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### ARBITRATION, LABOUR BOARDS AND THE COURTS IN THE 1980s: ROMANCE MEETS REALISM

Brian Etherington\*  
Windsor

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*In this article the author analyses recent Supreme Court of Canada jurisprudence on the relationship between courts and labour tribunals on judicial review of administrative action or as fora of original jurisdiction. The author takes issue with suggestions by some labour academics that the court's proclamations of deference to labour tribunals have led to a "unified and restrictive" theory of judicial review of arbitration and labour board decisions. By focusing on departures by the court from its avowed stance of deference in the 1980s, both on judicial review and as a forum of original jurisdiction, the author demonstrates that the notion of a uniform deferential approach to expert labour tribunals was never more than a romantic vision which gained favour because it did "fit" well within the liberal pluralist paradigm for our post World War II collective bargaining regime. The author concludes that there is little evidence that the court has become fully reconciled to the normative vision of our legislatures for labour relations, and that judges continue to intervene when confronted with legislative and administrative choices which are quite contrary to their own values and strongly held ideological preferences.*

*Dans cet article l'auteur analyse les décisions récentes de la Cour suprême du Canada concernant les rapports existant entre les cours de justice et les tribunaux de relations ouvrières dans le domaine de l'examen judiciaire des mesures administratives et en tant que tribunaux de première instance. L'auteur rejette la suggestion faite par certains universitaires spécialistes des questions de relations ouvrières suivant laquelle, les cours de justice ayant proclamé leur*

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\*Brian Etherington, of the Faculty of Law, University of Windsor, Windsor, Ontario.

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*respect des décisions des tribunaux de relations ouvrières, on en est arrivé à une théorie "unifiée et restrictive" de l'examen judiciaire des décisions des commissions de relations ouvrières et des conseils d'arbitrage. En mettant l'accent sur les cas des années 80 où les cours de justice n'ont pas adhéré à leur position de respect des décisions des tribunaux de relations ouvrières, que ce soit dans les cas d'examen judiciaire ou en tant que tribunaux de première instance, l'auteur en déduit que l'idée du respect uniforme de l'expertise des tribunaux de relations ouvrières n'a jamais été qu'une vision romantique qui a gagné du terrain parce qu'elle s'accordait au paradigme libéral pluraliste du régime de convention collective de l'époque d'après-guerre. L'auteur en conclut qu'il est rarement prouvé que les cours de justice ont totalement accepté la vision normative de nos législateurs en matière de relations ouvrières et que les juges continuent à intervenir quand il leur faut choisir entre des approches législatives ou administratives qui s'opposent totalement à leurs propres valeurs et aux préférences idéologiques qui leur tiennent à coeur.*

### Introduction

The Supreme Court of Canada has proclaimed deference to labour arbitration and labour boards several times during the past decade. Foremost is its decision in *C.U.P.E. Local 963 v. New Brunswick Liquor Corporation*,<sup>1</sup> hailed as a watershed marking the end of judicial activism and the beginning of restraint in judicial review of administrative action. Most academics applauded these developments. They had, for many years, severely criticized<sup>2</sup> the judicial activism of the 1960s and 1970s represented by decisions such as *Jarvis v. Associated Medical Services Incorporated*,<sup>3</sup> *Metropolitan Life Insurance Company v. I.U.O.E. Local 796*,<sup>4</sup> and *Port Arthur Shipbuilding Company v. Arthurs*.<sup>5</sup> Judicial intervention was viewed as dysfunctional given the purposes for legislative attempts to transfer jurisdiction over labour law matters to expert tribunals with broad powers to implement the policies of collective bargaining. Yet such judicial activism was to be expected given the clash in values between the purposes of the post-war collective bargaining regime and liberal values and assumptions concerning property and management rights, freedom of contract, and the right to trade which were predominant among the judiciary. Nevertheless, the fact that frequent and *ad hoc* judicial inter-

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<sup>1</sup> [1979] 2 S.C.R. 227, (1979), 97 D.L.R. (2d) 417 (hereafter sometimes referred to as *C.U.P.E.*).

<sup>2</sup> P.C. Weiler, *The Slippery Slope of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970* (1971), 9 O.H.L.J. 1; B. Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Bar Rev. 986; G.W. Adams, *Bell Canada and the Older Worker: Who Will Review the Judges?* (1974), 12 O.H.L.J. 389, and *Grievance Arbitration and Judicial Review in North America* (1971), 9 O.H.L.J. 443.

<sup>3</sup> [1964] S.C.R. 497, (1964), 44 D.L.R. (2d) 407.

<sup>4</sup> [1970] S.C.R. 425, (1970), 11 D.L.R. (3d) 336.

<sup>5</sup> [1969] S.C.R. 85, (1968), 70 D.L.R. (2d) 693.

vention arose from a clash between the normative vision of legislatures and the judiciary merely provided a further basis for academic criticism. Not only did it undermine the professed advantages of inexpensive, informal, sensitive, expert and speedy administrative regulation by specialized tribunals, it was also undemocratic.<sup>6</sup>

Given this background, it is little wonder that labour and administrative law academics viewed the court's 1979 decision in *C.U.P.E.* with favour for its deferential stance, and took to watching the court's subsequent decisions on judicial review very closely. Initially the court gave signs of conversion. Although there were notable exceptions,<sup>7</sup> the Supreme Court released several decisions in the 1979-84 period which appeared to demonstrate strong commitment to the path chosen in *C.U.P.E.* The policy of deference, unless faced with patent unreasonableness on the part of the administrative decision-maker, was applied in judicial review applications concerning labour arbitration decisions, both statutory<sup>8</sup> and consensual,<sup>9</sup> and labour board decisions not protected by a privative clause.<sup>10</sup> By 1983, Professor Langille argued that the court had constructed a "unified and restrictive"<sup>11</sup> theory of judicial review for arbitration and labour board decisions.

Significant developments in the relationship between the courts and labour tribunals have not been limited to decisions concerning the appropriate role for courts on judicial review. On a separate but quite related aspect of the relationship, the Supreme Court has recently held that a strong policy of deference to arbitration is called for where courts and grievance arbitration might be viewed as alternative fora of original jurisdiction.<sup>12</sup> This development was certainly foreseeable given the developments on the judicial review front following *C.U.P.E.* It would make little sense to adopt a policy of deference on judicial review to further industrial relations objectives through regulation by specialized tribunals, and then see those objectives undermined by the courts' exercise of original jurisdiction over labour relations matters.

<sup>6</sup> Laskin, *loc. cit.*, footnote 2, at p. 987.

<sup>7</sup> *Canadian Air Traffic Control Association v. The Queen*, [1982] 1 S.C.R. 696, (1982), 134 D.L.R. (3d) 577.

<sup>8</sup> *Douglas Aircraft Company of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245, (1979), 99 D.L.R. (3d) 385.

<sup>9</sup> *Volvo Canada Ltd. v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 720*, [1980] 1 S.C.R. 178, (1979), 99 D.L.R. (3d) 193.

<sup>10</sup> *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923, (1982), 136 D.L.R. (3d) 1.

<sup>11</sup> B.A. Langille, *Developments in Labour Law: The 1981-82 Term* (1983), 5 *Sup. Ct. L. Rev.* 225.

<sup>12</sup> *St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, (1986), 28 D.L.R. (4th) 1.

These declarations of deference on both fronts (judicial review and original jurisdiction) may have given the appearance that in the 1980s the judiciary had finally become reconciled to the normative vision and regulatory scheme of Canadian legislatures for labour relations. Yet the Supreme Court itself has made it clear, in several recent decisions, that there are limits to its deference to specialized labour tribunals and that in some contexts its deferential stance might disappear altogether. These decisions, the most notorious of which have arisen since 1984,<sup>13</sup> have caused much consternation for their inconsistency with the doctrine and policy espoused in *C.U.P.E.* Yet most commentators have focused primarily on the manner in which the departures are inconsistent with *C.U.P.E.* and post-*C.U.P.E.* developments.<sup>14</sup> There has been little in the way of attempts to draw the apparent departures from deference in areas of judicial review and original jurisdiction together to try to identify what lies behind them and what they may reveal about judicial values and assumptions.

This article focuses on the departures from the avowed judicial stance of deference and denial of jurisdiction. My purposes are threefold. First, I hope to show that the notion of a unified and restrictive theory of deference to labour tribunals on judicial review is a romantic vision of the relationship between courts and labour tribunals which is not really supported by the entire body of Supreme Court decisions since *C.U.P.E.* I will argue that even in the supposed period of consistency from 1979-84 there were significant departures from the avowed stance of restraint which forecast post-1984 developments and made claims of unified and restrictive approaches tenuous at best. My second purpose is to focus on the "departures" to see what they reveal about judicial values and preferences and the role they may play in dictating judicial intervention. If there is anything at all to the idea of a new attitude of judicial restraint in the 1980s then the instances of intervention should be more revealing of deeply held judicial values and preferences. I contend that the departures are largely inexplicable on doctrinal or beneficial labour policy terms but rather reveal that judges continue to intervene when confronted with legislative and administrative choices which are quite contrary to their own basic values and strongly held ideological preferences. Finally, I offer some suggestions as to why labour academics have been so eager

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<sup>13</sup> On the judicial review front, see *National Bank of Canada v. Retail Clerks' Int'l Union*, [1984] 1 S.C.R. 269, (1984), 9 D.L.R. (4th) 10; *Syndicat des employés de production du Québec et l'Acadie v. C.L.R.B.*, [1984] 2 S.C.R. 412, (1984), 14 D.L.R. (4th) 457, (hereafter sometimes referred to as *L'Acadie*); *Gendron v. Municipalité de la Baie-James*, [1986] 1 S.C.R. 401. On original jurisdiction, see *St. Anne Nackawic*, *supra*, footnote 12.

<sup>14</sup> B.A. Langille, *Judicial Review, Judicial Revisionism and Judicial Responsibility* (1986), 17 R.G.D. 169; R. Brown, *Developments in Labour Law: The 1984-85 Term* (1986), 8 Sup. Ct. L. Rev. 297.

to "fit" judicial pronouncements into the romantic vision of a unified and restrictive theory of judicial review. The existence of a unified and restrictive approach is important to the modern liberal pluralist vision of our collective bargaining regime. To admit that judges continue to intervene primarily to preserve industrial peace and protect deeply held traditional liberal values concerning property and management rights, freedom of contract and the right to trade would threaten the romantic vision of liberal pluralists concerning the primary purposes and justifications for our modern collective bargaining regime.

I begin with a discussion of the deferential approach in the area of judicial review and the recent departures from that approach. I then move on to a similar discussion of the movement toward deference in the area of original jurisdiction and the limits to that approach stated by the court. I conclude with a discussion of what we can learn from the departures from deference in both areas.

### I. *Deference on Judicial Review and its Limits*<sup>15</sup>

#### A. *The Romantic Vision*

Academic commentators have generally attempted to analyze the case law in terms of three eras. There is a general consensus<sup>16</sup> that the twenty to thirty year period preceding the *C.U.P.E.* decision represents the bad old days when both arbitration and labour board decisions were commonly quashed merely on the basis that the reviewing court disagreed with the expert tribunal's interpretations of collective agreements or statutory language. A review for simple error of law on the face of the record was available for any tribunal not protected by a privative clause. For those decision-makers protected by privative clauses, the courts acknowledged they were limited to review for jurisdictional error or natural justice concerns, but then developed and utilized numerous manipulative devices to characterize tribunal errors as jurisdictional. The 1979-84 period following the *C.U.P.E.* decision is generally viewed as a period of relatively harmonious jurisprudence when deference carried the day. But the 1984 decision of the court in *Syndicat des employés de production du Québec et l'Acadie v. C.L.R.B.*<sup>17</sup> has been the subject of

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<sup>15</sup> Much of the case law discussed in this section has been discussed in other academic writing and this alleviates the need for detailed discussion of many of the cases. However, some description of case development is necessary to form a background for the analysis which follows. This is particularly the case since I take the view that several commentators have romanticized the extent to which the Supreme Court held to the course indicated in *C.U.P.E.* in the 1979 to 1984 period. In particular, significant departures from a posture of restraint during this period have not received sufficient attention.

<sup>16</sup> See Langille, *loc. cit.*, footnote 14, at pp. 184-191, for a summary of the pre-*C.U.P.E.* era and further references.

<sup>17</sup> *Supra*, footnote 13.

severe criticism and is viewed by some as potentially a watershed decision representing a return to the uncertainty and meddling of pre-*C.U.P.E.* days.<sup>18</sup>

Although there had been some hint of a change in attitude toward judicial review of labour tribunals prior to 1979,<sup>19</sup> the first clear indication of a re-evaluation of the judicial role came in the *C.U.P.E.* decision. *C.U.P.E.* involved an application for judicial review by the respondent employer asserting that the New Brunswick Public Service Labour Relations Board had exceeded its jurisdiction by wrongly interpreting a statutory prohibition against the replacement of striking workers with "any other employee"<sup>20</sup> to apply to managerial staff of the employer. The New Brunswick Court of Appeal held that the Board's ruling on the definition of "employee" for the replacement worker prohibition was an erroneous ruling on a preliminary or collateral question going to jurisdiction and, therefore, not protected by the privative clause.<sup>21</sup> This was a typical gambit in the pre-*C.U.P.E.* era. Nevertheless, in *C.U.P.E.* itself it received stiff criticism from Dickson J. who described the preliminary question doctrine as manipulative and unhelpful and then outlined a new approach to judicial review.<sup>22</sup> The proper inquiry for the court to undertake henceforth was put in the following terms:<sup>23</sup>

<sup>18</sup> P.J.J. Cavalluzzo, *The Rise and Fall of Judicial Deference*, in N. Finkelstein and B.M. Rogers (eds.), *Recent Developments in Administrative Law* (1987), p. 235.

<sup>19</sup> *Service Employees Int'l Union, Local 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, at pp. 388-389, (1973), 41 D.L.R. (3d) 6, at pp. 11-12. See also the dissent of Dickson J. in *Jacmain v. Attorney General of Canada*, [1978] 2 S.C.R. 15, (1977), 81 D.L.R. (3d) 1.

<sup>20</sup> Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, s. 102(3).

<sup>21</sup> *New Brunswick Liquor Corp. v. C.U.P.E., Local 963* (1978), 21 N.B.R. 441, at p. 448 (N.B.C.A.).

<sup>22</sup> The following passages are central to Dickson J.'s call for a new approach (*C.U.P.E.*, *supra*, footnote 1, at pp. 233, 235-236 (S.C.R.), 422, 424 (D.L.R.)):

The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

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

<sup>23</sup> *Ibid.*, at pp. 237 (S.C.R.), 425 (D.L.R.).

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

The reasoning in *C.U.P.E.* appeared to signal disenchantment with the traditional formalistic and definitional devices relied on by the courts to characterize decisions as jurisdictional and call for a new functional approach to determine the appropriate role of courts when reviewing administrative decision-makers. The court had not only advocated restraint but had openly justified its stance on the basis of the relative strengths and weaknesses of courts and specialized labour tribunals, relying upon a rationale which could be applied to most specialized administrative tribunals.<sup>24</sup>

The court moved quickly to develop the doctrine of restraint in two decisions in 1979 and 1980 concerning judicial review of grievance arbitration decisions. In *Volvo Canada Ltd. v. U.A.W. Local 720*<sup>25</sup> the court applied the patently unreasonable standard for the review of a consensual arbitrator's interpretation of provisions of a collective agreement. The court appeared to discard the "very question" doctrine<sup>26</sup> and substitute the *C.U.P.E.* test, even though the arbitrator was not protected by a strong privative clause. The following term, the court applied a similar functional analysis to review of a statutory arbitrator<sup>27</sup> not protected by a strong privative clause. Estey J. recognized that statutory arbitrators not protected by strong privative clauses had traditionally been open to review for error of law, but went on to conclude that the law of review had evolved to the point where even in this context the scope of review should be limited to "matters of law which assume jurisdictional proportions. . .".<sup>28</sup> According to Estey J., such an error had to be one relating to the construction of the agreement of "such magnitude that the interpretation so adopted . . . may not be reasonably borne by the wording of the document. . .".<sup>29</sup> Thus the court appeared to move to a

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<sup>24</sup> See the passages cited, *supra*, footnote 22.

<sup>25</sup> *Supra*, footnote 9.

<sup>26</sup> This doctrine gave the appearance of restricting review of consensual arbitrators, but in fact left them quite unprotected as it allowed review for mere error of law on any issue other than "the very question", and courts were very good at finding that the issue at stake was not "the very question" submitted to the arbitrator. Several examples of this are referred to in the *Volvo* case.

<sup>27</sup> *Douglas Aircraft Company of Canada Ltd. v. McConnell*, *supra*, footnote 8.

<sup>28</sup> *Ibid.*, at pp. 275 (S.C.C.), 406 (D.L.R.). It was necessary to limit the scope of review in this fashion to give recognition to the purpose of statutory arbitration; the speedy, inexpensive and certain settlement of differences without the interruption of work.

<sup>29</sup> *Ibid.*, at pp. 276 (S.C.R.), 406 (D.L.R.).

common restrictive view of the scope of review of arbitrators' decisions, whether they be consensual or statutory.<sup>30</sup>

Finally, in 1983, the court extended the *C.U.P.E.* analysis to consideration of an application for judicial review from a decision of a labour relations board not protected by a privative clause.<sup>31</sup> It refused to question the judgment of the Public Service Employee Relations Board of Alberta concerning which bargaining items were to be excluded from interest arbitration under a provision of the Alberta Public Service Employee Relations Act.<sup>32</sup> Laskin C.J.C. noted that the *C.U.P.E.* approach had been applied to consensual and statutory arbitrations and adopted it for this case, despite the absence of a privative clause to exclude review for error of law.<sup>33</sup>

*C.U.P.E.*,<sup>34</sup> *Volvo*,<sup>35</sup> *Douglas Aircraft*<sup>36</sup> and *Olds College*<sup>37</sup> became the centrepieces for academic commentary suggesting that during the period from *C.U.P.E.* to the court's 1984 decision in *L'Acadie*<sup>38</sup> the court developed a harmonious and consistent jurisprudence on judicial review of labour tribunals.<sup>39</sup> Professor Langille put forward the thesis that the court had developed a "unified and restrictive" theory of judicial review for labour tribunals. The term restrictive simply refers to the attitude of restraint in the absence of patent unreasonableness advocated in *C.U.P.E.* The term unified meant that the court had applied the same standard to

<sup>30</sup> This view was reinforced by the court's 1983 decision in *Shalansky v. Board of Governors of Regina Pasqua Hospital*, [1983] 1 S.C.R. 303, (1983), 145 D.L.R. (3d) 413, wherein Laskin C.J.C. held that the standard of review for consensual arbitration was the reasonable test regardless of whether it concerned a specific question of law submitted to the Board.

<sup>31</sup> *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, *supra*, footnote 10.

<sup>32</sup> S.A. 1977, c. 40, s. 48(2).

<sup>33</sup> *Supra*, footnote 10, at pp. 931 (S.C.R.), 7 (D.L.R.). Laskin C.J.C. stated:

Here the Public Service Employer Relations Board is operating in its home territory, so to speak. . . In such circumstances the proper approach by a reviewing court is not the blunt substitution of judicial opinion for the views of the Board but rather that expressed by Dickson, J. in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation* . . .

<sup>34</sup> *Supra*, footnote 1.

<sup>35</sup> *Volvo Canada Ltd. v. UAW, Local 720*, *supra*, footnote 9.

<sup>36</sup> *Douglas Aircraft Company of Canada Ltd. v. McConnell*, *supra*, footnote 8.

<sup>37</sup> *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, *supra*, footnote 10.

<sup>38</sup> *Syndicat des employés de production du Québec et l'Acadie v. C.L.R.B.*, *supra*, footnote 13.

<sup>39</sup> Other cases commonly referred to in support of this proposition are: *Teamsters Union, Local 938 v. Massicotte*, [1982] 1 S.C.R. 710, (1982), 134 D.L.R. (3d) 385; *Heustis v. The New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768, (1979), 98 D.L.R. (3d) 622.

all types of labour tribunals, both consensual and statutory arbitration and labour boards, whether protected by a privative clause or not.<sup>40</sup> Langille characterized this as a remarkable achievement.<sup>41</sup>

For those who agree with this analysis of the 1979-84 jurisprudence, it is the apparent adoption of a uniform standard of review which makes the *L'Acadie*<sup>42</sup> decision such a monumental surprise and source of consternation. I intend to discuss the *L'Acadie* decision in some detail below, but first I will try to demonstrate that the assertion of a unified and restrictive theory of judicial review was more of a romantic vision of the way things ought to be than an accurate description of the court's pre-*L'Acadie* decisions in the 1980s.

### B. *Romance Meets Reality*

The romanticism of the vision of a uniform theory of review is revealed if one focuses on three pre-*L'Acadie* decisions of the court. In two of the decisions, *Yellow Cab Ltd. v. Alberta Board of Industrial Relations*<sup>43</sup> and *Canadian Air Traffic Control Association v. The Queen*,<sup>44</sup> the court made no pretence of adhering to a C.U.P.E. standard of review. In the third, *National Bank of Canada v. Retail Clerks International Union*<sup>45</sup> the court made reference to standards of patent unreasonableness but failed in the end to apply and adhere faithfully to such a standard.

In *Yellow Cab Ltd.* the court considered a judicial review application from a decision of the Alberta Board of Industrial Relations. The Board had ruled that the Yellow Cab company and its drivers were in an employer-employee relationship within the meaning of the Alberta Labour Act<sup>46</sup> and thus subject to the unfair labour practice provisions of the statute. The court, using some very narrow interpretations of language in the statute, and ignoring any consideration of labour relations policy or purpose, concluded that the Board had erred in law in interpreting the definitions of employer and employee to include the cab company and

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<sup>40</sup> Langille, *loc. cit.*, footnote 14, at pp. 193-194.

<sup>41</sup> *Ibid.*, at p. 196. Langille described these developments as follows:

Over several years and in four distinct cases covering the complete matrix of problems presented to the Court upon judicial review of specialized labour law decision-makers, it had constructed a rational and restrained view of its role. . . My own view is that the new theory was complete with the issuing of the decision in *Olds College* and I so wrote. It is my view that since writing on the basis of cases up to and including *Olds College*, the Supreme Court has affirmed the existence and viability of the new theory in a series of subsequent cases.

<sup>42</sup> *Supra*, footnote 13.

<sup>43</sup> [1980] 2 S.C.R. 761, (1980), 14 D.L.R. (3d) 427.

<sup>44</sup> *Supra*, footnote 7.

<sup>45</sup> *Supra*, footnote 13.

<sup>46</sup> S.A., 1973, c. 33.

its drivers. For my purposes the decision is far more important for what it says and fails to say about the approach of the court in review of labour board decisions. The court rejected the Board's argument that provisions in the enabling statute which granted exclusive authority to the Board to make decisions of this nature and made its decisions final and binding meant that the Board's decisions should be subject to attack only for lack of jurisdiction.<sup>47</sup> Instead the court held that, because the Labour Act allowed for review of labour board decisions by way of *certiorari* or *mandamus*,<sup>48</sup> there was no effective privative clause in the Act to restrict review to errors of jurisdiction. Hence the court had unquestionable power to interfere with the decisions of the Board for mere error of law on the face of the record.<sup>49</sup> The fact that the determination of employer or employee status may lie at the heart of the Board's specialization was considered irrelevant. *C.U.P.E.* and *C.U.P.E.*-like policy considerations concerning the relative merits of the two decision-makers went unmentioned.<sup>50</sup>

The failure of *Yellow Cab Ltd.* to address the institutional and functional concerns of *C.U.P.E.* was not that surprising a result in the circumstances. First, the decision was written by Ritchie J. for a five person panel that did not include Dickson J. or Laskin C.J.C., the two members of the court who were commonly viewed as prime architects and supporters of the *C.U.P.E.* approach. Second, while *C.U.P.E.* did contain some very broad judicial statements supporting a deferential approach on functional grounds, it also contained several passages which suggested its scope could be limited in future decisions. For instance, the court in *C.U.P.E.* focused on the strong privative clause forbidding any prerogative writ or judicial review proceedings in the New Brunswick Public Service Labour Relations Act<sup>51</sup> as justification for a restrictive standard

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<sup>47</sup> The Alberta Labour Act, *ibid.*, s. 50, gave the Board authority to determine who were employers and employees, and s. 51(1) stated that the Board had:

. . . exclusive jurisdiction to exercise the powers conferred upon it. . . and to determine all questions of fact and law. . . and the actions or decisions of the Board thereon is final and conclusive for all purposes.

Section 51(2) stated that:

No decision order, directive, declaration, ruling or proceeding of the Board shall be questioned or reviewed in any court. . .

<sup>48</sup> Section 51(3) allowed for *certiorari* applications "notwithstanding" ss. 51(1) and (2).

<sup>49</sup> *Yellow Cab Ltd. v. Alberta Board of Industrial Relations*, *supra*, footnote 43, at pp. 766-768 (S.C.R.), 430-431 (D.L.R.).

<sup>50</sup> This case is remarkable for its failure to consider precedent. Only one authority is cited—the pre-*C.U.P.E.* case of *Board of Industrial Relations of Alberta v. Steldebauer Chevrolet Oldsmobile Ltd.*, [1969] S.C.R. 137, (1978), 1 D.L.R. (3d) 81—which strongly endorses the power of a reviewing court to quash for mere error of law on the face of the record in the absence of a strong privative clause.

<sup>51</sup> See the passages cited, *supra*, footnote 22.

of review. The *C.U.P.E.* court also failed to reject fully the old cases and their manipulative devices such as the preliminary or collateral matter doctrine, in the end choosing to distinguish several of their disparaged precedents on the basis that there the matters in issue really were preliminary or collateral<sup>52</sup> rather than simply overruling them.

The *Olds College*<sup>53</sup> decision is often viewed as a silent rejection of *Yellow Cab* and clear adoption of the *C.U.P.E.* standard for review, even in the absence of a privative clause. Yet the reports of *Olds College* statement of a unified approach to judicial review may themselves be exaggerated. Immediately after his summary of the application of the *C.U.P.E.* stance of restraint toward arbitrators' decisions, Laskin C.J.C. qualified his summary of the adoption of the *C.U.P.E.* approach with the following remarks concerning the significance of a privative clause:<sup>54</sup>

Needless to say, however the scope of review is limited according to the reach of near-privative clauses, there is no complete ouster of review, even on errors of law unless a privative clause clearly enjoins interference on this ground . . .

This comment is hardly consistent with the assertion that *Olds College* removes the significance of the presence or absence of a privative clause for a restrictive approach to judicial review and is usually omitted from discussion of *Olds College* by proponents of the romantic vision of the post-*C.U.P.E.* period.<sup>55</sup>

Any doubt that *Olds College* is given too much significance as a statement of a unified or uniform approach is dispelled by consideration of a decision issued by the court just three weeks prior to *Olds College*. In *Canadian Air Traffic Control Association v. The Queen*,<sup>56</sup> Martland J., writing for the full court, totally ignored any *C.U.P.E.*-like consider-

<sup>52</sup> In *C.U.P.E.*, *supra*, footnote 1, at pp. 234-235 (S.C.R.), 422-423 (D.L.R.), Dickson J. distinguishes the preliminary question cases of *Jacmain v. Attorney General of Canada*, *supra*, footnote 19; *Parkhill Bedding and Furniture v. International Molders & Foundry Workers Union, Local 174* (1961), 26 D.L.R. (2d) 589 (Man. C.A.); *Jarvis v. Associated Medical Services*, *supra*, footnote 3, in the following manner:

On this view of the matters before the Board it is difficult to conceive how the existence of the prohibition, can be a question "preliminary" to the Board's jurisdiction, in the sense of determining the scope of the Board's capacity to hear and decide the issues before them. Thus, the cases cited . . . do not have any application in the case at bar. . . In each of these cases [*Jacmain*, *Parkhill*, and *Jarvis* ], at the threshold of the inquiry, the Board or the adjudicator had to determine whether the case before them was one of the kind upon which the empowering statute permitted entering an enquiry.

<sup>53</sup> *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, *supra*, footnote 10.

<sup>54</sup> *Ibid.*, at pp. 931 (S.C.R.), 7 (D.L.R.).

<sup>55</sup> See, for example, Langille, *loc. cit.*, footnote 14, at pp. 196-197.

<sup>56</sup> *Supra*, footnote 7. This case was argued on February 2, 1982, and the decision was rendered on May 31, 1982. *Olds College* was argued on February 9, 1982, and the decision was rendered on June 23, 1982.

ation of functional and appropriate relationships between courts and labour boards. The court upheld a Federal Court of Appeal decision to quash a Public Service Staff Relations Board's determination of "designated" employees under section 79 of the Public Service Staff Relations Act.<sup>57</sup> The Act gave the Board authority to determine which bargaining unit employees should be "designated" (and therefore unable to strike) because their "duties consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public".<sup>58</sup>

In effect, the court simply disagreed with the Board's interpretation that section 79 of the Act implicitly gave the Board the responsibility to determine what level of air service would be necessary in the interest of the safety or security of the public in the event of the strike. The court relied on a very narrow literal interpretation of section 79, devoid of consideration of the statutory purposes for providing the option of a meaningful right to strike to public servants, to remove virtually the power to determine designated status from the Board and place it in the hands of the employer. The court rejected arguments by the Canadian Air Traffic Control Association that its interpretation of the Act would significantly reduce the option and effectiveness of any legitimate strike action in the public service.

It is not my objective to comment extensively on the competing interpretations of the legislation and their policy ramifications. That has been done very well elsewhere.<sup>59</sup> The reasonableness of the Board's interpretation is supported by the fact that prior to 1981 the Board had never been called upon to determine "designated" employees because the employer had agreed with the Canadian Air Traffic Control Association and the Board's interpretation of the provision, and had designated only a minimal number of controllers necessary to keep emergency and essential service flights in the air in the event of a strike. This had been the case since the enactment of the Act in 1967. This suggests that the Board's interpretation of section 79, one it had applied in several cases prior to 1981, was at least reasonable and workable, if not "correct". Yet the brief judgment in the case makes no mention of *C.U.P.E.* and its progeny, nor does it indicate awareness of concerns about the relative merits of decision-makers or functional relationships.

This apparent indifference to, or wilful avoidance of, *C.U.P.E.* doctrine and policy is remarkable for several reasons. First, there is a private clause in section 100 of the Public Service Staff Relations Act<sup>60</sup> that

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<sup>57</sup> Public Service Staff Relations Act, R.S.C. 1970, c. 67.

<sup>58</sup> *Ibid.*, s. 79.

<sup>59</sup> Langille, *loc. cit.*, footnote 11.

<sup>60</sup> *Supra*, footnote 57, s. 100.

is similar to the one found in the public service labour statute in *C.U.P.E.* Second, *Canadian Air Traffic Control Association* involved the review of a "separate and distinct" public service labour board, just as *C.U.P.E.* had, and at bottom both cases dealt with essentially the same issue, the level of services that should be maintained during a public sector strike<sup>61</sup> and the role that a public sector labour relations board should play in dealing with that question. These factors were central to Dickson J.'s call for restraint in *C.U.P.E.*<sup>62</sup>

Finally, *Canadian Air Traffic Control Association* was argued and decided at virtually the same time as *Olds College*. It was certainly under deliberation during the same period. The presence of *Canadian Air Traffic Control Association*, decided during the middle of the 1979-84 period and contemporaneously with *Olds College*, severely undermines declarations of a unified and restrictive theory of judicial review.

A far more difficult case, because it parroted the language of deference but failed to adhere to it in substance, is *National Bank of Canada v. Retail Clerks International Union*.<sup>63</sup> The decision has been glossed over or accepted by some commentators as consistent with *C.U.P.E.* because the court referred to the language of *C.U.P.E.* before quashing the remedial order of the Canada Labour Relations Board.<sup>64</sup> However, *National Bank of Canada's* compliance with the *C.U.P.E.* approach is more apparent than real.

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100. (1) Except as provided in this act, every order, award, direction, decision, declaration or ruling of the Board, an arbitrator appointed under section 62 or an adjudicator is final and shall not be questioned or reviewed in any court.

(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Board, an arbitrator appointed under section 62 or an adjudicator in any of it or his proceedings.

<sup>61</sup> Langille, *loc. cit.*, footnote 11, at p. 253.

<sup>62</sup> Dickson J. stated, *supra*, footnote 1, at pp. 236 (S.C.R.), 424 (D.L.R.):

The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar. Not only has the Legislature confided certain decisions to an administrative board, but to a separate and distinct Public Service Labour Relations Board. That Board is given broad powers—broader than those typically vested in a labour board—to supervise and administer the novel system of collective bargaining created by the *Public Service Labour Relations Act*. The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of the Board members is all the more required if the twin purposes of the legislation are to be met. Nowhere is the application of these skills more evident than in the supervision of a lawful strike by public service employees under the Act.

<sup>63</sup> *Supra*, footnote 13.

<sup>64</sup> Langille, *loc. cit.*, footnote 14, at p. 214.

In *National Bank of Canada* the Canada Labour Relations Board had found National Bank responsible for committing unfair labour practices. The National Bank had been created by a merger of two predecessor banks late in 1979. During the summer of 1980 the union won certification for the Maguire Street Branch in Sillery of the new bank. One month later, avowedly as part of a reorganization program, the employer closed the unionized branch and incorporated its operation into a non-unionized branch in the area. The Canada Labour Relations Board held that the integration of the two branches was a sale of a business within the meaning of the successor rights provisions of the Canada Labour Code.<sup>65</sup> It also found that the Bank had been motivated by anti-union animus in closing the unionized branch to eliminate the newly organized union. This was not only "interference with the representation of employees by a trade union" but also constituted "intimidating or threatening employees because of their union activities. . .".<sup>66</sup>

On judicial review the employer attacked the successor employer finding, admitted the unfair labour practice findings, and attacked two parts of the six-part remedial order issued by the Canada Labour Relations Board under the authority of section 189 of the Code. One of the impugned parts required the employer to create a trust fund to be used to further the collective bargaining objectives of the Code. The other was a rather commonly used order requiring the employer to issue a letter to employees admitting past wrongs and promising future compliance with the Code. The Federal Court of Appeal dismissed the Bank's application for judicial review, holding that the Board had not exceeded its jurisdiction in light of the broad remedial discretion given to the Board. The Supreme Court refused to disturb the successor employee finding but quashed the impugned remedial orders.

The reasons of Chouinard J., writing for the entire court,<sup>67</sup> reveal a very different approach to the two separate issues. The first part of the judgment, which deals only with the successor rights finding, represents a model application of the *C.U.P.E.* approach. The court began with a summary of the issue and the Board's findings, quoted extensively from *C.U.P.E.* and its progeny, and concluded with a statement that the Board's finding could not be said to be patently unreasonable.<sup>68</sup> The second part of the reasons, which deals with the propriety of the two impugned

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<sup>65</sup> R.S.C. 1970, c. L-1 (now R.S.C. 1985, c. L-2).

<sup>66</sup> *National Bank of Canada v. Retail Clerks' Int'l Union*, *supra*, footnote 13, at pp. 282 (S.C.R.), 21 (D.L.R.). This was contrary to s. 184(1) and s. 184(3)(a) of the Canada Labour Code, *ibid.*, (1970).

<sup>67</sup> There was also a separate concurring opinion by Beetz J. which was supported by four other judges. See the discussion of the concurring opinion, *infra*.

<sup>68</sup> *National Bank of Canada v. Retail Clerks' Int'l Union*, *supra*, footnote 13, at pp. 276-281 (S.C.R.), 16-19 (D.L.R.).

remedies, is in marked contrast. Instead of applying the test of patent unreasonableness, Chouinard J. talked in terms of authority to grant the remedy ordered and quashed the trust fund remedy because he disagreed with the Board's opinion that this remedy would counter the consequences of the employer's violation of the Code.

This change in approach has been overlooked by most commentators, undoubtedly because the court referred to precedents which urged restraint in branding the exercise of remedial power by labour tribunals as an excess of jurisdiction.<sup>69</sup> However, after citing these cases Chouinard J. concluded that a remedy ordered pursuant to section 189 had to be "authorized by that section" and this required there to be "a relation between the unfair practice, its consequences and the remedy".<sup>70</sup> He then pointed out why, in his opinion, in each of the cases cited there was a relationship between the wrong alleged, its consequences, and the order made to remedy it, but concluded that such a relationship was absent in the case of the trust fund.<sup>71</sup> In short, he characterized the precedents cited as being correct for upholding the tribunal's remedy, not because the tribunal was not patently unreasonable in concluding the remedy would address the consequences of the statutory violation, but because the tribunal was correct in reaching that conclusion. Chouinard J. then applied this standard of correctness to the trust fund remedy. This is a far cry from the *C.U.P.E.*-like approach taken in the first part of the judgment.

Serious application of a patent unreasonableness test should have left the Board's remedial order intact. This was the result in the Federal Court of Appeal and the reasons given by the Canada Labour Relations Board for the remedies chosen appear to justify that result.<sup>72</sup> Unfortunately the Board's reasons were given only cursory treatment by the Supreme Court. A closer look is in order.

The Board began by noting the exceptional and complex nature of the remedial problem it faced.<sup>73</sup> Few employers were prepared to close

<sup>69</sup> *R. v. Canada Labour Relations Board, Ex parte Martin*, [1966] 2 O.R. 684 (Ont. C.A.); *Teamsters Union, Local 938 v. Massicotte*, *supra*, footnote 39; *C.L.R.B. v. Halifax Longshoremen's Association*, [1983] 1 S.C.R. 245, (1983), 144 D.L.R. (3d) 1.

<sup>70</sup> *National Bank of Canada v. Retail Clerks' Int'l Union*, *supra*, footnote 13, at pp. 288 (S.C.R.), 25 (D.L.R.).

<sup>71</sup> *Ibid.*, at pp. 291-292 (S.C.R.), 27-28 (D.L.R.).

<sup>72</sup> *Retail Clerks International Union v. National Bank of Canada* (1981), 42 di 352, [1982] 3 Can. L.R.B.R. 1.

<sup>73</sup> The Board, *ibid.*; at pp. 380 (di), 24 (Can. L.R.B.R.), described the uniqueness of the situation as follows:

Very few employers go so far as to close their business or a part of their business to get rid of a union. Even fewer employers will plan an unfair labour practice with as much Machiavellianism as the employer did in this case; it synchronized its unlawful actions for their commencement during a period of "legal void" and thereby

part of their operation to get rid of a union and to plan this most serious of unfair labour practices with the Machiavellianism used by the bank to give the appearance of technical compliance with the Code. The Board reviewed academic literature and labour board precedents dealing with the complex issues raised when an employer takes such drastic action to avoid collective bargaining.<sup>74</sup> It noted that labour boards have not ordered employers to reopen operations on a closed site but have otherwise used their powers to create innovative remedies to counter the serious psychological and practical effects that can result from such severe employer violations.<sup>75</sup> The Canada Labour Relations Board issued four directives to promote effective communication and access between the union and employees in the workplace. These orders were typical of other cases and were not disputed. However, the Board also ordered the bank to issue a letter to all employees informing them of the Board's findings and its (the bank's) intention to comply with its Code obligations in the future, and ordered the employer to establish a trust fund with contributions of \$48,000 a year for three years, to be administered jointly by the employer and the union to further the objectives set out in Part V of the Code among the bank's employees.

The Canada Labour Relations Board's reasons for thinking the letter and trust fund orders necessary to counteract consequences of the employer's actions are cogent and very sensitive to the realities of the labour relations context it faced.<sup>76</sup> The Board noted the tremendous psychological impact which the unlawful actions of such a powerful national employer were likely to have on all of its employees, both management employees and those eligible to join a union. The powerful nature of the employer combined with its demonstrated willingness to commit the most

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achieved a semblance of a pretext for acting. Even fewer industrial relations advisers or managers specialized in labour relations will approve and develop such a plan. We have a very clever, very intelligent employer here: it did everything possible in an attempt to benefit from a "technically" legal situation in order to intentionally commit the "most unlawful" of violations, namely freeing itself of all the obligations imposed by the Code by dealing a fatal blow to the bargaining unit.

This most exceptional of situations is eminently complex since it obliges the Board to attempt to erase the *fait accompli*. Can the clock be turned back? Are there alternatives? These are all questions the Board asked and attempted to answer . . . the Board consulted jurisprudence that might present similarities to the instant case. Few exist . . .

<sup>74</sup> *Ibid.*, at pp. 380-390 (di), 24-31 (Can. L.R.B.R.).

<sup>75</sup> G. Adams has described the remedial issues raised by such cases as being ones of "striking complexity" where "the availability or lack thereof of a practical yet effective remedy can pose a real dilemma"; G. Adams, *Labour Board Remedies on Entering the 80's*, in *Canadian Industrial Relations and Personnel Development, Collective Bargaining Arbitration* (CCH, 1981), pp. 6513-6532.

<sup>76</sup> The language used by the Board itself graphically illustrates its perception of the seriousness of the case: *supra*, footnote 72, at pp. 392-395 (di), 34-36 (Can. L.R.B.R.).

odious of Code violations would likely have a significant "chilling" effect on all of the bank's employees who might wish to join a union. The participation of a senior vice-president in the violation would make it difficult for management employees to accept their obligation to recognize the fundamental rights to collective bargaining of employees and to believe in the bank's willingness to respect those rights in the future. This required a direct assurance from the chief executive officer as to future employer compliance with the objectives of the Code. But it also required that the employer not be seen by employees to gain financially from its unlawful activity. Otherwise employees might fear employer willingness to repeat Code violations, risking mere "slap-on-the wrist" remedies. The Board calculated a \$48,000 per year saving for the employer from the unlawful closing, based on operating costs for the closed branch and the bank's 1979 plan under which the branch was to remain open for at least five years. This estimate of the life of the closed branch was reduced to three years to allow for possible revision of the master plan. The need to eliminate the chilling effect of the appearance of employer gain from unlawful action, and the dissuasive impact which the bank's actions had likely already had on all of its employees, led to the order for the creation of a trust fund with contributions from the employer equal to its estimated gains from Code violations for three years.

The broad remedial authority granted to the Board, upon finding an unfair labour practice of the nature found in *National Bank*, includes, for the purpose of ensuring fulfilment of the objectives of Part V of the Code, authority:<sup>77</sup>

. . . [to] require an employer or trade union to do or refrain from doing anything that it is equitable to require the employer . . . to do . . . in order to remedy or counteract any consequence [of the statutory violation] that is adverse to the fulfilment of . . . [the objectives of Part V of the Code].

In *National Bank* an expert tribunal, with years of experience dealing with difficulties in organizing employees in the banking sector, made an assessment of the likely consequences among all National Bank employees of this most severe violation of the right to organize and the means needed to counter those consequences effectively. Yet the Supreme Court dismissed the Board's assessment of the circumstances and response to the "strikingly complex" remedial issues with a brief conclusory two paragraphs where it found that a proper relationship between the consequences of the wrong and the remedy was absent. In the court's opinion, the trust fund to promote the objectives of the Code meant the promotion of unionization among other employees and the fact "that a large number of the Bank's other employees . . . [were] not unionized . . . [was] not a consequence of closure of the Maguire Street branch . . .".<sup>78</sup>

<sup>77</sup> Canada Labour Code, *supra*, footnote 65 (1970), as amended, s. 189.

<sup>78</sup> *National Bank of Canada v. Retail Clerks' Int'l Union*, *supra*, footnote 13, at pp. 292 (S.C.R.), 28 (D.L.R.).

This is the extent of Chouinard J.'s reasons for finding no connection between the remedy and the consequences of the employer's wrong. Absent are any considerations of the difficulties that bank employees have faced generally in their attempts to organize or the chilling effect this violation was likely to have on all of the bank's employees in the exercise of their rights in the future. Nor was there mention of the "strikingly complex" remedial issues faced when workplaces are closed down by powerful employers to avoid unionization by relatively powerless employees.

The central point is not whether the Board was correct. What is critical is the court's substitution of its judgment for that of the Board without asking whether it was "patently unreasonable" for the Board to find the required relationship between wrong and remedy. It is difficult to conclude that the Board was patently unreasonable in deciding that the dissuasive effect of the employer's actions on all of its employees would not be overcome if the employer was seen to benefit financially from its unlawful act. It is quite reasonable to assume that employees who see their employer receiving financial gain from an unfair labour practice and mere "slap-on-the wrist" remedial orders from labour boards would fear continued flouting of the law by their employer to prevent their exercise of the right to organize. Whether correct or not, the Board's trust fund order is difficult to characterize as patently unreasonable.

To discover what actually lay behind the quashing of the remedial order, we must look elsewhere. The first clue is Chouinard J.'s disapproval of the trust fund because the requirement that it be used to promote the objectives of the Code among other employees of the bank meant, in his opinion, that it was to be used to promote unionization of those other employees.<sup>79</sup> One can surmise that what bothered the court was not the absence of a connection between the wrong and the remedy or whether it was patently unreasonable to find such a relationship, but the perception that an employer could be forced to contribute to the promotion of unionization and collective bargaining in its work force. Whether or not the promotion of unionization would be a necessary and effective means of counteracting the consequences of the employer's action or whether the terms of the trust fund order would actually require the promotion of unionization<sup>80</sup> may not have been particularly relevant factors in the ultimate decision. Rather, the primary motivation for the

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<sup>79</sup> *Ibid.*

<sup>80</sup> Which of course by its terms, the order for the trust fund did not. The preamble, which states the objectives of Part V of the Code, refers to recognition and support, on the part of Canadian workers, trade unions and employers, for "freedom of association and free collective bargaining as the bases of effective industrial relations. . .". The court seems to have ignored the references to *freedom* which require that employees be left with the choice of whether they wish to associate for the purpose of bargaining collectively. The objectives of the Code are to ensure that this choice can be made in an environment of freedom, without coercion or intimidation from employers or unions.

court's intervention may well have been that the perception of compulsion of employer support for the unionization of its workforce was anathema to deeply ingrained judicial values about freedom of contract, voluntarism, and property and management rights.

This explanation is buttressed by comments found in Beetz J.'s brief concurring opinion.<sup>81</sup> First, Beetz J. concludes, without explanation, that the trust fund remedy was punitive, a position not adopted by Chouinard J.<sup>82</sup> Even more revealing are his comments on the order for an employer letter promising future compliance with the Code. Chouinard J. noted that this was a common labour board remedy but quashed it on the basis that it would be misleading in the absence of the trust fund order because the letter referred to the trust fund. However, Beetz J. expressed outright indignation at the suggestion that a labour board could have the authority to compel an employer to send a letter to its employees that might not express its true feelings about unionization and collective bargaining. Although the letter merely contained the employer's assurance that it would respect the right of its employees to exercise their rights under the Code, Beetz J. misdescribed the letter as expressing employer approval of the Code and its objectives. He then concluded:<sup>83</sup>

This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression.

This is one of the most revealing passages in terms of judicial values and preferences to be found in recent case law. Here the court is dealing with a case which the Canadian Labour Relations Board described as "extraordinary" because "a powerful financial institution adopted, without business reasons, the most drastic and odious method possible to deny its employees the right to bargain . . .".<sup>84</sup> Yet expressions of moral censure for such employer actions are notably absent from either of the Supreme Court judgments. Rather than express indignation at the deliberate and admitted flouting of powerless employees' rights to bargain collectively, the only expression of indignation to be found in the

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<sup>81</sup> The concurring opinion of Beetz J. was supported by Estey, McIntyre, Lamer and Wilson JJ.

<sup>82</sup> It is difficult to characterize the trust fund as punitive. It did not result in a fine or a worsening of the employer's financial position compared to the situation that would have ensued if the employer had complied with the Code. The fund merely took from the employer the financial gain it would receive as a direct consequence of its unlawful action.

<sup>83</sup> *National Bank of Canada v. Retail Clerks' Int'l Union*, *supra*, footnote 13, at pp. 296 (S.C.R.), 31 (D.L.R.).

<sup>84</sup> *Supra*, footnote 72, at pp. 394 (di), 34 (Can. L.R.B.R.).

Supreme Court are the words of Beetz J. demanding greater protection for the powerful bank from the "totalitarian measures" of a trust fund and a compelled communication to its employees promising respect for the exercise of their statutory rights.<sup>85</sup>

## II. 1984 and Beyond:

### *L'Acadie, Jurisdiction Talk and the Language of Limits*

The court's decision in *Syndicat des employés de production du Québec et L'Acadie v. C.L.R.B.*<sup>86</sup> has been severely criticized for its regression to a pre-*C.U.P.E.* form of definitional analysis.<sup>87</sup> While I agree with much of the critical commentary concerning the institutional inappropriateness of what was done in *L'Acadie* and the extent to which it was a rejection of the approach advocated in *C.U.P.E.*, I disagree with suggestions that *L'Acadie* was somehow shocking and surprising given the court's decisions since *C.U.P.E.* For while *L'Acadie* may represent a more open adoption of new/old formalistic devices to justify judicial intervention, there is little difference between *L'Acadie* and *National Bank* in the standards of review actually applied by the court to the remedial orders in the two cases.

*L'Acadie* began as an application by the Canadian Broadcasting Corporation to the Canadian Labour Relations Board for an unlawful strike declaration and cease and desist order against a concerted refusal by production employees to work overtime. There had been a dispute for several years over whether overtime was voluntary or mandatory under the current collective agreement and several predecessor agreements. Several years earlier an arbitrator ruled that overtime was voluntary under the predecessor agreement and that decision was left undisturbed on judicial review by the Quebec Superior Court. However, the judge who

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<sup>85</sup> These sentiments were supported by four others. The judgment of Chouinard J. does not wear the underlying value preferences so openly on its sleeve. However, there are several hints in the judgment that the employer's actions were not viewed as being that serious. His summary of the facts and Board reasons carefully omits numerous references in the Board's judgment to the deliberate nature of the flouting of the employees' rights by a very powerful employer. He also hints that the consequences of the Bank's actions could not be all that severe because six other branches of the bank concluded collective agreements shortly after the unlawful closing. Of course he fails to consider even the possibility that the six agreements may have been fairly weak and entered into by the union as a last resort when confronted with an employer willing to close down branches to avoid collective bargaining. The failure of the court to consider even the possibility that the other agreements might have been weak agreements induced by the bank's unlawful action may reveal a lack of judicial sensitivity to labour relations realities. However, if this is so it merely buttresses the conclusion that the court is ill-suited to second guess the Board's opinion on remedial issues.

<sup>86</sup> *Supra*, footnote 13.

<sup>87</sup> Brown, *loc. cit.*, footnote 14; Cavalluzzo, *op. cit.*, footnote 18; Langille, *loc. cit.*, footnote 14.

heard the case stated that it was an erroneous interpretation by the arbitrator, although it could not be disturbed because it was not a jurisdictional error. Over the next few years there were several skirmishes over the issue, some employees received discipline for refusal to work overtime, and the union filed several grievances. However, neither side had taken the matter to a second arbitration, the union preferring to rest its position on the ruling of the first arbitrator and the employer arguing that the Quebec Superior Court's interpretation of the language was obviously correct. Finally, the union called for a concerted refusal to work overtime during the negotiation of a new collective agreement, but prior to the union reaching a legal strike position. The Canadian Labour Relations Board granted an unlawful strike declaration and a cease and desist order.<sup>88</sup> However, the Board added an ancillary order requiring the employer and union to submit an extant overtime grievance to expedited arbitration.<sup>89</sup>

The union attacked both aspects of the Board's order on judicial review.<sup>90</sup> The main thrust of the union's attack was that the Board committed a jurisdictional error in finding that a refusal to work overtime constituted a strike where the collective agreement allowed for a refusal to work overtime. The union asserted that the determination of whether a strike existed or not was a preliminary or collateral question to the Board's jurisdiction to declare a strike to be unlawful. It was also argued that the Board's finding of a strike in the circumstances was patently unreasonable. Finally, the union claimed that the Canadian Labour Relations Board had exceeded its jurisdiction by ordering a grievance to be referred to expedited arbitration.<sup>91</sup>

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<sup>88</sup> Consistent with most of the prior labour board and court jurisprudence, the Board ruled that a concerted refusal to work overtime designed to pressure management was unlawful even if employees were entitled under the collective agreement to refuse individually to work overtime. Thus it was not necessary for the Board to decide the underlying issue of the correct interpretation of the agreement; see *CBC v. Syndicat des employés de production du Québec*, [1981] 2 Can. L.R.B.R. 52.

<sup>89</sup> The Board made it clear in the second order, obviously designed to resolve the underlying problem that caused the strike, that the outcome of the arbitration would merely settle the meaning of the current language and would not affect the parties' ability to negotiate a new provision on the issue in negotiations for a new agreement.

<sup>90</sup> The privative clause in the Canada Labour Code, *supra*, footnote 65 (1970), s. 122(1), restricted judicial review to failures of natural justice or other jurisdictional errors.

<sup>91</sup> The union's attack on the order for arbitration may seem puzzling at first glance. However, the only decided arbitration on the issue was in its favour. The main thrust of its case before the Board and the courts was that its members could not be ruled to be on an unlawful strike for a refusal to work overtime when the collective agreement gave them the right to refuse such work. The union was in the position of numerous other unions who discovered in the late 1970s and early 1980s that collective agreement language giving the right to refuse to cross picket lines, do struck work, handle "hot" products, or work overtime was totally ineffective to protect them from unlawful strike declarations and cease and desist orders from labour boards or courts.

Both the Federal Court of Appeal<sup>92</sup> and the Supreme Court of Canada left undisturbed the Canada Labour Relations Board's unlawful strike finding but quashed the Board's order for expedited arbitration of the underlying dispute. Beetz J., writing for the court, referred to the admonition of *C.U.P.E.* against the preliminary or collateral question doctrine and applied the deferential standard of patent unreasonableness to the Board's interpretation of the unlawful strike sections of the Code. However, in a ruling that is reminiscent of *National Bank*, the Board's interpretation of its apparently broad remedial powers under the Code was subjected to the far more stringent standard of correctness (or more accurately of agreement with the court's eventual interpretation of those provisions). But *L'Acadie* differs from *National Bank* in that the court attempts to provide justification for its departure from the posture of restraint when considering the remedial order.

The justification offered by the court is devastating to any suggestion that it had embraced a uniform and restrictive approach to judicial review in both privative clause and non-privative clause situations. We are told that privative clauses do make a difference because they mean a board cannot be reviewed for mere error of law but only for jurisdictional error. According to Beetz J. there are three kinds of error of law, apart from typical natural justice considerations, that can amount to jurisdictional errors. The first is an error which amounts to a patently unreasonable interpretation of provisions which boards are mandated to interpret. In Beetz J.'s scheme this is to be viewed as an act done arbitrarily or in bad faith and thus contrary to natural justice.<sup>93</sup> The second is a jurisdictional error made in the interpretation of a provision which confers jurisdiction on the board in that it "describes, lists and limits the powers of an administrative tribunal" or is otherwise "intended to circumscribe the authority of that tribunal. . .".<sup>94</sup> And finally, there are errors of law on preliminary or collateral matters, although Beetz J. seems to accept *C.U.P.E.*'s warning against the use of this concept as a stylistic device for defining matters as jurisdictional concerns.

It is ironic that in a judgment in which Beetz J. apparently rejects one manipulative definitional device to justify intervention under the rubric of jurisdictional error, he openly embraces another. Rather than following a functional approach of judging the reasonableness of a board's interpretation or actions, the court will attempt to divine which statutory provisions "confer jurisdiction by describing, listing and limiting" the powers of an administrative tribunal or are otherwise "intended to circumscribe authority". It will not be difficult for the court to manipulate

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<sup>92</sup> [1982] 1 F.C. 471 (F.C.A.).

<sup>93</sup> *Syndicat des employés de production du Québec et l'Acadie v. C.L.R.B.*, *supra*, footnote 13, at pp. 420 (S.C.R.), 463 (D.L.R.)

<sup>94</sup> *Ibid.*

the concept of "jurisdiction conferring" provisions when the court wishes to substitute its opinion for that of the tribunal. The return to jurisdictional talk has been denigrated for revealing a judicial preference for a formalistic approach.<sup>95</sup> It also focuses judicial efforts on a concept which is not helpful or illuminating in terms of addressing what should be the central issue in judicial review—working out appropriate institutional relationships between courts and labour tribunals on the question of who should interpret and apply our labour law.<sup>96</sup>

The renewed commitment of the court to the formalistic device of jurisdiction talk to justify intervention is just as illusory as the pre-*C.U.P.E.* jurisdictional talk of preliminary or collateral questions, in terms of presenting a distinction which is or should be significant for labour policy making and institutional appropriateness concerns, or ease of practical application. What may have changed after *L'Acadie* is a shift in the focus of the court's concern to the remedial authority of labour tribunals. The concept of jurisdiction conferring provisions appears to attempt to distinguish between provisions which merely "define concepts and empower the labour board to decide issues" and other provisions which "empower the labour board to do certain things".<sup>97</sup>

The thrust of *L'Acadie*, to define statutory provisions granting remedial powers as jurisdictional and thus requiring close scrutiny of their interpretation and application by tribunals, is difficult to justify on collective bargaining policy or institutional appropriateness grounds. There are numerous academic commentaries urging the importance of judicial restraint when reviewing a board's application of its expertise to the fashioning of appropriate remedies under provisions granting the board

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<sup>95</sup> Langille, *loc. cit.* footnote 14, at p. 198 said:

The case invokes a public airing of a judicial proclivity for the most arid, formalistic and mechanical approach to legal issues. The issue is treated as one of logical deduction from basic premises concerning the notion of "jurisdiction" . . . the case ignores the bold thrust of the Court's own recent articulation of the proper approach to judicial review, which was to shift attention from the "logic" of "jurisdiction" to the issue of reasonableness of *interpretation*.

<sup>96</sup> Langille, *ibid.*, at pp. 203-204:

"Jurisdiction" is not only "confusing", it is a meaningless and useless concept to be invoked in the context of working out the appropriate scope of judicial review of labour relations boards. In invoking it the Court commits an error in reasoning. . . The problem in judicial review is not what is the proper interpretation of our labour law (or a collective agreement) but who (what institution) should undertake that act of interpretation—the courts or the specialized decisionmakers created by the legislation? The problem is one of proper institutional relationships. The question can *never* be answered by the Court interpreting the legislation and declaring the Board made a "jurisdictional error"—that simply assumes an answer to the question posed. And it is the wrong answer.

<sup>97</sup> Primarily to issue remedial orders, but also perhaps to make other directive orders during the process of hearing; Langille, *ibid.*, at p. 210.

discretion to attempt to achieve the objectives of the legislative regime.<sup>98</sup> Support for this stance has also come from the bench in several recent Supreme Court of Canada decisions.<sup>99</sup> Both sources suggest that if the distinction between remedial and other provisions should have any significance for the intensity of court scrutiny that significance should be the reverse of what is arrived at in *L'Acadie*.<sup>100</sup> It is especially important when considering the complex task of formulating effective remedies to achieve statutory purposes and yet preserve and improve industrial relations in potentially volatile contexts for courts to defer to the expertise of the tribunals assigned this important task.<sup>101</sup>

These concerns received short shrift in the positivistic reasons of Beetz J. The specific unlawful strike provision and the broader general remedial authority provisions of the Code were interpreted narrowly to confirm the Federal Court of Appeal's opinion that the Code authorized the Board to stop unlawful strikes but did not provide it with the authority or duty to resolve labour disputes which were the cause of the strike.<sup>102</sup> The court then formulated the distinction between jurisdiction conferring provisions and all others and found the remedial provisions to be juris-

<sup>98</sup> G. Adams, *Labour Law Remedies*, in K.P. Swan and K.E. Swinton (eds.), *Studies in Labour Law* (1983), p. 55; Cavalluzzo, *op. cit.*, footnote 18, p. 255; Brown, *loc. cit.*, footnote 14.

<sup>99</sup> *C.L.R.B. v. Halifax Longshoremen's Ass.*, *supra*, footnote 69; *Teamsters Union Local 938 v. Massicotte*, *supra*, footnote 39.

<sup>100</sup> As Laskin C.J.C. stated in *C.L.R.B. v. Halifax Longshoremen's Association*, *ibid.*, at pp. 255-256 (S.C.R.), 8 (D.L.R.):

Even more in fashioning a remedy conferred in such broad terms is the Board's discretion to be respected than when it is challenged as exceeding its jurisdiction to determine whether there has been a breach of a provision of the Code. . .

It is rarely a simple matter to draw a line between a lawful and unlawful exercise of power by a statutory tribunal, however ample its authority, when there are conflicting considerations addressed to the exercise of power. This Court has, over quite a number of years, thought it more consonant with the legislative objectives involved in a case such as this to be more rather than less deferential to the discharge of difficult tasks by statutory tribunals like the Board.

<sup>101</sup> Cavalluzzo, *op. cit.*, footnote 18, p. 225, has criticized the regressive nature of *L'Acadie's* call for closer scrutiny of remedial orders:

Apart from the uncertainty that it [*L'Acadie*] has created, the judgment also does not make any policy sense in respect of the rationale for judicial restraint in relation to the judicial review of decisions of administrative boards. It appears that the rationale for restraint is even more persuasive in respect of remedial orders of labour boards especially. In remedying a situation created by a labour dispute, the Board is applying its experience and expertise to fashion a practical resolution. Surely this is an area where the Court does not have the same kind of expertise and experience. As such, it should defer to the judgment of the labour board, unless the decision is patently unreasonable.

<sup>102</sup> *Syndicat des employés de production du Québec et l'Acadie v. C.L.R.B.*, *supra*, footnote 13, at pp. 429 (S.C.R.), 471-472 (D.L.R.).

diction conferring. The reasonableness or desirability of a Board interpretation of its powers to allow it to deal with underlying causes of unlawful strikes was declared irrelevant.<sup>103</sup> The reversal of the sequence of *C.U.P.E.*-type justification for judicial review policy was complete. Institutional competence and labour relations policy were not to be considered in determining which tribunal decisions should be subjected to what level of scrutiny on judicial review.

Some commentators expressed hope that *L'Acadie* was merely an aberration which would have little impact on future decisions.<sup>104</sup> Certainly there have been post-*L'Acadie* Supreme Court rulings on judicial review of the exercise of arbitrators' remedial discretion in discipline cases which appeared to ignore *L'Acadie's* call for appellate-like scrutiny of jurisdiction conferring provisions and return to consideration of the reasonableness of the arbitrator's actions.<sup>105</sup> However, the court's 1986 decision in *Gendron v. Municipalité de la Baie-James*<sup>106</sup> represents an express affirmation and application of *L'Acadie* in the context of judicial review of a labour tribunal.

In *Gendron* the appellant's dismissal grievance had been dismissed after an arbitration carried out in circumstances indicating extreme negligence and arbitrary behaviour on the part of his union. The union had displayed carelessness in its investigation of the grievance and agreed to an incorrect statement of facts at the hearing without the knowledge or approval of the grievor. In fact, the union had failed to inform the grievor of the date of the arbitration so that he was not present to correct the factual statements and only learned of the arbitration one week after it was completed. On a complaint to the Quebec Labour Court against his union for failure in its duty of fair representation to the grievor, the Labour Court found for the grievor and ordered the matter referred to a new arbitration with the union to bear the costs. The grievor was to have carriage of the grievance. The Quebec Labour Code expressly provided for a reference to arbitration as a remedy for duty of fair representation complaints.<sup>107</sup>

<sup>103</sup> *Ibid.*, at pp. 440-442 (S.C.R.), 478-480 (D.L.R.). Note that Beetz J. openly accepted the Board's argument that its interpretation of its remedial powers could not be described as so erroneous as to be patently unreasonable: *ibid.*, at pp. 440 (S.C.R.), 478 (D.L.R.).

<sup>104</sup> Cavalluzzo, *op. cit.*, footnote 18, p. 225; J.M. Evans, *Developments in Administrative Law: The 1984-85 Term* (1986), 8 Sup. Ct. L. Rev. 1, at p. 41.

<sup>105</sup> *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, (1984), 14 D.L.R. (4th) 289; *Syndicat des professeurs du collège de Levis-Lauzon v. Collège d'enseignement général et professionnel de Levis-Lauzon*, [1985] 1 S.C.R. 596, (1985), 59 N.R. 194; *Fraternité des policiers de la communauté urbaine de Montréal Inc. v. Communauté urbaine de Montréal*, [1985] 2 S.C.R. 74, (1985), 21 D.L.R. (4th) 6.

<sup>106</sup> *Supra*, footnote 13.

<sup>107</sup> Sections 47.2 to 47.6 of the Labour Code, R.S.Q. (1978), c. C-27, provide that on a complaint to the Minister of failure by a union in its duty of fair representation, an

In the Supreme Court, Chouinard J. identified the issue as being whether the Labour Court had the power to allow a grievor whose grievance had already been denied after arbitration, in circumstances of great negligence on the part of the union presenting the grievance, "to submit his claim to an arbitrator appointed by the Minister for a decision in the manner provided for in the Collective Agreement, as in the case of a grievance".<sup>108</sup> Citing *L'Acadie*, the court held that the Labour Court's power to order arbitration on the unfair representation complaint raised a question on a jurisdiction conferring provision, where the administrative tribunal could be given no leeway for error. It was for the court to decide whether the provision properly interpreted allowed for a reference to arbitration as a remedy in the circumstances.<sup>109</sup>

The court interpreted the empowering provisions of the Quebec Labour Code as denying the power to refer a case to arbitration after it had already been arbitrated, even if the hearing had been more illusory than real due to the serious negligence or bad faith of the union. This finding was based both on a restrictive reading of the provisions for reference of the grievance to arbitration and the presence of a typical privative clause for arbitration in the Labour Code providing that awards were without appeal and binding on the parties.

The court's concern that the remedy of a new arbitration would undermine the legislative policy that grievance arbitration be "without appeal and binding on the parties" was overstated. Despite the court's suggestion that recognition of a power to order a second arbitration would somehow create an appeal-like process for arbitration, the Labour Court was proposing something more analogous to a right to natural justice for the grievor under the rubric of the duty of fair representation. Arbitra-

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investigative officer should attempt to settle the dispute, but where a settlement is not reached the employee may apply to the Labour Court to request that it refer it to arbitration. In such cases:

47.5. If the Court considers that the association has violated section 47.2, it may authorize the employee to submit his claim to an arbitrator appointed by the Minister for decision in the manner provided for in the collective agreement, as in the case of a grievance. . . The association shall pay the employee's costs.

The Court may, in addition, make any other order it considers necessary in the circumstances.

47.6 If a claim is referred to an arbitrator pursuant to section 47.5, the employer shall not allege the association's non-observance of the procedure and delays provided for in the collective agreement for the settlement of grievances.

<sup>108</sup> *Gendron v. Municipalité de la Baie-James*, *supra*, footnote 13, at p. 407.

<sup>109</sup> *Ibid.*:

If [the Code allows for a remedy of submission of the original grievance to a new arbitrator] the Labour Court did not exceed its jurisdiction. However, it cannot err in this regard, as its very jurisdiction is involved. If it errs, it is assuming a power it does not possess. This is the rule developed by this Court in *Syndicat des employés de production du Québec et l'Acadie v. Canada Labour Relations Board*. . .

tion awards are typically vulnerable to quashing by a reviewing court for denial of natural justice to one of the parties or for other forms of excess of jurisdiction. The *Gendron* Labour Court decision appeared to be little more than an extension of those principles to allow that expert tribunal to intervene and order a rehearing where serious negligence or bad faith on the part of the union led to the effective denial of fundamental natural justice to the grievor at the hearing of the grievance. The Quebec Labour Court was not alone in taking this approach to remedying problems of unfair representation. Prior to *Gendron*, the Ontario Labour Relations Board had issued a similar order under circumstances of negligence and bad faith representation of an employee on a dismissal grievance,<sup>110</sup> only to have the order quashed on judicial review because of *Gendron* in *Re Windsor Western Hospital Center Inc. and Mordowanec*.<sup>111</sup>

My concern is with the impact of *L'Acadie* on an issue of remedial authority, where two expert boards have made an assessment concerning the consequences of unfair representation by unions and have determined that an appropriate remedial order, which is within their discretion and necessary to counteract the consequences of the unfair labour practices, is to order a new arbitration of the initial grievance. One would hope that the tribunals used their expertise and experience to consider the impact of their order on the labour relations of the parties and the workings of the normal grievance arbitration process as a dispute resolution mechanism. And there is no suggestion in *Gendron* or *Windsor Western Hospital* that the tribunals' interpretation was patently unreasonable. Yet because they were applying so-called "jurisdiction conferring" provisions the court was able to substitute its opinion for that of the experts.

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<sup>110</sup> *Re Ontario Nurses Ass. and Mordowanec v. Windsor Western Hospital*, [1984] O.L.R.B. Nov. 1643. In the grievance meeting that led to her signing a letter of resignation, the grievor had been represented by a union official who was the nursing supervisor responsible for the criticisms the grievor was being confronted with at the meeting. The grievor had tried to object to her representation by the supervisor but the employer had refused to put off the meeting. The arbitration of the grievor's dismissal grievance resulted in a finding of voluntary resignation which meant there was no dismissal for the purposes of the collective agreement. However, the Ontario Labour Relations Board found that the union had failed in its duty of fair representation, the employer had violated the Ontario Labour Relations Act's prohibition against interference with union representation, and the letter of resignation upheld by the arbitrator was the result of this unlawful activity. The Board ordered that the employee's grievance against dismissal be submitted to a new arbitration on the issue of just cause.

<sup>111</sup> (1986), 56 O.R. 297 (Ont. Div. Ct.). On judicial review the Ontario Divisional Court relied on *L'Acadie* to impose a standard of correctness on the Board's exercise of remedial authority, and relied on *Gendron* for the more specific proposition that it was beyond the power of a labour board to order a second arbitration of a grievance which had already been decided by an arbitrator. Those precedents and the presence of the "final and binding" provision for grievance arbitration found in section 44 of the Ontario Labour Relations Act meant that it was beyond the jurisdiction of the Ontario Board to order a new arbitration despite the absence of fair representation and despite the absence of any consideration of the statutory unfair labour practice issues by the original arbitrator.

The underlying judicial motivations for the results arrived at in *Gendron* and *L'Acadie* are not immediately apparent. One might have thought that the judiciary would approve of labour board attempts to make greater use of grievance arbitration as a means of resolving underlying labour relations difficulties, enhancing worker dignity and participation in the decision-making process, and promoting greater industrial peace. The virtues of grievance arbitration as a longstanding and successful alternative dispute resolution device have often been touted by members of the Supreme Court in the past.<sup>112</sup> One might also have expected that in *Gendron*, where an individual employee faced loss of employment, the court would have been eager to see the grievor have a meaningful arbitration to determine if the employer had acted improperly at the outset in dismissing him. Instead, *Gendron* denies the grievor access to the sole remedy that could address fully the consequences of his union's failure in its duty of representation.<sup>113</sup>

Richard Brown, writing in 1986<sup>114</sup> prior to *Gendron*, explored several possible explanations for what he viewed as the aberration of *L'Acadie*. He suggested that it could be based on simple disagreement with the Canada Labour Relations Board's interpretation of its powers, the composition of the bench, or the fact that the court may have very different levels of concern over matters where the focus is primarily individual rights (versus a union or employer) as opposed to matters where the case involved broader labour/management concerns at a more general and collective level. The only perspective which seemed supportable at the time was the latter distinction. He was able to assert (correctly at the time) that the court had upheld the relief initially awarded in every case

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<sup>112</sup> See, for example, the comments of Estey J. on the virtues of grievance arbitration in *Douglas Aircraft Company of Canada Ltd. v. McConnell*, *supra*, footnote 8.

<sup>113</sup> This appears to leave labour boards with the prospect of only awarding remedies which affect the union despite the fact that employer wrongdoing may have been the root cause of the grievor's predicament. Unions could presumably be required to pay significant damages to the grievor for loss of the opportunity for reinstatement. This is especially likely since recent developments in *St. Anne Nackawic*, *supra*, footnote 12, have foreclosed any resort to the courts in wrongful dismissal actions in collective bargaining settings; see the text, *infra*, commencing at footnote 122. Of course this approach is consistent with the critical legal studies criticisms of Klare and others that the grievance arbitration regime, combined with the principles of exclusive representation and judicial conceptions of the duty of fair representation, has co-opted unions as junior management in the employer's enterprise by compelling them to play a major role in the discipline and control of the employees they represent. The *Gendron* decision heightens the management function of unions by placing a heavier responsibility and potential liability on them for errors in carrying out their representative role. See K.E. Klare, *Critical Theory and Labor Relations Law*, in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (1982), p. 65.

<sup>114</sup> Brown, *loc. cit.*, footnote 14, at p. 313.

of individual employees pitted against their employer or their union.<sup>115</sup> However, in both *L'Acadie* and *National Bank*, where broader labour/management interests and power balance considerations were at stake, the court had forsaken *C.U.P.E.* and intervened.

The subsequent appearance of *Gendron* destroys the integrity of Brown's paradigm as it involved a claim by an individual against his union. Nevertheless, the basic thrust of Brown's dichotomy, that the court was somehow spurred to action where there were broader labour/management interests at stake in the exercise of remedial authority, is an idea worthy of development. The court appears vitally concerned with the authority of labour boards (more so than the authority of arbitrators) to give remedies that could seriously affect the labour/management relationship and the interests of the parties and, perhaps even more importantly, the distribution of power and resources between the two parties. And it is precisely because the exercise of remedial authority by labour boards provides the greater potential for significant impact upon the relationship in those terms that it has come to be singled out in this post-*C.U.P.E.* era for closer scrutiny.<sup>116</sup>

This basic general concern, one that I suggest is founded on underlying judicial values and assumptions concerning property rights, freedom of contract, and voluntariness and self-government in the employment relationship, is arguably present in all the major departures from judicial restraint noted in this article. In *Yellow Cab Ltd. v. Alberta*

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<sup>115</sup> See, for example, *Heustis v. The New Brunswick Electric Power Commission*, *supra*, footnote 39; *Teamsters Union, Local 938 v. Massicotte*, *supra*, footnote 39; *Blanchard v. Control Data Canada Ltd.*, *supra*, footnote 105; *Fraternité des policiers de la Communauté urbaine de Montréal v. Communauté urbaine de Montréal*, *supra*, footnote 105; *C.L.R.B. v. Halifax Longshoremen's Ass.*, *supra*, footnote 69. For a more recent example, see *Telecommunications Workers Union v. B.C. Tel. Co.*, [1988] 2 S.C.R. 564, [1989] 1 W.W.R. 330.

<sup>116</sup> Workers and unions are far more dependent on the remedial powers of administrative decision-makers for the protection and promotion of their interests than employers. Because of the capitalist infrastructure of the collective bargaining regime, employers retain ownership and control of capital and the means of production. This, combined with the great extent to which management rights or prerogatives have been retained and institutionalized within the regime, means that employers are able to further their interests and obtain redress largely through "self-help". Employers act, managing, shifting, withholding, and sometimes withdrawing resources. Employees are left to resort to administrative processes and their after-the-fact remedies for the protection of their interests, often after lengthy delays during which the employees are expected to comply with employer directives so that production can continue. The employer's only significant need to resort to regulatory processes arises in the case of work stoppages or other worker interferences with production, and they are only compelled to resort to administrative decision-makers for damages. *St. Anne Nackawic*, *supra*, footnote 12, expressly preserves the employer's ability to resort to the courts to control and order an end to worker action which interferes with production; see the text, *infra*, commencing at footnote 122.

*Board of Industrial Relations*<sup>117</sup> the very existence of a collective bargaining relationship is at stake with the interpretation of who will be considered employees for the purposes of the Act. In *Canadian Air Traffic Control Association v. The Queen*<sup>118</sup> the very existence of a meaningful right to bargain collectively, with the right to strike, was at issue with the Public Service Staff Relations Board's exercise of its statutory mandate to designate essential employees. In *National Bank* it was apparent to the court that if it did not take an active role to stop it, the Canada Labour Relations Board might use its broad remedial powers in a creative and effective fashion to fulfil the mandate of the Canada Labour Code, even if that meant giving remedies that might actually promote organization and collective bargaining and allow employer resources to be commandeered for those purposes, rather than simply issuing declaratory orders and allowing employers to benefit from their unlawful activity. What seemed to trouble the Supreme Court judges most in *National Bank* was the potential threat to the employer's property rights, freedom of contract, and voluntarism presented by the trust fund for promotion of Code objectives.

The decisions in *National Bank*, *L'Acadie* and *Gendron* can, perhaps, all be characterized as reflections of judicial reverence for traditional liberal values of freedom of contract and voluntarism of the parties. Legislative collective bargaining regimes were accepted and justified by liberal pluralists on the basis that, while they regulated the employment relationship to a degree, they preserved the fundamental values of freedom of contract and voluntarism because they merely set up new procedures for the relationship, but left it to the parties to determine the substantive terms of the relationship through the use of their bargaining power. And it was argued that the voluntarism of the individual workers could in fact be enhanced by collective bargaining which would allow employees to increase their bargaining power. The new regime would also provide an opportunity for negotiation or grievance procedures which would enhance employees' individual dignity and right to participate meaningfully in the decision-making process in the workplace.<sup>119</sup> Thus the apparent sacrifice to individual freedom of contract and voluntarism was to be tolerated by the modern liberal pluralist, and perhaps even approved, because the regime adopted would preserve to a great extent, albeit in a more collective sense, freedom of contract and voluntarism. Although interference with freedom of contract and voluntarism is hinted

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<sup>117</sup> *Supra*, footnote 43.

<sup>118</sup> *Supra*, footnote 7.

<sup>119</sup> For an excellent discussion of liberal justifications for the development of current collective bargaining regimes, see H.J. Glasbeek, *Voluntarism, Liberalism and Grievance Arbitration: Holy Grail, Romance and Real Life*, in G. England (ed.), *Essays in Labour Relations Law* (1986), p. 57.

at in *National Bank*, in *L'Acadie*<sup>120</sup> Beetz J. is explicit about such interference if the Canada Labour Relations Board is allowed to order expedited arbitration as a remedy:

The power claimed by the Board by implication in paragraph 4 of its order is of a quite exceptional nature. It is the power to intervene in the grievance procedure *ex officio* and to direct the parties to complete it by conducting it along certain lines. . . In the case at bar, the parties agreed on a procedure for the settlement of grievances in article 57 of their collective agreement . . . subject to the duty of fair representation imposed on the union by s. 136.1, the parties remain free to present or not present a grievance in each particular case. If one or other of them does in fact present a grievance, the agreement expressly provides that they may agree to hold it pending or to settle it. Finally, I do not see what in principle can prevent a party from withdrawing or discontinuing a grievance. By paragraph 4 of its order, the Board is interfering in the grievance procedure, depriving the parties of the relative freedom left to them under the collective agreement, and *pro tanto* unlawfully varying that agreement.

*Gendron* also reflects concern for the freedom of contract, voluntarism and property rights of the *parties* to the collective agreement, and more particularly those of the employer. The court once again made reference to interference with the grievance and arbitration process agreed upon in the collective agreement and the threat of undermining the contractual process with an order for a second arbitration. Chouinard J. also expressed discomfort with the suggestion that the employer could be deprived of the benefit of its contractual bargain by being compelled to engage in the arbitration process for a second time because of the union's misconduct.<sup>121</sup> Finality and benefit of bargain between the parties, in the interests of promoting industrial peace, overrode any concern for employee dignity or participation rights.

The suggestions in these cases that the court is concerned with preserving some notion of freedom of contract and voluntarism are informative in terms of insights into motivation for judicial intervention. When coupled with the court's apparent focus on remedial orders indicated by *National Bank*, *L'Acadie* and *Gendron*, they invite the inference that traditional judicial values and assumptions concerning the nature of the management/labour relationship, freedom of contract, and voluntarism, played a major role in motivating departures from deference in the 1980s.

### III. Deference as a Forum of Original Jurisdiction and its Limits: *St. Anne Nackawic*

If *C.U.P.E.* is viewed as evidencing a belated acceptance of the labour relations regime adopted by the legislatures at the end of World War II, the Supreme Court of Canada's 1986 decision in *St. Anne Nackawic*

<sup>120</sup> *Syndicat des employés de production du Québec et l'Acadie v. C.L.R.B.*, *supra*, footnote 13, at pp. 433 (S.C.R.), 473 (D.L.R.).

<sup>121</sup> *Gendron v. Municipalité de la Baie-James*, *supra*, footnote 13, at pp. 409-411, 413-414.

*Pulp and Paper Company v. Canadian Paper Workers Union, Local 219*,<sup>122</sup> can be viewed as a complementary development in the area of original jurisdiction over labour relations disputes. The case involved an employer's assertion that the courts had jurisdiction to hear a claim for damages for an unlawful strike in violation of statutory and collective agreement bans on mid-contract work stoppages. Yet in answering this question the court went out of its way to deal with other outstanding issues concerning the jurisdiction of courts to hear and grant remedies in disputes representing potential overlap in court and arbitral jurisdiction. On the central issue of original jurisdiction to award damages, the court adopted a stance of overt judicial deference to grievance arbitration. For this, the decision has been described as another manifestation of judicial reconciliation with our modern collective bargaining regime.<sup>123</sup> However, the court also insisted on a strong reservation of court jurisdiction to grant injunctive relief against unlawful strikes.

*St. Anne Nackawic* arose from a common form of mid-contract sympathy strike. The defendant union represented a bargaining unit of millworkers who honoured the picket line of their employer's office workers' union. The office bargaining unit was on lawful strike, but the millworkers honoured the picket line despite the peace obligation found in their collective agreement and the New Brunswick Industrial Relations Act.<sup>124</sup> The employer moved quickly for an interlocutory injunction but the millworkers defied the injunction. They returned to work only after contempt proceedings and went on strike again for a short time after returning to work. Eighteen days of production time were lost in all due to the millworkers' walkouts before the office workers settled. The company later pursued the court action against the millworkers' union, claiming over \$670,000 in damages against it for breach of its statutory and collective agreement obligations. The union objected to the court taking jurisdiction over the damages issue, arguing that grievance arbitration was the appropriate and mandated forum for resolution of the alleged violation of the collective agreement. However, the union did not dispute the court's jurisdiction to grant the initial interlocutory injunction.

There is stark contrast between the first part of the judgment which deals with court jurisdiction to award damages and the second part dealing with jurisdiction to grant interlocutory injunctions against mid-contract

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<sup>122</sup> *Supra*, footnote 12.

<sup>123</sup> A. Sims, Case Comment on *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paperworkers Union, Local 219* (1987), 25 Alta. L. Rev. 296, has referred to the decision as "an important step in the Court's recognition of the overall scheme of our labour relations system. Since this scheme has been with us since the end of the Second World War, this belated recognition is most welcome".

<sup>124</sup> R.S.N.B. 1973, c. I-4, s. 91(1).

strikes. In the first part, Estey J. carefully developed a rationale for a strong doctrine of deference to arbitration to resolve disputes arising in the context of a collective agreement. He disparaged and apparently rejected precedents which suggested that employers and employees could continue to resort to the courts despite the presence of a collective agreement if they could characterize the dispute as raising only a question of enforcement of a collective agreement, and not requiring any interpretation of the agreement,<sup>125</sup> or they could characterize the claim as arising independently under the common law without relying on the collective agreement.<sup>126</sup> Instead the court cited with approval the famous declaration by Laskin C.J. C. in *McGavin Toastmaster v. Ainscough*<sup>127</sup> that the post-war collective bargaining regime had fundamentally altered the juridical nature of the employment relationship and had rendered the common law of individual employment contracts largely irrelevant. Recent examples of judicial deference to the arbitral process, even where the employee may have been denied access to arbitration by a union,<sup>128</sup> were heralded as evidence of the correct approach.<sup>129</sup>

Estey J. also suggested that the New Brunswick Industrial Relations Act provision requiring final and binding settlement of disputes under the agreement by arbitration or otherwise should be viewed as requiring recourse to arbitration as the exclusive means of dealing with disputes in the collective agreement context.<sup>130</sup> Finally, Estey J. sang the praises of arbitration as a dispute resolution mechanism for labour disputes and an integral component of our collective bargaining regime, and warned of the potential undermining of that process if the courts should act as an alternative forum for such disputes. The new watch-

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<sup>125</sup> *Hamilton Street Railway Co. v. Northcott*, [1967] S.C.R. 3, (1966), 58 D.L.R. (2d) 708.

<sup>126</sup> *Woods v. Miramichi Hospital* (1966), 59 D.L.R. (2d) 290 (N.B.C.A.).

<sup>127</sup> [1976] 1 S.C.R. 718, at pp. 724-727, (1975), 54 D.L.R. (3d) 1, at pp. 5-7.

<sup>128</sup> *General Motors of Canada v. Brunet*, [1977] 2 S.C.R. 537.

<sup>129</sup> Near the close of the first part of his reasons in *St. Anne Nackawic*, *supra*, footnote 12, at pp. 720 (S.C.R.), 13 (D.L.R.), Estey J. provides the following summary of the general consensus of recent cases:

The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement. Nor can courts properly decide matters which might have arisen under the common law of master and servant in the absence of a collective bargaining regime if the agreement by which the parties to the action are bound makes provision for the matters in issue, whether or not it explicitly provides a procedure and forum for enforcement.

The court goes on to conclude that the old exceptions to the rule of exclusive jurisdiction for arbitration are virtually non-existent today.

<sup>130</sup> *Ibid.*, at pp. 710, 719 (S.C.R.), 5-6, 12-14 (D.L.R.). Note that s. 55 of the New Brunswick Act, *supra*, footnote 124, is fairly typical of Canadian private sector provisions requiring final and binding settlement by arbitration or otherwise.

word, to ensure the success of the liberal pluralist experiment we call collective bargaining, was deference, just as it was in *C.U.P.E.*:<sup>131</sup>

What is left is an attitude of judicial deference to the arbitration process. . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of the collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.

The reasons on jurisdiction to award damages create the strong impression that there are no good reasons for the courts to retain original jurisdiction over disputes in the collective agreement context and there are very good reasons for the courts to recognize a legislative choice to have the relationship regulated by expert labour tribunals. The tone is that of a court willing to recognize the wisdom of this legislative choice without looking too closely to the language of statutory arbitration provisions for words indicating a clear intention to exclude the courts as alternate fora. However, the court's homage to deference disappeared rapidly when it considered the implications of its stance for the longstanding and often used jurisdiction of courts to issue interlocutory injunctive relief against illegal strike activity.<sup>132</sup>

An injunction is merely a different form of remedy to enforce collective agreement and statutory obligations and if one remedy is not available in the courts then logically the other should be unavailable as well. But this would conflict with what Estey J. identified as a "rather straightforward pattern" in "the history of labour law in our country since World War II. . .".<sup>133</sup> According to Estey J. the pattern was one whereby:<sup>134</sup>

. . . the parties would take recourse to the superior courts by an action for injunction, declaration and damages in which an interlocutory or interim injunction was sought with a view to driving the other party back to the labour relations process prescribed by statute. Rarely would the action proceed beyond the interlocutory stage.

<sup>131</sup> *Ibid.*, at pp. 721 (S.C.R.), 13-14 (D.L.R.).

<sup>132</sup> The issue of the jurisdiction of the courts to order injunctions against mid-contract work stoppages apparently was not raised by the parties. However, the extent to which Estey J. chose to address this issue indicates the level of his concern over the implications of his ruling on the damages issue for the ability of courts to act as a forum of original jurisdiction for injunctive relief against work stoppages.

<sup>133</sup> *St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, *supra*, footnote 12, at pp. 722 (S.C.R.), 14 (D.L.R.).

<sup>134</sup> *Ibid.*, at pp. 722 (S.C.R.), 14-15 (D.L.R.).

Although Estey J. referred to a history of "parties" recourse to the courts for injunctions, recourse to injunctions was generally an option for employers and not a realistic option for unions or workers.<sup>135</sup> Estey J. acknowledged at several points in the judgment that he was concerned about the capacity of employers to stop mid-contract strike activity as quickly as possible through the use of the courts.<sup>136</sup>

Estey J. offered several unsatisfying explanations for his exemption for injunctive jurisdiction from his call for deference to grievance arbitration. First, he suggested that although the courts historically have based injunctions against work stoppages on both the collective agreement and statutory violations, it is the breach of the statute that is most significant and justifies judicial intervention.<sup>137</sup> Injunctive jurisdiction is important because it allows courts to "enforce the general law as embodied in the statute. . .".<sup>138</sup> The difficulty with this argument is that it could also be used to justify court jurisdiction to award damages for the breach of statute, a jurisdiction the court rejects strongly in the first part of the judgment.

Estey J. also turned to technical parsing of the statutory language to argue for retention of court jurisdiction to grant injunctive relief because the "statutory context may be viewed as ambiguous on this issue". To further this interpretation argument, he offered arguments reminiscent of judicial review reasoning from the bad old days when intervention was common. The legislation failed to enact a privative clause "explicitly ousting the jurisdiction of the courts to deal with breaches of collective agreements". The absence of such an explicit legislative ouster was "perhaps revealing of the presence of a legislative intent to continue some role for the traditional courts in the labour relations patterns".<sup>139</sup> Estey J. also focused on the words in the statute requiring the collective agreement to provide for "final and binding settlement by arbitration or otherwise, without stoppage of work" to buttress his contention that the legislature had not clearly excluded court jurisdiction to deal with injunctions against unlawful strikes, and therefore such jurisdiction must remain. This argument may have had some cogency if the court had not made the contrary argument based on the same statutory provisions in holding

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<sup>135</sup> See, generally, S.A. Tacon, *Tort Liability in a Collective Bargaining Regime* (1980).

<sup>136</sup> See, for example, his reference to concern for the "longsettled jurisdiction of the courts to issue injunctions restraining illegal strike activity during the currency of a collective agreement"; *St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, *supra*, footnote 12, at pp. 721 (S.C.R.), 14 (D.L.R.).

<sup>137</sup> *Ibid.*, at pp. 726 (S.C.R.), 18 (D.L.R.).

<sup>138</sup> *Ibid.*, at pp. 727 (S.C.R.), 18 (D.L.R.).

<sup>139</sup> *Ibid.*, at pp. 723 (S.C.R.), 15 (D.L.R.).

that the courts did not retain jurisdiction to grant damages for illegal strikes.<sup>140</sup>

But this was mere window dressing. The real motivation for the strong defence of traditional injunctive jurisdiction clearly lay elsewhere. As Brown and Kilcoyne have suggested, the real motivation was the "god of industrial peace".<sup>141</sup> Estey J. and his fellow judges did not suffer from the illusions held by some modern liberal labour theorists as to the fundamental purposes and values which lay behind the enactment of our collective bargaining regime, liberal theorists who suggest that the prime motivation for the scheme was the enhancement of individual dignity and the right of workers to participate meaningfully in workplace decision-making.<sup>142</sup> For Estey J. the labour relations regime was not adopted to promote an equal partnership between labour and management.<sup>143</sup> For the court, "labour legislation was enacted largely to regulate industrial relations with an eye to preserving industrial peace", and the peace obligation included in the statutory requirement for settlement of differences without stoppage of work was the "cornerstone in this legislative edifice. . .".<sup>144</sup> Of utmost importance in the judicial scheme of values and assumptions about our modern labour relations schemes are the preservation of industrial peace, the avoidance of expensive interruptions in the flow of production and interference with the right to trade, and the channeling of collective confrontation into narrowly prescribed processes and time periods. As Estey J. stated:<sup>145</sup>

The avoidance of the disruptive effect of cessation of production of goods and services except in well defined circumstances is one of the basic design features of labour relations legislation. Another feature of labour legislation is the provision for rapid restoration of normal bargaining relations. Long or repeated abstentions of the parties from participation in the remedial process of collective bargaining and grievance processing defeats the program.

Because other available forms of dispute resolution may not be able to bring an end to expensive work stoppages as quickly as courts, the overall purpose of the labour relations scheme required that "ready access" to the courts for interlocutory injunctions be preserved.<sup>146</sup>

<sup>140</sup> This point has also been noted by Sims, *loc. cit.*, footnote 123, at p. 300.

<sup>141</sup> R. Brown and J. Kilcoyne, *Developments in Employment Law: The 1985-86 Term* (1987), 9 Sup. Ct. L. Rev. 325, at p. 352.

<sup>142</sup> D. Beatty, *The Role of the Arbitrator: A Liberal Version* (1984), 34 U.T.L.J. 136.

<sup>143</sup> B.A. Langille, *Equal Partnership in Canadian Labour Law* (1983), 21 O.H.L.J. 496.

<sup>144</sup> *St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, *supra*, footnote 12, at pp. 724 (S.C.R.), 16 (D.L.R.).

<sup>145</sup> *Ibid.*, at pp. 725 (S.C.R.), 17 (D.L.R.).

<sup>146</sup> *Ibid.* Estey J. also suggests that he is merely trying to preserve the functionality of the grievance arbitration scheme by preserving court jurisdiction to grant injunctions

Estey J. has been criticized for his failure to consider arguments for deference to labour tribunals in the regulation of illegal work stoppages in the first instance.<sup>147</sup> Several academics, including Arthurs, Weiler and Brown, have severely criticized the shortcomings of interlocutory court proceedings as a means of dealing with mid-contract work stoppages.<sup>148</sup> They have condemned injunctive processes for their one-sidedness in terms of the factual record thrust before the judge, a judge who is not only largely ignorant of the context of the dispute, but also inexperienced and often insensitive to industrial relations policy concerns and the underlying interests at stake.<sup>149</sup> In contrast, labour tribunal processes commonly employ investigative officers and mediation to get at underlying causes of conflict and attempt to resolve the dispute in a fashion which considers the interests of both parties and does not merely address the symptoms of the problem. The dispute can often be resolved without resort to adjudication and in cases where adjudication proves necessary, the expert board should be able to deal with underlying causes and develop a coherent policy which is "responsive to all the interests at stake".<sup>150</sup>

But these criticisms assume that the court would place significant value on ensuring that mid-contract or illegal strikes were resolved in a manner that dealt with more than the symptoms of labour relations disputes and attempted to deal with causes to protect the interests of both parties. They also seem to assume that the courts place a high value on promoting a method of resolving disputes which enhances the dignity and participatory rights of individual workers. But this simply has not been demonstrated in the courts' use of their traditional jurisdiction to issue interlocutory injunctions to control collective action by workers. Criticisms of the willingness of the judiciary to grant interim and interlocutory injunctions to stop secondary picketing or illegal strikes with-

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which force the parties back to the mechanisms prescribed by the collective agreement and statute for dispute resolution. But he does not have to issue an injunction ordering workers back to work to do this. He could instead issue an injunction requiring expedited arbitration of the underlying dispute or tell the parties to go immediately to the labour board for a ruling on the legality of the refusal to cross picket lines, leaving it open to the parties to return to the court to enforce compliance with those mechanisms and the results of their use.

<sup>147</sup> Brown and Kilcoyne, *loc. cit.*, footnote 141, at p. 353.

<sup>148</sup> H.W. Arthurs, Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship (1960), 38 Can. Bar Rev. 346; J.M.P. Weiler, The Administrative Tribunal: A View From the Inside (1976), 26 U.T.L.J. 193; Brown and Kilcoyne, *loc. cit.*, footnote 141.

<sup>149</sup> Weiler, *ibid.*, at pp. 202-203.

<sup>150</sup> Brown and Kilcoyne, *loc. cit.*, footnote 141, at p. 355. There could have been some difficulty in deferring to the labour board in *St. Anne Nackawic* itself because the New Brunswick Industrial Relations Board lacked a statutory mandate to make cease and desist orders, unlike several other labour boards in Canada. But there is no clear indication in *St. Anne Nackawic* that the court is prepared to restrain the judiciary from

out insisting on proof of the normal requirements for the granting of such relief, requirements like proof of irreparable harm, are longstanding and well documented.<sup>151</sup> I have suggested elsewhere<sup>152</sup> that these judicial practices reflected a hierarchy of values in the judiciary in which the right to trade of employers is placed far higher than the worker interests at stake. I also argued that the Supreme Court's unnecessary haste to legitimize these injunctive practices when confronted with a challenge that they infringed Charter freedoms of workers<sup>153</sup> demonstrated that judicial preferences and assumptions concerning interests in the workplace placed the right to trade of employers far above the freedom of expression interests of workers.

The common theme throughout is an overriding concern for keeping interruptions in production to a minimum in the interests of preserving the right to trade and little evidence of concern with methods of dispute resolution which may address the underlying interests of *both* parties or individual workers.<sup>154</sup> And one only has to harken back to the

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granting interlocutory injunctions against strikes in other jurisdictions where labour boards have been granted more extensive mandates to deal with all aspects of illegal work stoppages.

R. Kerr, Case Comment on *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219* (1987), 66 Can. Bar Rev. 169, at p. 174, suggested that *St. Anne Nackawic* might allow for deference to labour boards to deal with all aspects of illegal work stoppages in other jurisdictions where wide jurisdiction to grant cease and desist orders and other relief is given to the labour board and stated to be exclusive (for example, s. 106(1) of the Ontario Labour Relations Act, R.S.O. 1980, c. 228). However, Kerr concludes, I think correctly, that "... it is doubtful whether this constitutes the clear ouster of court jurisdiction to grant an injunction that the Supreme Court has called for in the *St. Anne Nackawic* case".

<sup>151</sup> See, generally, Tacon, *op. cit.*, footnote 135; Arthurs, *loc. cit.*, footnote 148; J.A. Manwaring, *Legitimacy in Labour Relations: The Courts, the British Columbia Labour Relations Board and Secondary Picketing* (1980), 20 O.H.L.J. 274.

<sup>152</sup> B. Etherington, Case Comment on *Retail, Wholesale and Dept. Store Union, Local 580 v. Dolphin Delivery Ltd.* (1987), 66 Can. Bar Rev. 818.

<sup>153</sup> *Retail, Wholesale and Dept. Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174.

<sup>154</sup> Although *St. Anne-Nackawic* has been applied in one or two cases to prevent employers from recovering wages or vacation pay from employees in court (*Board of Comm. of Police for Timmins v. Sawinski* (1987), 62 O.R. (2d) 71 (Ont. H.C.)), its impact has been most prevalent as an authority for courts' refusal to entertain wrongful dismissal claims and related causes of action; see, generally, *Oliva v. Strathcona Steel Mfg. Inc.*, [1987] 1 W.W.R. 730 (Alta. C.A.), overruling Alberta precedent; *MacDonald v. Hamilton-Wentworth Roman Catholic Separate School Board* (1986), 58 O.R. (2d) 114 (Ont. C.A.). It is also critical to note that courts have been very unresponsive to requests from individual employees and unions for interlocutory injunctions to restrain employers from acting contrary to collective agreements or statutory prohibitions. The industrial relations norm of not impeding employer management and control of property and resources until after an employee or union has succeeded in the grievance process or proven an unfair labour practice is evident in labour tribunal practice and judicial responses

1984 decision in *L'Acadie* to see the same value preferences and assumptions evidenced by judicial intervention in the courts' judicial review role. It will be remembered that the court approved of the suggestion by the Federal Court of Appeal that it was folly for the Canada Labour Relations Board to suppose that the Canada Labour Code would "impose on the Board a duty to resolve labour disputes which may be the cause of strike".<sup>155</sup> Thus the court upheld the Board's cease and desist order, but quashed the order for expedited arbitration to resolve the underlying labour dispute. This intervention reflected the judicial assumption that the main purpose of the collective bargaining regime should be the preservation of industrial peace, and little value is placed on the protection of other interests at stake when an unlawful work stoppage arises.

### Conclusion

The vision of a unified and restricted theory of review in the post-*C.U.P.E.* period was romantic even before the notorious *L'Acadie* decision. Other departures from *C.U.P.E.*'s call for restraint were either ignored, explained away, or received little comment.<sup>156</sup> Yet all of the Supreme Court's departures from deference for expert labour boards in the 1980s present important insights into judicial values and assumptions concerning our collective bargaining regime. For these departures are not susceptible to adequate justification on grounds of patent unreasonableness of the labour tribunal, institutional appropriateness concerns, or other well recognized labour relations policy objectives.

What is most noticeable about the departures from restraint in the 1980s is that they can all be characterized as judicial interventions which ultimately protected employer interests and impeded developments with

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to employee requests for injunctive relief. The fact that dismissed or laid off workers may face irreparable harm in the form of inability to maintain mortgages or domestic harmony has not been considered by courts, and initial indications are that *St. Anne Nakawic* will reinforce judicial antipathy to injunctive relief for workers. See *Carling O'Keefe Breweries Ltd. v. West Union Brewery, Beverage, Winery & Distillery Workers, Local 287* (1987), 52 Alta. L.R. 319 (Alta. C.A.).

<sup>155</sup> Per Pratte J. in *Syndicat des employés de production du Québec et l'Acadie v. C.L.R.B.*, *supra*, footnote 92, at pp. 476-477, quoted with approval by Beetz J. in *Syndicat des employés de production du Québec et l'Acadie v. C.L.R.B.*, *supra*, footnote 13, at pp. 429 (S.C.R.), 471-472 (D.L.R.); and the text, *supra*, at footnote 102.

<sup>156</sup> See, for example, Evans, *loc. cit.*, footnote 104, at p. 33, footnote 112. Evans discusses *L'Acadie* as an aberration and then notes, only in a brief footnote, that the court failed to apply the test of patent unreasonableness to the remedial order in *National Bank*. This relegation of *National Bank* to a footnote is consistent with the author's acceptance of Langille's theory of a unified and restrictive approach to judicial review prior to *L'Acadie*. Evans even goes so far, although critical of *L'Acadie*, to suggest that it may not be such a serious departure because it may have raised "a particularly severe test for the *C.U.P.E.* approach to jurisdictional control" if it had been applied in the case (at p. 34).

potential to enhance workers' dignity and participatory rights. The denial of employee status to dependent contractors in *Yellow Cab* and the transfer of power to the employer to designate essential employees (unable to strike) in *Canadian Air Traffic Control Association* are obvious examples. In *National Bank*, the court interfered with board powers to create effective remedies to protect the right of vulnerable employees to organize in the face of serious employer misconduct. The court's concern with voluntarism, freedom of contract and property rights resulted in greater recognition of employer interests than employees' statutory rights. In *L'Acadie*, the court's denial of board authority to order expedited arbitration to resolve underlying disputes is ultimately far more protective of employer interests than those of employees or unions. Redress for violations of employers' rights or protection of their interests seldom turns on the resolution of an underlying dispute through the grievance process. Our modern collective bargaining regime continues to preserve the employer's power and right, as owner and manager of the means of production, to manage its operation proactively and leave it to employees and unions to comply with the employers' directives and seek redress after the fact through the grievance or labour board process. Thus employers act and continue to act in the face of underlying disputes, and employees must await the outcome of their grievances or complaints to attain recognition of their interests. In that context, *L'Acadie*'s intervention to forbid board authority to order speedy resolution of underlying causes of collective job action as an ancillary remedy to an order to cease the workers' job action can be viewed as protective of employer interests and an impediment to greater protection of employee interests. In *Gendron* the denial of board jurisdiction to order a second arbitration results in protection for the employer's contractual interests in finality, and removal of potential liability on the individual's initial claim, while it denies employees access to the one forum that can provide full redress, and places greater responsibility and potential liability on unions. Finally, in *St. Anne Nackawic* the court went out of its way to preserve employer access to the courts to maintain industrial peace and thereby protect employer interests in uninterrupted production and the right to trade, despite arguments that deference to expert tribunals to handle all aspects of work stoppages would allow for greater sensitivity to employees' interests.

I am not suggesting that significant departures from restraint in the 1980s are a manifestation of some form of crass instrumentalism on the part of the court or some of its members. We are all aware of far too many recent cases where the court chose not to interfere with tribunal decisions that were favourable to workers and unions. My contention is that where the court did choose to intervene on judicial review or retain an active role as a forum of original jurisdiction in the 1980s, it acted under traditional judicial values and assumptions concerning property and management rights, freedom of contract, voluntarism and the right

to trade. The fact that this generally resulted in the protection of employer interests, often to the detriment of individual worker or union interests, is largely a natural consequence of the fact that under our modern collective bargaining regime there has been little change in power relations or distribution of wealth in the labour/employer relationship. Employers continue to be the owners of the means of production and other property, managers and traders, and are thereby more apt to benefit from the protection of traditional liberal values by the courts. It was these value preferences which led the courts to develop common law doctrines in contract, property and tort which operated to protect employer interests from the threats posed by collective worker action, and failed to give recognition to legitimate worker concerns. The courts' inability to shut out their traditional liberal preferences and assumptions to develop a common law which accommodated these interests was a major factor in the development of a legislated regime for collective bargaining which transferred primary responsibility for the administration and enforcement of the regime to expert tribunals and tried to keep courts from significant involvement in the process.

I contend that those who embraced the romantic notion that the Supreme Court had adopted a unified and restrictive approach to judicial review based on *C.U.P.E.* were simply too eager to make experience fit within the liberalist pluralist vision of collective bargaining. Labour academics who support the liberal pluralist interpretation of the advent of collective bargaining in North America have identified the enhancement of individual employee dignity, voluntarism and right to participate in decisions in the workplace as central purposes of the regime's adoption.<sup>157</sup> Collective bargaining would enhance employee bargaining power and thereby empower them to further those objectives. However, a critical element of the experiment was the transfer of jurisdiction for regulation of the relationship to expert administrative and contractual tribunals who would be more accessible to workers and more sensitive to the industrial relations context, and thus better able to identify and give recognition to individual workers' interests. Thus it was important for industrial relations liberals to advocate limited involvement of the courts and to argue

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<sup>157</sup> H. Glasbeek has described the liberal pluralist explanation of the adoption of collective bargaining as a device to increase worker voluntarism through increased bargaining power as the "tourism theory" of the relationship between liberal aims and collective bargaining. He asserts, I think correctly, that the development of collective bargaining was the result of more than a century of struggles and the immediate experiences of the Depression and great confrontations between capital and labour which brought home the need for state intervention in some form of social engineering to preserve industrial peace and avoid major upheaval. For Glasbeek, to suggest that the scheme was initially adopted to further liberal aims for individual workers is like saying that the forces which created Niagara Falls did so with the intent to further the objectives of tourism. See Glasbeek, *op. cit.*, footnote 119, pp. 67-69.

for the adoption of a theory of judicial review which turned on notions of institutional appropriateness and functionality to restrict judicial interference in the development of labour policy to a minimum. Given past experience, intervening courts were unlikely to act to promote the objectives identified for the regime by liberal pluralists and could impede their furtherance.

Prior to *C.U.P.E.* the courts showed little understanding or appreciation for this liberal pluralist vision of the new regime and its purposes. Frequent and *ad hoc* intervention was prevalent, although much criticized because of the absence of meaningful criteria for intervention.<sup>158</sup> And the interventions often impeded the ability of the expert boards to further the objectives of enhancement of employee dignity and participatory rights.<sup>159</sup> Finally, with the arrival of *C.U.P.E.*, there was a pronouncement on judicial review which did "fit" the romantic vision of the purposes of the post-war regime held by liberal pluralists. If the court could just refine and extend this approach to the review of labour tribunals more generally, the vision could be realized. And so examples of the extension of *C.U.P.E.* resulted in the description of a unified and restrictive theory of judicial review by Langille and others, despite the existence of several contemporaneous decisions by the court which cast serious doubts about the commitment of the court, or at least many of its members, to the *C.U.P.E.* approach espoused by Dickson C.J.C. The cases of intervention in the 1980s suggest that *C.U.P.E.* has not rid us of judicial interventions when deeply held judicial values and beliefs are disturbed, and also suggest that the court still does not share the liberal pluralist vision of the purposes of the collective bargaining regime.

On a final note, the examination of judicial activism in this decade must raise some concern for modern liberal visionaries like David Beatty who have extolled the virtues of the Charter and its potential for the protection and promotion of individual worker dignity and rights to meaningful participation in economic and social decision-making.<sup>160</sup> Following a somewhat selective and ahistorical summary of the courts' involvement in the protection of worker interests during the past century, Beatty concludes that there is "some basis" to be optimistic that courts can contribute legal rulings under the Charter that will be sensitive to the interests and purposes of workers.<sup>161</sup> Even if we can put aside the ahistorical

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<sup>158</sup> See the articles cited, *supra*, footnote 2.

<sup>159</sup> See, for example, cases cited, *supra*, footnotes 3, 4 and 5.

<sup>160</sup> D. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (1987).

<sup>161</sup> *Ibid.*, p. 39. Even Beatty has difficulty in trying to contend, with conviction, that courts have done a good job of protecting worker interests. Note the qualifying words (emphasis added) in the following passage (*ibid.*, p. 40):

premise offered for Beatty's optimism, our experiences in the 1980s do not demonstrate a judicial inclination to intervene to promote the individual worker interests identified by Beatty.<sup>162</sup>

To the contrary, the courts have provided examples of intervention which restrict expert decision-makers from furthering those liberal aims. If workers can take any message from recent judicial pronouncements on court involvement in regulation of the labour relations process, it is that they must continue to look to legislatures and administrative tribunals—as flawed as they may be sometimes—for the protection of employee interests, and be suspicious of the courts' ability and inclination to give them sufficient recognition. Not romance this, just hard and enduring realism.

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As with the law the court contributed to the pre-industrial labour codes, *some* members of the judiciary were at *least sensitive*, even in the heyday of laissez-faire liberalism, to *the most basic physiological needs* workers pursue through their work. These principles of the common law. . . were undeniable instances of rule-making by courts which insisted that *certain* interests of workers be given *some minimum degree* of concern and respect.

One is tempted to suggest "damning by faint praise". Of course this brief passage ignores judicial development and adaptation of numerous common law principles and doctrines to render illegal almost any form of collective action by workers to further their interests. For a far more critical view of the history of judicial involvement in protection of worker interests, see, generally: Tacon, *op. cit.*, footnote 135; Arthurs, *loc. cit.*, footnote 148; Manwaring, *loc. cit.*, footnote 151; Etherington, *loc. cit.*, footnote 152.

<sup>162</sup> Nor do the decisions of the Supreme Court on judicial review of labour law under the Charter offer much basis for optimism among workers. The decisions in the three right-to-strike cases denied constitutional protection for the right of workers to strike to further essential associational purposes, including the betterment of workers. Members of the court made some grand statements about the need for restraint on Charter review of complex legislative choices in labour policy. But they also suggested that freedom of association under the Charter belongs to the individual, not to collectives. See *Reference Re Public Service Relations Act*, [1987] 1 S.C.R. 313, (1987), 38 D.L.R. (4th) 161; *PSAC v. The Queen*, [1987] 1 S.C.R. 424, (1987), 38 D.L.R. (4th) 249; *Government of Saskatchewan v. RWDSU, Local 544*, [1987] 1 S.C.R. 460, (1987), 38 D.L.R. (4th) 277. In *Retail, Wholesale and Dept. Store Union, Local 580 v. Dolphin Delivery Ltd.*, *supra*, footnote 153, the court held that the Charter was not applicable to common law doctrines when they were impugned in the context of private litigation, absent a governmental actor as a party. As a result, common law doctrines which place restraints on collective action by workers to protect employer interests in property, the right to trade, and freedom of contract are, for the most part, removed from review for their interference with workers' Charter rights and freedoms. Of course, the court also went on to make the unnecessary holding that restraints placed on workers' freedom of expression by court injunctions against secondary picketing, under common law doctrines developed to prevent inducement of breach of contract, were reasonable limits under s. 1 of the Charter.