activity complained of "as an offence", but also individuals within the employer organization who exercise lawful authority over the employee(s) complained about, or over the activity that is or is likely to result in the offence. This interpretation of s. 74 flows from the plain meaning of the expression "lawful authority" and is consistent with its purpose and context. If the legislature had wished to limit the scope of s. 74 to complaints to a "public authority" instead of a "lawful authority" it would have said so. [paras. 3, 38]

The plain meaning of s. 74 is reinforced by the labour relations context. Whistleblower laws, such as s. 74, seek to reconcile an employee's duty of loyalty to his or her employer with the public interest in the suppression of unlawful activity. The employees's duty of loyalty and the public's interest in whistleblowing is best reconciled with the "up the ladder" approach i.e. protecting employees who first blow the whistle to the boss or other persons inside the employer organization who have the "lawful authority" to deal with the problem. The legislature wanted a workplace free of unlawful activity but it did not specify prosecution as the only or even the preferred method of bringing about that result. By withholding whistleblower protection unless and until the employee goes "outside" to the enforcement authorities of the state, the Court of Appeal's narrow interpretation of s. 74 would discourage the internal resolution of alleged misconduct. Failure by whistleblowing employees "to try to resolve the matter internally" is condemned by courts and labour arbitrators as *prima facie* disloyal and inappropriate conduct. There is nothing in s. 74 or surrounding context to suggest that the Saskatchewan legislature in 1994 intended to expose "loyal" employees to employer retaliation without a remedy. [paras. 16, 19, 23, 25, 26, 36]

M pursued an "up the ladder" reporting approach. Based on the trial judge's findings, M was discharged because she reported to a lawful authority (the International Union of Iron Workers) the financial misconduct of her supervisors. The alleged misconduct was an "activity that is or is likely to result in an offence" within the meaning of s. 74. On a correct interpretation of "lawful authority", the union's

dismissal of M violated s. 74(1)(a) of *The Labour Standards Act*. [paras. 42, 48]

Per **Deschamps** J. (dissenting): The wording of s. 74 and its context do not indicate that the legislature intended to extend protection to an employee who reports a suspected wrongdoing within an organization. Broadening the definition of "lawful authority" to include employers is therefore inconsistent with this Court's approach to statutory interpretation and the plain meaning of the provision. "Lawful authority", as used in s. 74, can only be understood to mean persons or entities with the authority to enforce federal and provincial statutes. Since there is a rational basis for the external reporting requirement, a court must not second-guess the legislature's decisions about how to formulate effective labour policy. [paras. 3, 6, 9]

Cases Cited

By Binnie J.

Referred to: Rizzo & Shoes Ltd. (Re), [1998] 1 S.C.R. 27; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; Kolodziejski v. Auto Electric Service Ltd. (1999), 177 Sask. R. 197; Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union (1981), 3 L.A.C. (3d) 140; Haydon v. Canada, [2001] 2 F.C. 82; Read v. Canada (Attorney General), [2005] F.C.J. No. 990 (QL), 2005 FC 798; Re Simon Fraser University and Association of University and College Employees, Local 2 (1985), 18 L.A.C. (3d) 361; Forgie and Treasury Board (Immigration Appeal Board), [1986] C.P.S.S.R.B. No. 310 (QL); Re Treasury Board (Employment & Immigration) and Quigley (1987), 31 L.A.C. (3d) 156; Newfoundland and Labrador Nurses' Union v. Health Care Corp. of St. Johns', [2001] Nfld. L.A.A. No. 1 (QL); R. v. Wust, [2000] 1 S.C.R. 455, 2000 SCC 18; R. v. McIntosh, [1995] 1 S.C.R. 686; R. v. Hasselwander, [1993] 2 S.C.R. 398; R. v. Goulis (1981), 125 D.L.R. (3d) 137; EC, Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-Fraud Office (OLAF); EC, Council Decision 1999/394/EC of 25 May 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests.

By Deschamps J. (dissenting)

Rizzo & Shoes Ltd. (Re), [1998] 1 S.C.R. 27; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; R. v. B. (G.), [1990] 2 S.C.R. 57; R. v. Morin, [1992] 3 S.C.R. 286; R. v. Yebes, [1987] 2 S.C.R. 168; R. v. Burns, [1994] 1 S.C.R. 656; R. v. W. (R.), [1992] 2 S.C.R. 122.

Statutes and Regulations Cited

Act respecting labour standards, R.S.Q., c. N-1.1, s. 122.

Criminal Code, R.S.C. 1985, c. C-46, ss. 40, 279, 294, 369, 425.1.

Election Act, R.S.A. 2000, c. E-1, s. 161.

Employment Rights Act 1996 (U.K.), 1996, c. 18, s. 43C(1)a) [as am. 1998, c. 23].

Employment Standards Act, R.S.B.C. 1996, c. 113, s. 83.

Employment Standards Act, R.S.P.E.I. 1988, c. E-6.2, s. 35.

Employment Standards Act, R.S.Y. 2002, c. 72, s. 108.

Employment Standards Act, S.N.B. 1982, c. E-7.2, s. 28.

Employment Standards Act, 2000, S.O. 2000, c. 41, s. 74.

Employment Standards Code, R.S.A. 2000, c. E-9, s. 125.

Employment Standards Code, S.M. 1998, c. 29, C.C.S.M. c. E110, s. 133.

Federal-Provincial Agreements Act, R.S.S. 1978, c. F-13, s. 9.

Forest and Range Practices Act, S.B.C. 2002, c. 69, s. 58.

Highway Traffic Act, R.S.N.L. 1990, c. H-3, s. 109.

Interpretation Act, 1995, S.S. 1995, c. I-11.2, s. 10, 36.

Labour Standards Act, R.S.N.L. 1990, c. L-2, s. 78.

Labour Standards Act, R.S.N.W.T. 1988, c. L-1, s. 67.1.

Labour Standards Act, R.S.S. 1978, c. L-1, s. 74 [as am. 1994, c. 39, s. 41].

Labour Standards Act (Nunavut), R.S.N.W.T. 1988, c. L-1, s. 67.1.

Labour Standards Act, S.S. 2005, c. 16, s. 8.

Labour Standards Act, 1969, S.S. 1969, c. 24, s. 64.

Labour Standards Code, R.S.N.S. 1989, c. 246, s. 30.

Mental Health Act, R.S.N.B. 1973, c. M-10, s. 1(1) "nearest relative".

Mental Health Services Act, S.S. 1984-85-86, c. M-13.1, s. 28.2(1).

Mines and Minerals Act, S.M. 1991, c. 9, s. 232(1).

Privacy Act, R.S.N.L. 1990, c. P-22, s. 4.

Privacy Act, R.S.S. 1978, c. P-24, s. 3.

Protected Disclosures Act 2000 (N.Z.), 2000/7.

Authors Cited

Bennion, Francis Alan Roscoe. Statutory Interpretation: A Code, 4th ed. London: Butterworths, 2002.

Callahan, Elletta Sangrey, Terry Morehead Dworkin and David Lewis. "Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest" (2004), 44 Va. J. Int'l L. 879.

Côté, Pierre-André. The Interpretation of Legislation in Canada, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.

Dubin, Charles L., and John Terry. Whistleblowing Study. Study commissioned by the Competition Bureau. Ottawa: Industry Canada, 1997.

Graham, Randal N. Statutory Interpretation: Theory and Practice. Toronto: Edmond Montgomery, 2001.

Laskin, Bora. "The Function of the Law" (1973), 11 Alta. L. Rev. 118.

Saskatchewan. Legislative Assembly. Debates and Proceedings (Hansard), 4th Sess., 22nd Leg., April 22, 1994, p. 1785.

Sullivan, Ruth. Sullivan and Driedger on the Construction of Statutes, 4th ed. Markham, Ont.: Butterworths, 2002.

History and Disposition:

APPEAL from a judgment of the Saskatchewan Court of Appeal (Tallis, Cameron and Gerwing JJ.A.) (2003), 238 Sask. R. 234, 305 W.A.C. 234, 233 D.L.R. (4th) 61, 28 C.C.E.L. (3d) 179, [2004] 7 W.W.R. 290, 2004 CLLC para. 210-005, [2003] S.J. No. 640 (QL), 2003 SKCA 103, reversing a judgment of Ball J. (2003), 229 Sask. R. 37, [2003] 6 W.W.R. 746, 2003 CLLC para. 220-045, [2003] S.J. No. 15 (QL), 2003 SKQB 9, reversing the decision of McMurtry Prov. Ct. J., [2002] S.J. No. 555 (QL), 2002 SKPC 78. Appeal allowed, Deschamps J. dissenting.

Counsel:

Roger J. F. Lepage, Kerri A. Froc and Alison Mitchell, for the appellant.

Roderick M. Gillies, for the respondent.

[Editor's note: A corrigendum was published by the Court February 24, 2006. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of McLachlin C.J. and Major, Binnie, LeBel, Abella and Charron JJ. was delivered by

1 BINNIE J.:-- In this case, the respondent trade union seeks to narrow the protection given to employees under the Saskatchewan "whistleblower" legislation contained in s. 74 of *The Labour Standards Act*, R.S.S. 1978, c. L-1, as am. S.S. 1994, c. 39, s. 41. The somewhat unusual situation of a trade union seeking a dilution rather than an expansion of employee rights arises from the fact that the respondent union is itself being prosecuted by one of its own employees, Linda Merk.

2 Merk alleges that she was fired as bookkeeper and office manager of Local 771 because she blew the whistle on alleged financial abuses committed by her immediate supervisors, the president of the local, Charles Gumulcak, and its business manager, Bert Royer.

3 I agree with Cameron J.A., dissenting in the Saskatchewan Court of Appeal, that Linda Merk's letter to the General President of the International Union of Iron Workers that "blew the whistle" on these alleged financial abuses was a complaint "to a lawful authority" within the meaning of the Act and

brought Merk within the Act's protection. The plain meaning of "lawful authority" includes those who exercise authority in both the private and public context. If the legislature had wished to limit the scope of s. 74 to complaints to a "*public* authority", it would have said so. The correctness of the broader interpretation is reinforced by the purpose and context of s. 74, as will be seen. Based on the trial judge's findings of fact, the union's dismissal of Merk violated the Act. The appeal must be allowed and a conviction entered.

I. Facts

4 In the fall of 2000, Bert Royer received a Visa credit card for union expenses. Shortly thereafter, Merk realized that Royer was double charging expenses by putting them on his Visa card (which was paid directly by Local 771) despite already having received advances for the same expenses, or claiming reimbursement for the same amount as if the expenses had been paid from his own pocket. The trial judge found that in the result union funds were misappropriated. For example, Royer received a hotel advance for travel September 6-10, 2000, of $1,099.40. His actual hotel expense was $917.81. There was no evidence of repayment to the union. On October 28, 2000, he received $154.10 as an advance for hotel expenses. He then charged $162.64 on the union Visa to cover his hotel expense. There is no evidence of repayment. On October 19-20, 2000, Royer received an advance for an oil change and mileage for a trip to Saskatoon. He then put the oil change and gas charges of $48 on the union Visa. Merk alleged that Gumulcak was also collecting expenses to which he was not entitled.

5 After Merk's remonstration with Royer met with an angry response, Merk's father (a former business agent of Local 771) and three other union members wrote to the General President of the International Union of Iron Workers in Washington, Joseph Hunt, to complain that expense reimbursements to Royer and Gumulcak were not being dealt with in accordance with the union constitution. The General President assigned a union investigator from the International Union of Iron Workers, one Fred Marr, who came to Saskatchewan to speak to those involved, including Merk. Fred Marr subsequently reported that in his view the only problem with the double-dipping expense claims was that the by-laws of Local 771 did not specifically prohibit collecting more than once for the same expenses. According to the trial judge, Marr believed that if the by-laws were rewritten, the complaints would be resolved. She commented:

> This is ridiculous. It should not be necessary to spell out in local by-laws that expenses are to be reimbursed one time only.
>
> ([2002] S.J. No. 555 (QL), 2002 SKPC 78, para. 8)

Following receipt of Marr's "report", the executive of Local 771 met on September 21, 2001 and authorized the termination of Merk's employment. She was not at that time informed of this authorization and, for the next few weeks, her superiors chose not to act on it.

6 After waiting a time for some response from the International Union of Iron Workers following Marr's "investigation", Merk took it upon herself to write to Joseph Hunt, the General President of the International Union of Iron Workers on October 19, 2001 setting out her complaints and saying:

> I hope you will appreciate my concerns and inform me of your decisions and subsequent actions regarding these serious problems by October 25, 2001. Your response will dictate any further actions that I may need to take. Any further delays will do nothing but jeopardize this local union which could unfortunately prove harmful to the membership and to this organization as a whole.

7 The response from the union was not what Merk anticipated. She was dismissed from her job by letter dated November 5, 2001, signed by Royer and Gumulcak. It said:

> Due to a number of matters occurring during your employment, not the least of which occurred in the last few days prior to your leaving the workplace, as well as you forwarding your 19th of October 2001 correspondence to Joseph Hunt ... and matters surrounding same, the local union has found it necessary to terminate your employment. [Emphasis added.]

II. Statutory Provisions

8 *The Labour Standards Act*, s. 74, provides:

> **74**(1) No employer shall discharge or threaten to discharge or in any manner discriminate against an employee because the employee:
>
> (a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada; or
>
> (b) has testified or may be called on to testify in an investigation or proceeding pursuant to an Act or an Act of the Parliament of Canada.
>
> (2) Subsection (1) does not apply where the actions of an employee are vexatious.

III. Judicial History

A. *Trial Judge* ([2002] S.J. No. 555 (QL), 2002 SKPC 78)

9 McMurtry Prov. Ct. J. reviewed the law and concluded:

> Merk certainly was terminated because of her pursuit of the issue of Royer's expenses through the union. Once it appeared to Royer that the union's investigation cleared him, he felt safe to fire her. [para. 18]

10 The trial judge was therefore "satisfied beyond a reasonable doubt that Merk was terminated because she complained about Royer's expenditures" (para. 15). In terms of s. 74, Royer's conduct qualified as an "activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada". However, the Act also requires that the firing be related to a complaint to a "lawful authority". On this point, the trial judge said:

> If the language of the section permitted me to consider a member of the union bureaucracy as a lawful authority, I would have convicted. However, "lawful authority" must be interpreted as a person or institution authorized by law to investigate offences. If I am wrong and the General President of the union is a lawful authority, given his ability to remove any officer from his or her position, Merk's complaint to Marr, the President's investigator, would meet the test. I am convinced that Merk providing information to Marr is the reason she was dismissed. [Emphasis added; para. 19.]

In other words, but for a restrictive interpretation of the phrase "lawful authority" to officials of the state

(rather than a private entity such as a union), she would have entered a conviction.

B. *Summary Conviction Appeal Judge Ball J.* ((2003), 229 Sask. R. 37, 2003 SKQB 9)

11 The Queen's Bench judge agreed with the trial judge's interpretation of "lawful authority", but allowed the appeal on other grounds (not here relevant) and substituted a conviction (para. 51).

C. *Court of Appeal* ((2003), 238 Sask. R. 234, 2003 SKCA 103)

12 Gerwing and Tallis JJ.A. allowed the appeal but agreed with the narrow interpretation of "lawful authority" adopted in the courts below. Gerwing J.A., basing herself in part on predecessor legislation, took the view that

> the lawful authority must be one that is capable of exercising authority, i.e., compelling obedience, with respect to the conduct reported as an offence. Here the offence threatened to be reported, and the only one which can sustain the charge, is fraud, and the Union hierarchy, while it can enforce its own by-laws, has no capacity to deal with this as "an offence". [para. 20]

13 Cameron J.A., dissenting, would have affirmed a conviction but on grounds different from those of the summary conviction appeal court. In his view, the General President was a "lawful authority" because the purpose of the whistleblower law was "best attained by interpreting this expression liberally, to include other persons in authority, including persons possessed of corporate authority recognized by law to act upon the reported wrongdoing" (para. 46).

IV. Analysis

14 Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority. In relation to the private sector (as here), the purpose still has a public interest focus because it aims to prevent wrongdoing "that is or is likely to result in an offence". (It is the "offence" requirement that gives the whistleblower law a public aspect and filters out more general workplace complaints.) The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation. "[R]eports from insiders allow for early detection and reduction of harm, reduce the necessity for and expense of public oversight and investigation and may ultimately deter malfeasance" (E. S. Callahan, T. M. Dworkin and D. Lewis "Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest" (2004), 44 *Va. J. Int'l L.* 879, at p. 882).

15 The terminological debate in the Saskatchewan courts over the scope of the words "lawful authority" in s. 74, which on a plain meaning (in my view) includes a private authority as well as a public authority, is rooted in a more philosophic issue. Is the Saskatchewan legislature's intention best respected by withholding s. 74 protection from employees unless and until they take their complaint to the police or some other public official who can "deal with the allegation *qua* offence", as was held by the Saskatchewan Court of Appeal (at para. 21), or is it best respected by extending the protection to employees who go "up the ladder" *inside* the employer organization in an effort to have the "activity" terminated rather than prosecuted? A contextual and purposeful reading of s. 74 confirms its plain meaning. Purpose and context are important, as Laskin J. (as he then was) wrote over 30 years ago:

> The distinction that I draw is between a purely formal, mechanical view of the law, antiseptic and detached, and a view of the law that sees it as purposive, related to our social and economic conditions, and serving ends that express the character of our

organized society.

(B. Laskin, "The Function of the Law" (1973), 11 *Alta. L. Rev.* 118, at p. 119)

Here the legislature speaks of "lawful authority". This is a well-known concept. If, for example, a landowner orders a trespasser off her property, she is exercising as landowner "lawful authority" every bit as much as if a policeman (whose lawful authority flows from a different source) were to do so. The question is not whether the authority is public or private, but whether it is lawful.

16 The general principles of labour relations provide, I believe, the appropriate context. In employment law, there is a broad consensus that the employee's duty of loyalty and the public's interest in whistleblowing is best reconciled with the "up the ladder" approach. The Saskatchewan legislature was not oblivious to the realities of the workplace.

A. *Applicable Rules of Statutory Interpretation*

17 The direction from the Saskatchewan legislature to the courts in s. 10 of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, is that "[e]very enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects". The "objects" of s. 74 include better protection for employees who not only uncover unlawful "activity" but who bring this activity to the attention of "a lawful authority" who can do something about it. The question is how best to attain that objective.

18 Allied with s. 10 of *The Interpretation Act, 1995* is the contextual approach to statutory construction encapsulated by E. A. Driedger: "[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (*Construction of Statutes* (2nd ed. 1983), p. 87). This approach has regularly been adopted and applied in this Court: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42. The analysis is applied in several steps.

(1) Grammatical and Ordinary Sense

19 Gerwing J.A. held that "lawful authority" should be limited to someone "in a position to deal with the allegation *qua* offence" (para. 21). In her view the words "lawful authority" take their colour from the reference in s. 74 to an "offence", but it seems to me the word "offence" simply delineates the sort of "activity" the legislature wished to ferret out. The legislature's desire was to have such "activity" brought to the attention of someone who had the "lawful authority" (public or private) to remedy the problem. While the response to unlawful conduct could include prosecution for an "offence", it could also include steps short of prosecution through action by an employer or other private authority who has the lawful power to put a stop to the wrongful conduct. The legislature wanted a workplace free of unlawful activity. It did not specify prosecution as the only or even the preferred method of bringing about that result. Taking this case as an example, Joseph Hunt, the General President of the International Union of Iron Workers was not a public official but he had lawful authority, through mobilization of the powers of the international union, to bring to an end the ongoing misappropriations of members' money at Local 771. There is nothing in the "grammatical and ordinary meaning" of s. 74 to cast doubt on this broader interpretation of "lawful authority".

(2) The Scheme of the Act

20 *The Labour Standards Act* is essentially employee protection legislation. The whistleblower measure was expanded in 1994 together with other provisions collectively justified by the Labour

Minister to the Legislative Assembly as follows:

> The primary purpose of this Bill is to rectify some real injustices - injustices which most fair-minded people admit exist and need to be tackled, although they may not agree upon the means we have chosen.
>
> (Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 4th Sess., 22nd Leg., April 22, 1994, p. 1785)

21 One of the injustices addressed in *The Labour Standards Act* amendments was the problem of workplace retaliation against employees who blow the whistle on unlawful conduct. The courts in Saskatchewan have called for a "generous" interpretation of the Act. For example, Lane J.A., writing in a somewhat different context for the court in *Kolodziejski v. Auto Electric Service Ltd.* (1999), 177 Sask. R. 197 (C.A.), explained, at para. 18, that:

> Labour standards legislation is characterized as "benefits - conferring legislation". As such, it must be interpreted generously and <u>any doubt arising from difficulties in language must be resolved in favour of the claimant</u>. [Emphasis added.]

22 The appellant claims the benefit of the protection of the Act. The union respondent would deny it.

(3) <u>The Object of the Act</u>

23 Section 74, as stated, seeks to reconcile an employee's duty of loyalty to his or her employer with the public interest in the suppression of unlawful activity. A long line of decisions in the labour relations field affirms that this balance is best achieved if "loyal" employees are encouraged to resolve the problems internally rather than marching forthwith to the police, i.e. work with internal remedies before going public. Yet the interpretation given s. 74 by the Saskatchewan Court of Appeal denies the "loyal" employee protection: the employee only obtains protection when the complaint is taken outside the employer organization to the police or other public authority. This is the antithesis of good labour relations policy, as noted by J. M. Weiler almost a quarter of a century ago in his arbitral award in *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union* (1981), 3 L.A.C. (3d) 140, at p. 163:

> The duty of fidelity does not mean that the Daniel Ellsbergs and Karen Silkwoods of the world must remain silent when they discover wrongdoing occurring at their place of employment. Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment <u>to the attention of those who can correct such wrongdoing. However, the duty of fidelity does require the employee to exhaust internal "whistle-blowing" mechanisms before "going public".</u> These internal mechanisms are designed to ensure that the employer's reputation is not damaged by unwarranted attacks based on inaccurate information. Internal investigation provides a sound method of applying the expertise and experience of many individuals to all problems that may only concern one employee. [Emphasis added.]

24 This so-called "up the ladder" approach has also been favoured by courts and other labour arbitrators. In *Haydon v. Canada*, [2001] 2 F.C. 82 (T.D.), Tremblay-Lamer J. stated, at para. 120:

> The applicants endeavoured on several occasions to have their concerns addressed internally without success. As a general rule, public criticism will be justified where reasonable attempts to resolve the matter internally are unsuccessful. [Emphasis added.]

See also *Read v. Canada (Attorney General)*, [2005] F.C.J. No. 990 (QL), 2005 FC 798, *per* Harrington J., at para. 123; *Re Simon Fraser University and Association of University and College Employees, Local 2* (1985), 18 L.A.C. (3d) 361 (R. B. Bird); *Forgie and Treasury Board (Immigration Appeal Board)*, [1986] C.P.S.S.R.B. No. 310 (QL) (M. Bendel); *Re Treasury Board (Employment & Immigration) and Quigley* (1987), 31 L.A.C. (3d) 156 (J. M. Cantin), and *Newfoundland and Labrador Nurses' Union v. Health Care Corp. of St. Johns'*, [2001] Nfld. L.A.A. No. 1 (QL) (P. Kelsey), at paras. 292-94, 298-99 and 312. Many of these cases arose in relation to public sector employees where the public interest in "whistleblowing" may be more obvious, but the need in the private sector to strike a proper balance is the same.

(4) The Public Policy Debate

25 Saskatchewan is not alone in its desire to protect legitimate whistleblowers. Amongst other more or less contemporaneous initiatives was the report to the federal government by the former Chief Justice of Ontario, Charles L. Dubin, who wrote in contemplation of amendments to the *Competition Act*, R.S.C. 1985, c. C-34, that he too supported an "up the ladder" approach:

> [T]he decisions of arbitral panels hearing grievances from whistleblowing employees suggest that the employee's duty of fidelity is a strong one, and is generally breached when an employee criticizes his or her employer publicly or discloses information that damages the employer's interests. An employee may be justified in going public to expose wrongdoing or illegal acts by the employer. But in order to successfully rely on that justification, the employee must first try to resolve the matter internally. Although these same principles would probably apply to common law actions for wrongful dismissal brought by non-unionised employees, there do not appear to be any reported judgments that deal with this issue. [Emphasis added.]
>
> (C. L. Dubin and J. Terry, *Whistleblowing Study* (1997), p. 20)

Failure to "try to resolve the matter internally" is condemned by courts, labour arbitrators and other commentators as *prima facie* disloyal and inappropriate conduct. It would be anomalous to interpret s. 74 as requiring recourse to outside agencies as a condition precedent to protection.

26 The correctness of the broader approach is confirmed by the experience in many other jurisdictions. In Britain, for example, whistleblower protection contained in the *Employment Rights Act 1996* (U.K.), 1996, c. 18, requires (except in special circumstances) that an employee first make a good faith disclosure internally, either to his employer (43C (1)(a)) or to another "internal" person when the worker reasonably believes that the relevant failure relates to the conduct of that person or that that person has legal responsibility over the matter. In New Zealand, the *Protected Disclosures Act 2000* (N.Z.), 2000/7, which covers both the public and private sectors, requires whistleblowers to report through internal channels (with a few minor exceptions) before blowing the whistle publicly (s. 7). In Europe, the so-called Whistleblowers' Charter, 1999 is administered by the Anti-Fraud Office in the Commission and creates procedures that require employees to exercise all internal avenues for reporting misconduct before they can blow the whistle to an outside authority. (See article 2 of Commission Decision dated April 28, 1999 (1999/352/EC, ECSC, Euratom) and related Council Decision dated May 25, 1999 (1999/394/EC, Euratom); and articles 22a and 22b of the Staff Regulations of officials of the

European Communities (amended by Council Regulation (EC, Euratom) No. 723/2004 dated March 22, 2004.).) There is nothing in s. 74 or surrounding context to suggest that the Saskatchewan legislature in 1994 intended to expose "loyal" employees to employer retaliation without a remedy.

(5) Avoidance of Anomalous Results

27 The argument that an employer can dismiss without fear of prosecution an employee for bringing serious wrongdoing to its attention internally, but cannot do so as soon as the employee goes to outside authorities, invites rejection on the basis of irrationality, as described in R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 246:

> A variation on irrational distinction occurs when an interpretation leads to an outcome in which persons deserving of better treatment receive worse treatment or vice versa.

See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 451-52. In *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18, our Court declined to accept the interpretation of a sentencing provision which "would reward the worst offender and penalize the least offender" (para. 42). A comparable anomaly would arise here if a narrow view of "lawful authority" were adopted.

(6) Legislative History

28 Part of Driedger's "entire context" is legislative history. The majority opinion of Gerwing J.A. was in part predicated on her view that s. 74 was intended merely as an incremental advance on an earlier immunity clause contained in s. 64 (later renumbered s. 74), which itself was limited to cooperation with public authorities:

> **64.** No employer shall discharge or threaten to discharge or in any manner discriminate against an employee because the employee has testified or is about to testify in an investigation or proceeding held or to be held pursuant to the provisions of this Act, or an employee who makes a complaint or furnishes information to the minister or his agent under this Act.
>
> (*The Labour Standards Act, 1969*, S.S. 1969, c. 24)

On this basis Gerwing J.A. concluded:

> The current s. 74 broadened the protection to other statutes, but nothing in its wording or in the legislative history suggests that the term "lawful authority" should be extended to someone not in a position to deal with the allegation *qua* offence. [para. 21]

29 There are, of course, legislative provisions in other jurisdictions that adopt this narrower approach. Section 425.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, for example, gives protection to employees who blow the whistle to "a person whose duties include the enforcement of federal or provincial law". It will be noted, however, that the wording of the *Criminal Code* is a good deal more explicit in its restricted scope. The effect of the majority decision in the Saskatchewan Court of Appeal, with respect, is to read into s. 74 the more restrictive language of the *Criminal Code* without textual or contextual justification.

30 The aim of predecessor sections to s. 74 was to encourage employee cooperation with government officials in labour matters, and was typical of the protection that is found in most Canadian labour codes; see, e.g. *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 83; *Employment Standards Code*, R.S.A.

2000, c. E-9, s. 125; *The Employment Standards Code*, S.M. 1998, c. 29, C.C.S.M. c. E110, s. 133; *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 74; *An Act respecting labour standards*, R.S.Q., c. N-1.1, s. 122; *Employment Standards Act*, S.N.B. 1982, c. E-7.2, s. 28; *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2, s. 35; *Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 30; *Labour Standards Act*, R.S.N.L. 1990, c. L-2, s. 78; *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, s. 67.1; *Labour Standards Act (Nunavut)*, R.S.N.W.T. 1988, c. L-1, s. 67.1; *Employment Standards Act*, R.S.Y. 2002, c. 72, s. 108.

31 In recent years, however, legislative horizons have expanded. Section 74 is not on its face directed to cooperation between employees and government officials. Having regard to the consideration already mentioned it seems to me that s. 74 should be seen as part of a broader legislative reform rather than the narrower incremental step favoured by the Saskatchewan Court of Appeal.

(7) Penal Provision

32 The respondent says that s. 74 is a penal provision and that it must therefore be read restrictively. Gerwing J.A., at para. 25 of her judgment, concluded that "the interpretation of a penal statute that is ambiguous must be resolved in a manner favourable to the accused person": *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paras. 38-39.

33 In my view, with respect, this approach is of limited value when interpreting a regulatory statute such as *The Labour Standards Act*. If it is concluded in all the relevant circumstances that the legislature intended a broad approach, that is the approach that will be adopted. In *R. v. Hasselwander*, [1993] 2 S.C.R. 398, the Court addressed the interpretation of the definition of "prohibited weapon" in the *Criminal Code*, and noted that while one possible definition would bring the accused's weapon within the prohibition, the other would not. In resolving this issue, Cory J. adopted an earlier *dictum* of Martin J.A. of the Ontario Court of Appeal in *R. v. Goulis* (1981), 125 D.L.R. (3d) 137:

> ... even with penal statutes, the real intention of the legislature must be sought, and the meaning compatible with its goals applied. [p. 413]

Sullivan also stated, at p. 387:

> The rule [of strict construction] is difficult to reconcile with federal and provincial Interpretation Acts which provide that all legislation is to be deemed remedial and given a liberal and purposive interpretation. In the clearest possible language, this statutory directive requires doubts and ambiguities in penal legislation to be resolved in a manner that promotes the purposes of the legislation, regardless of the impact on accused persons.

See also Côté, at p. 477.

34 Reference might also usefully be made to R. N. Graham, *Statutory Interpretation: Theory and Practice* (2001), at pp. 210-15, and to F. A. R. Bennion, *Statutory Interpretation: A Code* (4th ed. 2002), at p. 706:

> In accordance with the basic rule of statutory interpretation, a penal enactment will not be given a strict construction if other interpretative factors weigh more heavily in the scales.

35 I conclude that in the circumstances of this case "other interpretative factors" outweigh the principle of strict construction of penal statutes relied upon by the respondent.

B. *Conclusion with Respect to the Scope of Employee Protection Afforded by Section 74*

36 The interpretation of s. 74 adopted by the Saskatchewan Court of Appeal would discourage the internal resolution of alleged misconduct by withholding whistleblower protection unless and until the employee goes "outside" to the enforcement authorities of the state. For the reasons given, I believe its interpretation of "lawful authority" is too narrow. Section 74 protection should be extended to employees who first blow the whistle to the boss or other persons *inside* the employer organization who have the "lawful authority" to deal with the problem. If the problem is not resolved internally, then employees can go "outside" to the police or another enforcement agency, but in order to obtain the protection of s. 74, it is not *necessary* that they do so.

37 I should add that there may well be circumstances where an employee is fully justified in not seeking an internal remedy but in going directly to the police, as where (for example) it is feared that the employer may destroy evidence. Whether or not an employee is justified in bypassing internal remedies will depend on the circumstances. My point is simply that a suitable "lawful authority" may be found *inside* as well as *outside* the employer organization, and if an employee chooses to go the inside route and suffers retaliation, the protection of s. 74 is still available.

38 For the foregoing reasons, I conclude that the expression "lawful authority" in s. 74 includes not only the police or other agents of the state having authority to deal with the activity complained of "as an offence" but also individuals within the employer organization who exercise lawful authority over the employee(s) complained about, or over the activity that is or is likely to result in the offence.

C. *Subsequent Amendments to Section 74*

39 My colleague Deschamps J. notes that about a year after the decision of the Court of Appeal in this case, the Saskatchewan legislature amended s. 74 to provide expressly that "lawful authority" includes "up the ladder" supervisors:

> 74 ...
>
> (3) In this section, **"lawful authority"** means:
>
> (a) any police or law enforcement agency with respect to an offence within its power to investigate;
> (b) any person whose duties include the enforcement of federal or provincial law with respect to an offence within his or her power to investigate; or
> (c) <u>any person directly or indirectly responsible for supervising the employee</u>.
>
> (S.S. 2005, c. 16, s. 8)

40 From this my colleague concludes that we should infer that the legislature intended to *expand* the meaning of lawful authority to include supervisors. I do not agree. Section 36 of *The Interpretation Act, 1995* of Saskatchewan provides that such an inference is not permissible. Section 36 says

> **36**(1) The repeal or the amendment of a provision in an enactment does not imply:
>
> (a) ...
> (b) a declaration as to the previous state of the law; or
> (c) a declaration that the law pursuant to the enactment prior to the repeal or

> amendment was different from the law as it is pursuant to the enactment as amended.
>
> (2) The re-enactment, revision, consolidation or amendment of a provision in an enactment does not imply an adoption of any judicial or other interpretation of the language used in the provision or of similar language.

41 Equally consistent with the legislative amendment to s. 74 is the explanation (which I think is more likely) that the Saskatchewan legislature did not agree with the way in which the Saskatchewan Court of Appeal in this case had interpreted its handiwork. In any event such speculation either way is foreclosed by s. 36 of *The Interpretation Act, 1995*.

D. *Application to the Facts of this Case*

42 The appellant certainly pursued an "up the ladder" reporting approach. Prior to her termination, she had progressively disclosed Royer's and Gumulcak's alleged misappropriation of union funds to (1) Royer himself, as her supervisor; (2) to a trustee of Local 771 who along with two other trustees were responsible to the membership for the finances; (3) to the union's auditor who could have flagged the problem in his audit; (4) to the investigator, Fred Marr appointed by the General President of the International Union of Iron Workers; (5) to the General President of the International Union of Iron Workers; and only when none of these people could be stirred to action, (6) to the police. In reaching my conclusions, I do not wish to be taken as suggesting that Merk's complaint to the union trustee of Local 771 or its auditor were not to a "person in authority". The appeal was argued by both sides on the basis of Merk's complaints to the International Union of Iron Workers representatives. As no argument was addressed to the status of the local people, and no provision of the local constitution was put forward to support that view, I say no more about potential s. 74 protection in that regard.

43 There is some suggestion in the union's argument that Merk's allegations were made irresponsibly or in bad faith, leading the employer (the union) to conclude that she was unsuitable for the job. In effect, the union says the cause of dismissal was not retaliation for whistleblowing, but because of its conclusion about Merk's unsuitability illustrated by her irresponsible allegations. This argument, too, collapses in the face of findings of fact by the trial judge, who stated:

> Until the date of her termination, Ms. Merk had justification for being concerned that the payments were improper and it was reasonable for her to believe that some of Royer's expenditures were a fraud on the union. In my view, that is sufficient to meet the threshold in section 74. It would be unreasonable to require that she have evidence that establishes, beyond a reasonable doubt that an offence has occurred. [para. 16]

44 Who then, on the facts of this case, is a person with "lawful authority"? The trial judge answered that question too. Had she been persuaded as a matter of law that "lawful authority" included authorities internal to a union or corporation, she would have convicted. To repeat her finding, at para. 19 of her judgment:

> If I am wrong and the General President of the union is a lawful authority, given his ability to remove any officer from his or her position, Merk's complaint to Marr, the President's investigator, would meet the test. I am convinced that Merk providing information to Marr is the reason she was dismissed.

45 The reason the trial judge put her focus on Merk's communication to "the President's investigator", rather than on her October 19, 2001 letter to the General President himself, is that the executive of Local

771 authorized the firing of Merk on September 21, 2001, almost a month prior to the date of her letter to General President Hunt of October 19, 2001. The union says the letter to Hunt is irrelevant.

46 The further facts are, however, that such "authorization" was not acted on until November 5, 2001. The letter of dismissal specifically refers to "your 19th of October 2001 correspondence to Joseph Hunt ... and matters surrounding same". The "matters surrounding same" obviously included Merk's agitation about the improper expense claims going back for more than a year to the fall of 2000.

47 Irrespective of the authority given by the union executive to Royer and Gumulcak on September 21, 2001 to fire Merk, she knew nothing about it until November 5, 2001. That was the effective date of her dismissal. In terms of s. 74, the *actus reus* was not complete until November 5, 2001 and at that time the *mens rea* of Gumulcak and Royer was inflamed by Merk's letter to the General President of October 19, 2001, and they so stated in the letter of dismissal on that date. Accordingly, the *actus reus* and the requisite *mens rea* did not coincide until November 5, 2001 at which time the s. 74 offence was complete. The union having referenced Merk's October 19, 2001 complaint in its letter of dismissal, it does not now lie in the union's mouth to argue that her October 19th complaint to President Hunt about alleged financial misconduct did not at least contribute to her dismissal.

V. Conclusion

48 In summary, based on the trial judge's findings, Merk was discharged because she reported to a lawful authority (the International Union of Iron Workers) the financial misconduct of Gumulcak and Royer. The alleged misconduct was an "activity that is or is likely to result in an offence" within the meaning of s. 74. The offence was complete on November 5, 2001. On a correct interpretation of "lawful authority", there should have been a conviction. The appeal should therefore be allowed and a conviction entered. As we are advised that this is a private prosecution, the appellant will have her costs here and in the courts below on a party and party basis. The matter is returned to the trial judge to impose sentence and consider the appellant's claim for further and other relief.

The following are the reasons delivered by

49 DESCHAMPS J.:-- The issue raised by this case is one of pure statutory interpretation. Rather than determining legislative intent, the majority asks whether employee protection can be best achieved by extending the meaning of s. 74 to employees who blow the whistle inside an organization, or by withholding protection from them. In effect, the majority reasons that because the purpose of the legislation is remedial, the plain meaning of the provision should be ignored in order to provide the broadest protection possible. This is, in my view, a circular approach which strays far from the principles of statutory interpretation. I would therefore restate the question and ask what the legislature's intention is, rather than identifying the desired protection and asking whether the legislature should have afforded it to employees.

50 The majority raises an important concern about the peculiar situation created by s. 74 of *The Labour Standards Act*, R.S.S. 1978, c. L-1, as am. S.S. 1994, c. 39, s. 41. It may indeed appear unsatisfactory that an employee who reports alleged wrongdoing to his or her superiors does not receive the same protection as an employee who reports directly to an outside agency. However, I disagree with the majority's broad interpretation of the expression "lawful authority". Amendments are left to the legislature; it is not for the Court to stretch the rules of statutory interpretation.

51 "Lawful authority", as used in s. 74 of the Act, can only be understood to mean a person or entity with the authority to enforce federal and provincial statutes. Extending "lawful authority" to the employer requires reading in words which do not accord with the plain meaning of the provision and go against this Court's interpretative approach.

I. What is "Lawful Authority"?

52 The Court has repeatedly held that "there is only one principle or approach" to statutory interpretation, "namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26).

53 On its face, "lawful authority" refers to a person or entity authorized to exercise public power. This meaning is reinforced in s. 74 by the term's close proximity to "an offence pursuant to an Act or an Act of the Parliament of Canada", which suggests, as Gerwing J.A. of the Court of Appeal noted, that the lawful authority must be capable of "compelling obedience, with respect to the conduct reported as an offence" (para. 20).

54 The majority contends that a narrow reading of "lawful authority" leads to irrational consequences and therefore cannot be supported. It is a well-established principle of statutory interpretation that the legislature does not intend to produce consequences that are absurd, illogical or incoherent (*Rizzo & Rizzo*, at para. 27). With respect, however, requiring employees to report suspected offences to a public authority cannot be viewed as irrational. The legislature may have been motivated by a number of concerns. For example, persons or entities exercising public power, such as the police, are uniquely situated to enforce the law and to deal with allegations of criminal or quasi-criminal activity. As the Court of Queen's Bench judge observed in this case, encouraging employees to report internally could therefore work "against the goal of promoting disclosure to those responsible for enforcing federal and provincial statutes" ((2003), 229 Sask. R. 37, 2003 SKQB 9, para. 39). Whatever the legislature's purpose in creating an external reporting requirement, s. 74 falls far short of "irrationality". Given that there is a rational basis for the requirement of reporting to an entity authorized to exercise public power, the Court must not second-guess the legislature's decisions about how to formulate effective labour policy.

55 A plain reading of "lawful authority" is also in line with analogous uses of the term in other federal and provincial statutes. "Lawful authority" appears repeatedly in the *Criminal Code*, R.S.C. 1985, c. C-46, as well as in multiple provincial statutes as varied as the Alberta *Election Act*, R.S.A. 2000, c. E-1, the Manitoba *Mines and Minerals Act*, S.M. 1991, c. 9, and the Newfoundland and Labrador *Highway Traffic Act*, R.S.N.L. 1990, c. H-3. While these statutes do not specifically define "lawful authority" or, where applicable, its equivalent in French as a police officer or public agency, the term is consistently used in relation to an activity which is an offence unless carried out with authority conferred by statutory or common law. As such, an employer cannot be considered a "lawful authority" under s. 74 (see for example *Criminal Code*, ss. 40, 279, 294 and 369; Alberta, *Election Act*, s. 161; British Columbia, *Forest and Range Practices Act*, S.B.C. 2002, c. 69, s. 58; Manitoba, *The Mines and Minerals Act*, s. 232(1); Newfoundland and Labrador, *Highway Traffic Act*, s. 109; Saskatchewan, *The Federal-Provincial Agreements Act*, R.S.S. 1978, c. F-13, s. 9).

56 In the small number of statutes where "lawful authority" is given an expanded meaning, the intention to do so is clear from the provision. The Saskatchewan legislature has, for example, extended lawful authority beyond its plain meaning in two provisions. Section 3 of the Saskatchewan *Privacy Act*, R.S.S. 1978, c. P-24, provides that proof of surveillance of an individual without the consent of the individual "or some other person who has the lawful authority to give the consent" is *prima facie* evidence of a violation of privacy. Similarly, s. 28.2(1) of the Saskatchewan *Mental Health Services Act*, S.S. 1984-85-86, c. M-13.1, provides that the director of mental health services may order the return of

someone to another province if "an order has been issued by a person with the lawful authority to make that order in that jurisdiction for the person to be given a compulsory psychiatric examination" (see also Newfoundland and Labrador, *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 4; New Brunswick, *Mental Health Act*, R.S.N.B. 1973, c. M-10, s. 1(1) "nearest relative"). By comparison, s. 74 contains no modifying phrase extending "lawful authority" to encompass those who supervise employees, and must, as a result, rest on the plain meaning of the term.

57 The object of the Act is obviously remedial and, to this end, s. 74 affords a remedy to complainants who turn to a public authority for assistance. However, simply finding that the purpose of the Act is remedial is not in itself determinative and we must still ask how far the legislature intended to go. The wording of the statute and its context, in my view, do not indicate that the legislature intended to extend protection to an employee who reports a suspected wrongdoing within an organization. Broadening the definition of "lawful authority" and of its equivalent in French to include employers is therefore inconsistent with the plain meaning of the provision and this Court's approach to statutory interpretation.

58 As a matter of policy, the Saskatchewan legislature has already exercised its legislative mandate to strengthen whistleblower protections by amending s. 74. The amended provision (S.S. 2005, c. 16, s. 8), which came into force on May 27, 2005, expressly broadens the definition of "lawful authority":

> 74(1) No employer shall discharge or threaten to discharge, take any reprisal against or in any manner discriminate against an employee because the employee:
>
> (a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada; or
> (b) has testified or may be called on to testify in an investigation or proceeding pursuant to an Act or an Act of the Parliament of Canada.
>
> (2) Subsection (1) does not apply where the actions of an employee are vexatious.
> (3) In this section, "lawful authority" means:
>
> (a) any police or law enforcement agency with respect to an offence within its power to investigate;
> (b) any person whose duties include the enforcement of federal or provincial law with respect to an offence within his or her power to investigate; or
> (c) any person directly or indirectly responsible for supervising the employee.

I do not refer to the amendment, as my colleague Binnie J. suggests, as argument to infer the legislative intent but only to note that by explicitly expanding the definition of lawful authority to include supervisors, the legislature effectively resolved the dilemma highlighted by the majority without distorting the plain meaning of the term.

II. Application to the Facts of the Case

59 The trial judge found that the decision to terminate Merk was made by the Executive Board of the union on September 21, 2001. Although McMurtry Prov. Ct. J. found that "Merk certainly was terminated because of her pursuit of the issue of Royer's expenses through the union", she concluded that the decision to terminate Merk occurred before Merk threatened to go to the police in her letter of October 19th ([2002] S.J. No. 555 (QL), 2002 SKPC 78, para. 18). The trial judge based this finding on several factors, including the minutes of the Executive Board meeting at which the termination was

authorized, the similarity between the draft termination letter and the letter that was ultimately sent, and Royer's testimony that he did not terminate Merk immediately because she was ill. The trial judge concluded that "[o]nce it appeared to Royer that the union's investigation cleared him, he felt safe to fire her" (para. 18).

60 The Court of Appeal refused to interfere with the trial judge's decision, finding that "[t]here was evidence to support [the factors] she accepted and no reason she could not have rejected the implied threat in the letter" ((2003), 238 Sask. R. 234, 2003 SKCA 103, para. 18). I agree with the Court of Appeal in this regard. While the trial judge could have explored the events following September 21 more fully, an appeal court only has a limited role (*R. v. B. (G.)*, [1990] 2 S.C.R. 57; *R. v. Morin*, [1992] 3 S.C.R. 286). There is no basis for interfering with the trial judge's findings of facts.

III. Conclusion

61 Statutory provisions must be interpreted in their entire context and on their plain and ordinary meaning. Reading in a broader definition of "lawful authority" goes against this Court's interpretative tradition and creates inconsistencies with the use of the term in other legislative contexts. Ultimately it is up to the legislature, as occurred in this case, to extend the scope of the statute through legislative amendment. Having regard to all of these factors, I conclude that the Court of Appeal was correct to decline to intervene. I would have dismissed the appeal.

Solicitors:

Solicitors for the appellant: Balfour Moss, Regina.

Solicitors for the respondent: Plaxton, Gillies, Saskatoon.

* * * * *

Corrigendum, released February 24, 2006

Please note the following changes in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, released November 24, 2005:

In para. 26 of the English version, after the Council Decision dated May 25, 1999, a third document should be cited: "; and articles 22a and 22b of the Staff Regulations of officials of the European Communities (amended by Council Regulation (EC, Euratom) No. 723/2004 dated March 22, 2004.)". The three citations should read: (See article 2 of Commission Decision dated April 28, 1999 (1999/352/EC, ECSC, Euratom) and related Council Decision dated May 25, 1999 (1999/394/EC, Euratom); and articles 22a and 22b of the Staff Regulations of officials of the European Communities (amended by Council Regulation (EC, Euratom) No. 723/2004 dated March 22, 2004.).

cp/e/qw/qlscl/qlhbb

TAB 8

[Indexed as: **Cadillac Fairview Inc., Re**]

Re Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36;

Re plan of compromise or arrangement of
CADILLAC FAIRVIEW INC. and all other companies
set out in Sched. "A" attached hereto;

CADILLAC FAIRVIEW INC. and all those companies
set out in Sched. "A" (applicants)*

Ontario Court of Justice (General Division – Commercial List)
Farley J.

Heard – January 18, 1995.
Judgment – January 19, 1995.

Corporations – Arrangements and compromises – Companies' Creditors Arrangement Act – Application of statute – American company being "company" within meaning of s. 2 of Act provided it has assets or does business in Canada – Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2.

Corporations – Arrangements and compromises – Companies' Creditors Arrangement Act – Jurisdiction of court – Appropriate for Canadian court to include in CCAA order request for aid and recognition of any United States court or administrative body – Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

A U.S. corporation may be a "company" within the meaning of s. 2 of the *Companies' Creditors Arrangement Act* ("CCAA"), provided that it has assets or does business in Canada. The definition in s. 2 can conceivably apply to a U.S. corporation with a bank account in Canada.

It is quite appropriate that a CCAA order may request the aid and recognition of any court, including any court of the United States (federal or state), or any administrative body in the U.S. to assist the Canadian court in carrying out the terms of the order. That is particularly true in view of the recognition of the intertwining of economic relations under NAFTA.

Cases considered

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) – considered.

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (C.A.) – considered.

Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, [1993] 3 W.W.R. 441, 77 B.C.L.R. (2d) 62, 14 C.P.C. (3d) 1, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96 – distinguished.

---

*Schedule "A" was not provided by the court.

Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 107, 29 C.P.C. (3d) 65 (Gen. Div.) – referred to.
Ashmore v. Corp. of Lloyd's, [1992] 2 All E.R. 486 (H.L.) – considered.
Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) – referred to.
Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd., [1971] 4 W.W.R. 542, 21 D.L.R. (3d) 75 (Man. C.A.) – referred to.
Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd., [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) – referred to.
Tridont Health Care Inc., Re (1991), 4 C.B.R. (3d) 290 (Ont. Bktcy.) – considered.
887574 Ontario Inc. v. Pizza Pizza Ltd. (January 1, 1995), Docs. 93-CQ-33541, B85/93, Farley J. (Ont. Gen. Div. [Commercial List]) – referred to.

Statutes considered
Business Corporations Act, R.S.O. 1990, c. B.16 –
s. 132
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 –
s. 2 "company"
Insurance Act, R.S.O. 1990, c. I.8 –
s. 132(1)

Rules considered
Ontario, Rules of Civil Procedure.

MOTION for advice and directions of court with respect to order.

Earl A. Cherniak, Q.C., Robert J. Morris and *Lyndon A.J. Barnes*, for applicants Cadillac Fairview Inc. and Cadillac Fairview Corporation Limited.

W.A. Kelly, Q.C., J.C. Orr and *H.A. Daley*, for JMB/CF Advisors – CFCL, JMB/CF Advisors – CFUS, JMB Realty Corporation and related entities.

David Byers, for mortgage lenders.

Charles F. Scott, for syndicate lenders.

Steven Sharpe, for Goldman, Sachs and for Whitehall.

Peter Roy, for Subordinated Debt Committee.

James Dube, for Canadian Imperial Bank of Commerce.

T.M. Dolan, for Toronto Dominion Bank.

(Doc. B38/94)

1 January 19, 1995. FARLEY J.: – This motion came on at 5:00 p.m. It was for this Court's advice and directions pursuant to para. 35 of my December 23, 1994 Order with respect to the adjudication of claims relating to:

(a) the Advisory Agreement dated November 2, 1987 among Cadillac Fairview Inc., The Cadillac Fairview Corporation Limited and JMB/CF Advisors – CFCL;

(b) the Advisory Agreement dated November 2, 1987, among Cadillac Fairview Inc., Cadillac Fairview U.S. Inc. and JMB/CF Advisors – CFUS; and

(c) any other claims between the Applicants and their related United States companies (as listed in Sched. "D" to the December 23, 1994 Order) and JMB Realty Corporation and its related entities.

2 The grounds for the motion were succinctly put as "(a) the Advisory Agreements and the claims arising in respect thereof are of critical importance to the Applicants' Plan of Compromise; (b) it is essential that such claims be adjudicated quickly in order that such Plan can be formulated and presented to creditors . . .".

3 The Applicants terminated the Advisory Agreements following the grant of the December 23, 1994 Order. Apparently the amounts estimated to be forthcoming if the terminations had not taken place would have been in excess of several hundred million dollars. It is understood that the Applicants take the position that the JMB entities ("JMB") have either breached the Agreements in some way that would entitle the Applicants to terminate them or that the Agreements were void or voidable pursuant to s. 132 of the *Business Corporations Act*, R.S.O. 1990, c. B-16, as amended, ("OBCA") because the provisions of that section were never complied with at any time. Under the second alternative, the Applicants assert that they have a claim for the return of several hundred millions of dollars already paid.

4 This afternoon JMB advised the Applicants that it had initiated a lawsuit against them (and Cadillac Fairview U.S., Inc.) in Chicago:

> 2. In this action, JMB seeks: (a) declarations that its Advisory Agreements are valid and enforceable (Count 1); (b) recovery of the damages suffered as a result of defendants' breaches of the Advisory Agreements (Count II); and (c) an injunction and other relief to prevent defendants from fraudulently transferring funds from the U.S. operations and entities to or for the benefit of Canadian entities or a particular group of creditors of CFI (Counts III-IV)

5 In these reasons I will deal with the situation as if the JMB Chicago action had not been initiated and then I will deal with that aspect secondly. However, I would observe that the return date for the Chicago action is 11:00 a.m. January 19, 1995 (Chicago time – 12 noon Toronto time). It was therefore requested that I make my reasons available as soon as possible on the morning of January 19th.

I also note that the speed with which JMB has acted in the Chicago action confirms that JMB and its legal counsel are able to act very expeditiously; thus there would not appear to be any difficulty in adhering to a tight litigation timetable so long as there was a reasonable (in the circumstances) allowance of time.

6 The Applicants proposed in Sched. C a timetable which would allow a determination of the Advisory Agreements question and claims arising therefrom vis-à-vis the Applicants and JMB in a period of time immediately after March 3, 1995, with the trial of the issues to take place according to the time the Court could clear. The Applicants propose that it be JMB which initiate the claim whereas JMB proposes that it be the Applicants which issue a Statement of Claim. Given the nature of questions to be answered, I see no difference in substance as to which initiates the claim – they are opposite sides of the same coin. Since it seems to be a matter of importance to JMB and the Applicants did not make any objection, I would think that we can proceed with the Applicants issuing a Statement of Claim – but as discussed, infra, in a trial of issue format.

7 Mr. Kelly was given, by my Registrar during the hearing, a copy of the Trial Requirements Memo which has been widely circulated over the last half-year in the Commercial List, which memo merely formalizes the procedures we have adopted previously for Commercial List cases. I would note that we have received no "complaints" or query from the bar with this memo except for the question as to the use of a joint expert (but this is only a recommendation for consideration and I doubt it would come into play in this case; in any event it appears that the bar may be more comfortable with experts for both sides, in which case there should be an early exchange of reports and the opportunity to critique). Allow me to emphasize that this type of litigation as we have in the subject case is what has been termed "real time" litigation (vs. "autopsy" litigation). If it develops into "autopsy" litigation then clearly under those circumstances there will be a diminution in "value" over which all interested parties would be staking their claims in this type of litigation. This is not "hurried up" justice since, if so, this could be justice denied in the same way as justice delayed is. It is, however, justice on a timing to meet the exigencies of the circumstances. Therefore, axiomatically the Court cannot (and will not in the interests of ensuring that there is justice for all concerned) allow the case to be "hijacked" by tactics.

8 I referred Mr. Kelly to *Ashmore v. Corp. of Lloyd's*, [1992] 2 All E.R. 486 (H.L.), a very instructive decision for a multiple number of reasons. I think an excerpt from the headnote is particularly apposite (see p. 486):

> **Held** – the control of proceedings was always a matter for the trial judge and the parties were not entitled as of right to have their case tried to a conclusion in such manner as they thought fit and if necessary after all the evidence had been adduced and could have no legitimate expectation that such a course would be followed. A party's only legitimate expectation was that he would receive justice which could only be achieved by assisting the judge and accepting his rulings. Furthermore the decision or rulings of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by the appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.

I also note Lord Templeman's views at p. 493:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable, without judgment or discrimination. In *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947 at 959, [1991] 2 AC 249 at 280-281 I warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So, too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong.

9 Counsel must represent their clients' interests (and we in society expect – in fact demand – that they do it well). Counsel are also officers of the Court – and thus we must rely on them to be ardent supporters of the justice system – a system (with an independent judiciary and capable counsel) without which we in society would be lacking one of our most fundamental and cherished rights – in fact without the system of justice all of our other rights and legitimate expectations would be in jeopardy. We must jealously and zealously preserve this system. I note too in passing that the system is to be there for everyone – everyone is entitled to their day in Court – but not someone else's day. Thus Court time must be enforceable and

co-operatively used so that others who wish access to justice will have a reasonable and legitimate opportunity to do so. I raise these aspects generally; I do not wish in any way that they be misconstrued as being directed at Mr. Kelly (or his clients). Mr. Kelly and Mr. Cherniak are two very experienced counsel who I have no doubt will provide not only excellent legal advice but also excellent practical advice to their clients – after all, when a client says to counsel "Win this case", he is really saying "Help me solve my problem". These comments are directed at all counsel and parties in these proceedings – and to any other litigants in any cases generally. I would also emphasize that the success which the Commercial List has apparently enjoyed is, to my mind, based on the 3 Cs – co-operation, communication and common sense.

10 In the conclusion re scheduling I would therefore ask counsel to discuss and hopefully agree on a timetable which would allow them to be trial-ready for the week of March 6, 1995. I would ask for this and the issues to be tried to be given me by Friday afternoon, January 20, 1995.

11 I should also note that it appears that JMB's claim would be unsecured. It therefore strikes me that given the secured debts and the "values" present, it would be highly undesirable for JMB not to co-operate in a reorganization since it would be apparent that in a pure bankruptcy it would recover nothing, given its underwater position. I would also observe that, while (and I do not doubt that they will do so) JMB and the Applicants will vigorously advance its interests, one may wish to step back and objectively assess what those interests are. Clearly as well any adviser (including legal advisers) who materially assists a party in reaching a better than trial (and appeal) result with its uncertainties, inability to synergize benefits (win/win brainstorming), costs (legal, financial, other out-of-pocket expenditures, time, loss of opportunity, etc.) and length of time (which may result in the matter becoming worthless or certainly less valuable) should be entitled to a substantial premium in fees (vs. the usually inefficient and counter-productive process of it being a mindless multiplicand of hourly rate times hours docketed). This is not restricted to the multi-million dollar case; it is equally applicable to and probably more important in the small-dollar case. Lastly, I would note that for the purposes of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings it is only necessary to determine the value of JMB's on-going claims; it is not necessary to determine whether JMB must disgorge its past receipts. However, if the parties sit down and truly communicate (i.e., try to understand what the other side is trying to convey), then perhaps the two elements can be dealt with. I am of the view that the parties should do this and I therefore expect that in the case timetable they will schedule meetings of counsel and parties

to that end – as well as adhering to the Commercial List's requirements of continually canvassing the prospects of settlement or resolution. This is so much more productive than the Götterdämmerung scenario.

12 As for the importance of determining the JMB claim, it appears to me that it is of such a potential magnitude that it would have a significant impact upon any class of creditors drawn up in any plan to be formulated under the CCAA regime by the Applicants. It may well give JMB a veto position, especially if current projections hold. However, even if it were valued at less than what is currently projected (but well above zero), then one should not lose sight that it will impact the overall question – that is, in my view, it is not necessary to have a veto for it to loom important since that presupposes that all other unsecured claimants would vote the same way. Clearly, this claim at present is not of the nature of a $1 million dollar claim in a class where there are 99 other claims of other creditors of $1 million dollars each – thereby becoming submerged as to number and value. I think it sophistry to insist that there be a plan proposed in detailed form by the Applicants prior to there being any determination of a claim which is of such importance as the JMB claim.

13 I am further of the view that my analysis (relating to the fallout regarding the Algoma guarantee of its U.S. subsidiary Cannelton) in *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) is correct vis-à-vis the question of JMB having a claim provable in bankruptcy and therefore JMB should receive "creditor" treatment. I do not think that the analysis in *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*, [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) "survives" the change in the legislation. I would note that my *Algoma* decision given orally might be reasonably misconstrued with reference to p. 7 (as it appears JMB has done so). It is clear that a U.S. corporation can be a "company" within the meaning of CCAA – but provided that it has assets or does business in Canada (see definition of "company" in s. 2 which conceivably could allow the extension to a U.S. corporation with a bank account in Canada).

14 With respect to third party aspects I am of the view that while the *Rules of Civil Procedure* allow for third party proceedings and they may be the more efficient way of dealing with litigation which is not so "time critical" as this appears to be, it is not mandatory to incorporate them since they can be dealt with otherwise.

15 In another Algoma case, *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.), the Court said that, regarding the Kelsey-Hayes claim at p. 14:

> The fact that s. 12(2)(iii) provides that the amount of a creditor's claim, if not admitted by the company, "shall be determined by the

> court on summary application by the company or by the creditor," does not compel the court to determine the valuation summarily. The provision simply authorizes the proceedings to be brought summarily, that is, by way of originating notice of motion or application rather than by the lengthier, and more complicated, procedure of an action. In an appropriate case, therefore, there is no reason why the determination cannot be made after a trial either of an issue or an action in the course of which production and discovery would be available. In the absence of such a trial, it cannot be said, in our view, that the valuation of the claim of Kelsey-Hayes against Algoma in the sum of $1 is correct.

It was clear from the Court's example at p. 18 that it was concerned about possible hardship to a worthy claimant – and as well generally that the CCAA plan approved by the stakeholders in Algoma not be disturbed (although the Court appears at p. 13 to have misconstrued my analysis when it said: "Mr. Justice Farley held that he had no authority to permit Kelsey-Hayes to proceed against *Algoma and went on to confirm the valuation of the claim at $1*" (emphasis added)). Firstly, I believe that I indicated I had no authority to permit Kelsey-Hayes to proceed against *Royal Insurance Company* (*not* Algoma) by virtue of the wording of s. 132(1) of the *Insurance Act*, R.S.O. 1990, c. I.18. Secondly, despite my adjourning the first hearing for two reasons – (i) to require Kelsey-Hayes to notify Royal Insurance of the claims proceedings so that its views could be known about a direct claim against it and (ii) to present some evidence (really *any* evidence) about its claim when all that in reality had been advanced by Kelsey-Hayes was that it only wished to proceed against the insurance pot – but in fact, Kelsey-Hayes presented no evidence in support of its claim at the time of the resumed hearing either. Thirdly, I would observe that I do not believe the question of summary proceedings was even canvassed by Kelsey-Hayes let alone objected to at the stage of proceedings before me. However, I would add that the decision of the Court of Appeal is a model of practicality and ingenuity.

16 I do not see the questions relating to the Advisory Agreements as being very difficult to grasp or complex, particularly when one recalls the dictates of Lord Templeman. In my view, the discovery process (examination and production) can be expeditiously dealt with when one recalls the governing feature is *relevance*. The s. 132 OBCA question is a very restricted one which will likely almost exclusively centre upon the corporate records. The question of "fundamental" breach would appear to be aptly named in this situation, since it would seem that the allegations are of such a nature that the ultimate decision would be clearly apparent on one side – or the other. That is, it does not seem to lend itself to the murky middle zone which may get the parties involved in attempting a microscopic examination of the universe. Rather, it appears that if there is a

fundamental breach it should be apparent to anyone with 20-100 eyesight (without the benefit of corrective lenses) without the necessity of such a detailed examination of minutiae. The fact that millions of dollars are at issue is meaningless as to the principles and facts involved; likely it only means that clients will pay their counsel great sums to fight the case.

17 I would be of the view that, with the use of the 3 Cs, the Trial Requirements Memo, and the efficient and effective use of time, the parties will be able to meet the timetable requirements discussed above with trials of issue tentatively scheduled for the week of March 6, 1995. This will allow for such viva voce evidence as may be reasonably necessary. I would therefore ask counsel to formalize the specific issues to be tried and give that to me with their case timetable. I have no doubt that these counsel will ensure that the Court has all the necessary evidence before it to make the appropriate decisions (and the corollary of not having surplus and unneeded evidence).

18 It seems to me that it would be highly desirable for those voting on a plan to have as much certainty as possible as to what would be the implications of such an approved plan (i.e., what claims are accepted as involved in the question of what is proposed to be compromised) and who will have what percentage of the vote in any class. I fully recognize that any trial decision can be appealed but I also note the extreme co-operation and accommodation which the Court of Appeal has shown in dealing with "real time" litigation appeals.

19 I turn to the Chicago action now. It is difficult for one, I believe, to draw any other conclusion, given that JMB was aware of this motion by the Applicants, than that the Chicago proceedings are tactical. It would also appear that what JMB wishes to achieve in the Chicago proceedings is essentially what would be determined in the trials of issue contemplated in these proceedings. I also note that in *Re Tridont Health Care Inc.* (1991), 4 C.B.R. (3d) 290 (Ont. Bktcy.), I commented that the Commercial List procedures then could in essence be the "happy marriage" of a bankruptcy proceeding and an ordinary civil proceeding. Then I am of the view that, notwithstanding the use of "in Canada" in several places in the stay of proceedings paras. 10(a) and (e), one should not overlook that the subsequent wording of these clauses is not so restricted. It would therefore appear to me at first glance that JMB, by its Chicago proceedings, may have – and perhaps inadvertently so – transgressed against the prohibition in paras. 10(a) and (e). Clearly JMB is now in an Ontario Court while at the same time it is suing the Applicants in the Chicago proceedings. I would further note that the December 23, 1994 Order had an appropriate comeback clause (para. 36) which to date JMB has not availed itself of if it felt that the relief granted in the Order were too extensive or otherwise inappropriate.

20 Lastly, I would indicate that para. 39 of that Order requests the aid and recognition of any Court including any Court of the United States (Federal or State) or any administrative body in the United States of America "to act in aid of and to be complementary to this Court in carrying out the terms of this Order". Certainly there is recognition of the intertwining of our economic relations in the NAFTA Treaty entered into between Canada and the United States.

21 As I mentioned in my paper "Transnational Insolvencies and Restructurings: The Need For Cooperation And Co-ordination" (to be given at the International Bar Association, Lagos, Nigeria, February 27-28, 1995) at p. 17:

> . . . would be the North American Free Trade Agreement which includes in its chapter relating to investments Article 1109 concerning transfers:
>
> Article 1109:
>
> 1. Each party shall permit all transfers relating to an investor of an investor of another Party in the Territory of the Party to be made freely and without delay . . .
>
> 4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application if its laws relate to:
>
> (a) bankruptcy, insolvency or the procedures of the rights of creditors; . . .
>
> At this stage the ramifications of such clause have not been considered by any court.

22 As well, we have the mutual advantage of our two legal systems having common roots in the common law and evolving in such ways as to meet the needs of the situations as they arise as opposed to being hide-bound by codes as in other areas of the world where there is not the concept of inherent jurisdiction (see *Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd.* (1971), 21 D.L.R. (3d) 75 (Man. C.A.) at pp. 80-81, *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at pp. 35-38, and my decision *887574 Ontario Inc. v. Pizza Pizza Ltd.* (Ont. Gen. Div. [Commercial List]) released January 1, 1995). Lastly, I would observe that our Courts give full recognition to comity and that this is being expanded to meet the needs of modern day international aspects: see *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.), especially at p. 411 where MacPherson J. stated:

The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing interjurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095 [S.C.R.]:

"Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.*"

(Emphasis added)

Morguard Investments was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule – there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process.

23 I would therefore respectfully request the Chicago Court to take these factors into consideration before advancing further with the proceedings before it. I note that this case is significantly different from *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96 since there is already in existence (and known to JMB) the proceedings here in Toronto and the December 23, 1994 Order including the stay provisions. It may very well be that with more time for reflection (and

further submissions if necessary) Courts on both sides of our border will be able to determine the most appropriate way of proceeding, without the pressure of last minute and unannounced actions.

24 Counsel demonstrated their customary ability in being able to reach conclusions expeditiously and co-operatively in that they agreed that costs in this motion should be in the event and in the amount of $5,000. JMB is to pay the Applicants that amount forthwith.

Order accordingly.

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, C.c-36, as amended

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Court File No. M38188

COURT OF APPEAL FOR ONTARIO

BOOK OF AUTHORITIES

CaleyWray
Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto, Ontario M5H 2M5

Douglas J. Wray (18023C)
Email: wrayd@caleywray.com
Tel: 416-775-4673
Fax: 416-366-3763

Jesse Kugler (52532R)
kuglerj@caleywray.com
Tel : 416-775-4677
Fax: 416-366-3293