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Review of Grievance Arbitration Awards: Ontario, the United States, and British Columbia

Howard Leslie Abraham Ehrlich†

The balance between arbitral independence in settling industrial disputes and the necessity of review by a supervising body depends upon the reviewing authority's attitude toward the arbitration process. The author examines the extent of supervisory review of the arbitral process in the United States, the Canadian province of Ontario, and the Canadian province of British Columbia. The traditional common law standard of review in Ontario, the noninterventionist policy in the United States, and a variation of that approach as applied in British Columbia are compared. The author advocates the approach of British Columbia as an advantageous balancing of the systems developed in Ontario and the United States, concluding that the noninterventionist approach to the review of arbitration decisions as refined in British Columbia best serves the interests of speed, economy, and finality vital to the arbitration process.

INTRODUCTION

If grievance arbitration is to survive as an effective means of settling industrial disputes, a balance must be struck between the integrity and independence of the arbitrator, on the one hand, and the perceived need for a supervisory body which will constrain arbitral excesses, on the other. The quality and extent of supervisory review of grievance arbitration awards depend, to a large extent, upon the respect which the reviewing authority has for the arbitral process.

This Article will examine the issue of supervisory review by investigating three jurisdictions in which the degree of scrutiny varies markedly. The traditional common law approach is typified by the Canadian province of Ontario, a jurisdiction in which the courts have relied on administrative law precedents in devising an aggressive standard of review. An antithetical approach prevails in the United States, where the


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Supreme Court has advocated a national labour policy of nonintervention. A variation of the American approach has been adopted in the Canadian province of British Columbia, where supervisory review is vested, for the most part, in the Labour Relations Board.

Review in the United States and British Columbia is not characterized by aggressive intervention in the arbitral process. Arbitral awards in the province of Ontario do not enjoy the same degree of immunity. The major difference between the review of awards in the United States and British Columbia and the approach taken in Ontario relates to the interpretive judgment of the arbitrator. While the Ontario standard of reasonableness does not necessarily result in a full-fledged right of appeal on the merits, it is common for a court in that jurisdiction to substitute its own opinion for that of the arbitrator. The test of reasonableness is far more invasive than the prevailing standards in the United States and British Columbia.

The varying approaches applied in the three jurisdictions reflect deeply rooted philosophical differences regarding the role of the arbitrator. The Ontario courts view the arbitrator as no different than any other quasi-judicial entity. Because of this, the courts in that jurisdiction are quite content to embark upon a microscopic examination of an award in search of reviewable error. The American courts, on the other hand, respect the labour arbitral process, and treat it as unique. The integrity of the process is viewed as sacrosanct, and at its helm is the arbitrator—the proctor—who guides the troubled ship of industrial dispute resolution through uncharted waters. The British Columbia Labour Relations Board and Court of Appeal evince a similar confidence in the process. In that jurisdiction, the arbitrator is seen as the person most responsive to the needs and expectations of the parties. Her role is simply to do her best to interpret the collective agreement.

It may be argued that review of any sort is unproductive because it detracts from the final and conclusive effect of an award. An incorrect award, it is said, is better than one which is untimely, as unresolved industrial disputes tend to produce continual and progressive irritation in the workplace. Informality, speed, and economy tend to avoid this virulent effect. Further, a noninterventionist reviewing authority is consistent with the expectations of the parties who chose the arbitrator, not the supervisory body, to interpret the agreement. Moreover, a losing party can seek renegotiation if it finds an award unacceptable.

Academic writers, for the most part, advocate a "hands off" approach.¹ This permits an arbitrator to carry out his mandate in an at-
mosphere of maximum freedom. It may be argued, however, that too much freedom is dangerous, and that an appropriate restraint on an institution which makes decisions of fundamental importance is warranted.

It is understandable why the three jurisdictions developed different standards of review. Ontario, for example, had no guiding force in determining the proper approach toward review. Consequently, the gap was filled by administrative law precedents, little thought being given to the adaptation of such concepts into a labour relations context. The United States, on the other hand, was led by Mr. Justice Douglas, who recognized idiosyncrasies inherent in the arbitral process deserving of protection. Had it not been for such foresight, review of awards in the United States could have developed to be quite invasive. In British Columbia, Paul Weiler, a seasoned arbitrator and the first Chairman of the Labour Relations Board, had a healthy respect for the arbitral process and wished to preserve its integrity. That approach was perpetuated by subsequent Chairmen and Vice-Chairmen, some of whom were arbitrators.

One major debate centers around which type of supervisory body should review awards. The system of British Columbia is unique in that reviewing authority is vested, for the most part, in the Labour Relations Board. This is perceived as desirable because the Board is well versed in labour relations matters, while the courts draw from a body of experience which is not attuned to such realities. An argument against the conferral of such a broad reviewing authority in the Board is that citizens, at least in Canada, have come to believe that one of the courts’ primary functions is to protect them against abuses by quasi-judicial bodies such as arbitrators.

Minimal review of grievance arbitration awards is desirable. The virtues of speed, economy and finality are important. They can be destroyed by excessive intervention. Review is required, however, as a balance against arbitral abuses. The approach of British Columbia is preferable because the substantive law and choice of reviewing authority accords the proper degree of respect to the arbitral process, while maintaining a measure of procedural fairness uniquely tailored to labour relations realities. Further, matters which are not unique to labour law are properly directed to the Court of Appeal, which has the required expertise to deal with such issues.

This Article is an exhaustive comparative examination of the various degrees of scrutiny accorded grievance arbitration awards in the three jurisdictions. What follows is a detailed compartmentalizing and contrasting of grounds of review. While the compartments are not necessarily watertight, they serve to highlight important features of applicable review in each jurisdiction.
I

ONTARIO: THE TRADITIONAL COMMON LAW APPROACH

A. Overview

In Ontario, supervisory review of arbitration awards is judicial, and is governed substantively by grounds of review emanating from traditional common law principles and concepts of administrative law. Those grounds of review are, essentially, denial of natural justice, jurisdictional error, and error of law on the face of the award. This gives the courts a tremendous amount of discretion in determining the existence of a reviewable error. The procedural rules for gaining access to review are contained in the Judicial Review Procedure Act, which provides that the courts, by use of the statutory counterparts to the administrative law prerogative writs of certiorari, mandamus, and prohibition, may quash, set aside, or modify or remit an award to the same or a different arbitrator. Remission for reconsideration is the preferred practice. Notwithstanding the existence of a reviewable error, it is within the discretion of a court to refuse any relief if, for example, there has been undue delay.

B. Grounds for Review by the Courts

1. Denial of Natural Justice

Since it is generally accepted that the union would normally adequately represent an employee’s interests, the courts have not automatically extended the requirements of natural justice—that is, the opportunity to be present and to be heard—to an employee simply because she may be adversely affected by an award. Notice is required, however, where the union chooses sides between employees and pursues the interests of one to the detriment of the other. An employee who is the subject of an improper promotion grievance, for example, must be notified. It appears, however, that notice requirements are not strictly

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3. Id. §§ 6(1), (2).
5. Section 2(5) of the Judicial Review Procedure Act, Ont. Rev. Stat. ch. 224, provides as follows:
Where, in any of the proceedings enumerated in subsection (1), the court had before the 17th day of April, 1972 a discretion to refuse to grant relief on any grounds, the court has a like discretion on like grounds to refuse to grant any relief on an application for judicial review.
7. Id.
adhered to in practice.\(^8\)

Where notice is required, it should be in writing and should indicate the issue to be arbitrated. It must set out the date, time and place of hearing and the right to representation by counsel or some other agent.\(^9\) Service should be personal or by registered mail well in advance of the hearing date.\(^10\) An employee who is entitled to notice may be present,\(^11\) call evidence,\(^12\) and cross-examine witnesses.\(^13\)

A refusal by an arbitrator to consider evidence\(^14\) or its admissibility\(^15\) may also constitute a denial of natural justice. Evidentiary questions can likewise result in a denial of natural justice, but this only rarely occurs. One such example is where an employer obtains information in confidence from an employee and attempts to use it to support the latter's dismissal.\(^16\) In addition, an arbitrator who admits extrinsic evidence and fails to consider it may commit a reviewable error based on denial of natural justice.\(^17\) Hearsay, although admissible,\(^18\) may not be relied upon solely to the exclusion of primary evidence.\(^19\) Natural justice also generally precludes ex parte fact finding.\(^20\)

In addition to considerations of notice and evidence, an award may be set aside for denial of natural justice on grounds of fraud or bias.\(^21\) The test for bias is whether there exists a real apprehension, reasonably held, that an arbitrator might be swayed by bias.\(^22\) An arbitrator is not entitled to act, for example, if a business or personal relationship with

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17. Scarborough Fire Fighters Ass'n v. Borough of Scarborough, 78 C.L.L.C. 14,123 (Div. Ct. 1977). This type of error is usually characterized as an error of law and is noted here for convenience.
18. International Bhd. of Teamsters, Local 938 v. Kingsway Transps., Ltd., 8 O.A.C. 363 (Div. Ct. 1985). Section 44(8)(c) of the Labour Relations Act, ONT. REV. STAT. ch. 228 (1980) provides that an arbitrator or arbitration board has power "to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not."
one of the parties is such that there is a reasonable suspicion that she may be improperly influenced, whether or not she is. Arbitral conduct may be indicative of bias, such as where an arbitrator is hostile and interferes excessively with cross-examination of witnesses.

The conduct of a nominee—the member of a tripartite arbitration board chosen by one of the parties—does not, however, attract such scrutiny. Here the rule relating to bias is relaxed to a considerable extent. The limit of the rule was overstepped in one case where a union nominee was an employee on the staff of the union at the time of the nomination.

2. Jurisdictional Error

The fundamental rule of this basis of review is that an arbitrator can neither exercise jurisdiction which he does not possess nor decline jurisdiction which he possesses. An incorrect finding in favour of the existence of contractual relations between an employer and a union, for example, is reviewable. Generally, there are four types of jurisdictional errors:

a. Arbitrability

The question of arbitrability may arise substantively or procedurally. Although Ontario courts address these issues separately, they do not expressly differentiate between substantive and procedural arbitrability. This question of arbitrability may refer to whether the parties have agreed to arbitrate the subject matter of a dispute (“substantive arbitrability”) or to whether a party has complied with the procedure of bringing a grievance to arbitration (“procedural arbitrability”).

Most matters are substantively arbitrable. Substantive arbi-

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29. Section 44 of the Labour Relations Act, Ont. Rev. Stat. ch. 228, § 44(1)-(2) (1980), provides as follows:

(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection (1), it shall be deemed to contain the following provision:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allega-
trability depends on whether the question submitted to arbitration will reasonably bear the interpretation placed upon it by the arbitrator.30 A finding of an arbitrator relating to procedural arbitrability may be sustained only where his interpretation of the provision is one which it will reasonably bear.31 The arbitrator, however, possesses statutory authority to ignore the collective agreement and relieve against noncompliance with mandatory time limits unless the operation of the statutory provision which gives him the authority to relieve is expressly excluded by the agreement.32 The discretion to relieve against time limits, if not excluded by the agreement, must still be exercised in a proper manner.33 Where an arbitrator fails to refer to provisions of an agreement governing arbitrability and to make a finding of law based thereon, he commits reviewable error.34

b. Arbitrator Addresses the Wrong Question or Fails to Answer the Question Submitted

A court may refuse to sustain an award where an arbitrator addresses the wrong question, fails to answer the question submitted, or takes improper or irrelevant considerations into account.35 Some examples will illustrate the scope of this ground of review.

In In re Miller and Algoma Steel Workers Credit Union, Ltd.,36 an arbitration board was asked to decide whether the person filling a newly
created assistant manager position was included in the bargaining unit so as to require compliance with the agreement in making the appointment. The board ruled that the assistant manager was not an employee under the Labour Relations Act.\textsuperscript{37} Therefore, compliance with the agreement was not necessary. The court refused to sustain the award because, in its opinion, the board had asked itself the wrong question. The proper question was whether the assistant manager fell within the exception of "manager" under the agreement.\textsuperscript{38}

In \textit{Ford Motor Co. of Canada, Ltd. v. International Union, UAW and Weatherill},\textsuperscript{39} the grievance involved an insurance program for employees. The agreement created a health and welfare program, the total cost of which was the employer's responsibility. The agreement provided that the company "shall receive and retain any divisible surplus, credits or refunds or reimbursements under whatever name arising out of the Program."\textsuperscript{40} It further stipulated that compliance with any federal or provincial law making provision for medical and health benefits would constitute full compliance with the commitments of the basic program. The Health Services Insurance Act\textsuperscript{41} provided that "[w]here the amount required to be paid under an agreement . . . is greater than the amount the employer is . . . required to pay . . . the employer shall . . . pay the amount of the excess to or for the benefit of the employees . . . ."\textsuperscript{42}

The new premiums under the provincial plan were less than those established under the agreement. The arbitrator ruled that the employees, not the employer, were entitled to the saving in premiums. The court refused to sustain the award. It held that the arbitrator failed to consider an essential provision of the agreement: although he had referred to the "dividend surplus" article of the agreement, he did not further discuss the provision. The court saw no valid distinction between asking a wrong question and failing to ask the proper one.\textsuperscript{43}

Similarly, in \textit{Oshawa Wholesale, Ltd. and Ontario Produce Co. v. Warehousemen Union Local 419},\textsuperscript{44} an arbitration board was asked to determine if work performed by casual employees constituted overtime within the meaning of the agreement. The board ruled that the grievors were entitled to be offered such work. The court refused to sustain the

\textsuperscript{37} Id. at 671; ONT. REV. STAT. ch. 232, § 1(3)(b) (1970) (current version at ONT. REV. STAT. ch. 228, § 1(3)(b) (1980)).
\textsuperscript{38} 53 D.L.R.3d at 671-72. \textit{See also} General Concrete v. United Cement Workers, 79 C.L.L.C. 14,205 (Div. Ct. 1978).
\textsuperscript{39} 70 C.L.L.C. 14,056 (S.C. 1970).
\textsuperscript{40} \textit{Id.} at 262.
\textsuperscript{41} Ont. Stat. ch. 43, § 10 (1968-1969).
\textsuperscript{42} 70 C.L.L.C. at 262.
\textsuperscript{43} \textit{Id.} at 266.
award. Although the board in effect decided that the work done by the casual help was overtime, it proceeded to consider a question that was not submitted to it, namely, that the regular employees were entitled to priority vis-à-vis casual employees with regard to being offered the work in question.\textsuperscript{45}

c. Amendment, Alteration, or Modification of the Agreement

Even in the absence of a clause stating that an arbitrator has no authority to amend, alter, or modify an agreement,\textsuperscript{46} an arbitrator has no authority, by rectification or otherwise,\textsuperscript{47} to render an award which has this effect.\textsuperscript{48} However, there is a statutory exception to this rule which provides relief against noncompliance with mandatory time limits set out in an agreement.\textsuperscript{49} The following cases are illustrative of this ground of review.

In Association of Radio Employees of Canada v. CBC,\textsuperscript{50} an arbitration board held the employer to be in violation of the agreement by hiring two announcers without giving notice of the availability of the positions to staff announcers. The board directed the holding of a competition whereby staff announcers were not to be measured against the newly hired announcers.\textsuperscript{51} The court set aside the award, holding that the board had committed reviewable error by directing the holding of a competition which was not provided for in the agreement.\textsuperscript{52}

In Re Hotel Dieu Hospital and Ontario Nurses’ Association,\textsuperscript{53} an arbitration board incorporated into the agreement provisions relating to

\textsuperscript{45} 71 C.L.L.C. at 407.
\textsuperscript{46} Port Arthur Shipbuilding Co. v. Arthurs, 70 D.L.R.2d 693, 695 (Can. 1968).
\textsuperscript{47} Metropolitan Toronto Bd. of Comm’rs of Police and Metropolitan Toronto Police Ass’n, 26 D.L.R.3d 672 (C.A. 1972), aff’d on other grounds, 45 D.L.R.3d 548 (Can. 1974).
\textsuperscript{49} Section 44(6) of the Labour Relations Act, Ont. Rev. Stat. ch. 228 (1980), provides as follows:

Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.


51. Id. at 3-4.
52. Id. at 7.
holiday pay contained in employment standards legislation. The award was quashed because the board, in the opinion of the court, had amended the agreement.54

d. Functus Officio

The jurisdiction of an arbitrator begins with the submission to arbitration and concludes upon final determination of the grievance. Where an arbitrator has completed her award, she is said to be "functus officio." After that time she may correct only "clerical mistakes, errors arising from accidental slips or omissions, or errors of a merely technical nature."55 Where an arbitrator fails to complete the duties cast upon her to make a final and binding award, a court may remit the matter to her for reconsideration with an order to hear and determine all issues necessary to finally resolve the dispute. The doctrine of functus officio has no application where such a remission has been made.56

3. Error of Law

Since arbitrations under the Labour Relations Act of Ontario are statutory rather than consensual,57 all errors of law on the face of an award are reviewable.58 An arbitrator's interpretive judgment historically has been treated as a question of law, but mere disagreement with the interpretation given to the agreement by an arbitrator is not a sufficient ground of review. The award is reviewable only if the interpretation is one which the language of the agreement will not reasonably bear.59

54. Id. at 281-82.
This test has been referred to as the "clearly wrong" or "outrageous or patently unjustifiable or patently unreasonable" standard of review.

Errors of law may manifest themselves in other ways as well. For example, an arbitrator may not direct compliance with a provision made illegal by statute. Where an arbitrator expressly or implicitly misinterprets a statute, his interpretation will not be sustained. Deference is not given to the interpretation even though it may be one which the language of the statute reasonably bears.

Further, an arbitrator has no authority to rely on extrinsic evidence to interpret an unambiguous contractual provision. An arbitrator's finding that an ambiguity exists must be based on an interpretation of the agreement which the agreement can reasonably bear.

II
United States: The Noninterventionist Approach

A. Overview

Supervisory review of arbitration awards in the United States is judicial and governed substantively by the Federal Arbitration Act. The

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60. Sudbury Mine Workers' Union, Local 598 and Int'l Nickel Co. of Can., Ltd. and United Steelworkers, 68 C.L.L.C. 14,127 (H.C.J. 1968).
68. 9 U.S.C. §§ 1-14 (1982). Section 10 of the Act provides as follows:
In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing.
grounds of review in that Act have been absorbed into the body of federal law under section 301 of the Labor Management Relations Act ("LMRA") by some courts, while they are regarded as persuasive by others. The grounds of review are denial of a fair hearing, lack of fair representation, jurisdictional error, inconsistency with law or public policy, and incompleteness, ambiguity, or internal inconsistency. This approach to review is basically noninterventionist.

Review of awards falls within the legislative framework of sections 203(d) and 301 of the LMRA. A state or federal court may vacate, set aside, or remit an award for reconsideration to the same or a different arbitrator where a proper ground of review has been established. This latter alternative reflects the Ontario practice. Remission is not, however, the preferred alternative, and there is no statutory basis as in Ontario for denying relief once a proper ground of review has been established.

B. Grounds for Review by the Courts

1. Denial of Fair Hearing

Just as Ontario's courts enjoy authority to review awards based upon denial of natural justice, United States courts may review arbitral decisions on the basis of denial of a fair hearing. An award may not be sustained if an arbitrator denies a party a fair hearing in the arbitration proceedings. One such example is where bias occurs in the arbitration

upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.


73. See supra notes 2-6 and accompanying text.

74. Remission is generally granted only to clarify or correct an award. United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); Young Radiator Co. v. UAW, 734 F.2d 321 (7th Cir. 1984) (en banc); Hanford Atomic Metal Trades Council v. General Elec. Co., 353 F.2d 302 (9th Cir. 1965); International Ass'n of Machinists v. Crown Cork & Seal Co., 300 F.2d 127 (3d Cir. 1962) (per curiam); Todd Shipyards Corp. v. Industrial Union of Marine Workers, Local 15, 242 F. Supp. 606, 611-12 (D.N.J. 1965).

75. See supra note 5 and accompanying text.

process. Bias is treated in a like manner in the Ontario and United States jurisdictions. Courts in the United States, like their Ontario counterparts, adopt a relaxed approach in the area of tripartite arbitration, which involves an arbitration board composed of a management nominee, union nominee, and a neutral chairman. Similarly, a review of the cases reveals that the rules relating to hearsay are relaxed in the United States as they are in Ontario.

The Federal Arbitration Act provides, in part, for vacation of an award for corruption or fraud, evident partiality, or prejudicial misbehavior of an arbitrator. Arbitral misconduct may manifest itself in a failure to postpone an arbitration to give the parties sufficient time to prepare, to consider or hear certain types of evidence, or to give notice.

While the United States and Ontario approaches are very similar with regard to this ground for review, there are some minor differences between the two jurisdictions. For example, although an arbitrator in Ontario has no authority to rely on extrinsic evidence to interpret an unambiguous provision, it has been suggested that an arbitrator in the United States may do so in the absence of a "no alterations" clause. It is also unclear whether the United States position reflects that which

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See also National Post Office Mailhandlers v. United Postal Servs., 751 F.2d 834, 843-44 (6th Cir. 1985).
77. There would not appear to be any United States Supreme Court or circuit court of appeals decisions on point. In Colony Liquor Distrbs., Inc. v. Local 669, Int'l Bhd. of Teamsters, 312 N.Y.S.2d 403, 405 (1970), aff'd, 28 N.Y.2d 546 (1971), a reasonable inference of partiality test was adopted. See supra notes 22-24 for cases on the Ontario position.
78. See supra note 25 and accompanying text.
80. For the Ontario position see supra notes 18-19 and accompanying text.
83. Washington Metro, 724 F.2d at 140.
85. Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas, Local 901, 763 F.2d 34, 40 (1st Cir. 1985).
88. See supra note 66 and accompanying text.
89. International Bhd. of Elec. Workers, Local 99 v. United Tel. Co., 738 F.2d 1564, 1569 (11th Cir. 1984). It is unclear whether an arbitrator in the United States may rely on extrinsic evidence in the presence of a "no alterations" clause. In Torrington Co. v. Metal Prods. Workers Union, Local 1645, 362 F.2d 677, 680 (2d Cir. 1966), the court held that such a clause significantly restricts the arbitrator's authority to do so. Contra Holly Sugar Corp. v. District Workers Int'l Union, 412 F.2d 899, 904-05 (9th Cir. 1969).
prevails in Ontario requiring notice to all adversely affected employees, although the practice in both jurisdictions has been to refrain from giving such notice.

2. Lack of Fair Representation

A court in the United States may refuse to enforce an award where a breach of a union's duty of fair representation has been established. This has the effect of vacating an award. A similar effect may be achieved where a court enters judgment against an employer and a union when both a breach of the duty and a violation of the agreement have been established. The reason underlying this ground of review is not difficult to understand. It is unfair to employees to uphold awards which are the result of inadequate representation by a union which has exclusive authority to protect employee interests. The integrity of the arbitration process would be undermined by judicial deference in this area.

Ontario courts treat this ground of review as an adjunct to the concept of natural justice. Even prior to the statutory imposition of the duty of fair representation in Ontario, awards were not sustained where a breach of the common law duty of fair representation was established.

3. Jurisdictional Errors

Courts in the United States also review jurisdictional errors, which, as in Ontario, may be broken up into four categories.

a. Arbitrability

United States courts, unlike their Ontario counterparts, speak in terms of substantive and procedural arbitrability. While there is no statutory provision in the United States deeming most matters substan-
tively arbitrable, there is a presumption in favour of substantive arbitrability. All matters not specifically excluded from the scope of the arbitration clause are, accordingly, arbitrable. Disputes are inarbitrable only if it may be said that the arbitration clause cannot possibly be susceptible of an interpretation in favour of arbitrability, and forceful evidence of an intention to exclude the claim from arbitration is required. Doubts are resolved in favour of coverage.99

An arbitrator's incorrect finding in favour of or against substantive arbitrability is reviewable.100 The situation in Ontario is different, where the question of arbitrability is governed by the reasonableness standard.101 As a practical matter, however, both jurisdictions adopt a non-interventionist approach in this area.

In Mobil Oil Corp. v. Local 9-766, OCAW,102 a clause limited arbitration to the "express terms" of the agreement. There was no express term relating to subcontracting, although the arbitrator was able to identify provisions of the agreement which potentially were violated by the subcontracting of delivery work. The court upheld the arbitrator's finding in favour of substantive arbitrability.

An arbitrator also has jurisdiction to decide upon procedural arbitrability.103 An award may not be sustained, however, where an arbitrator's interpretation of a provision relating to procedural arbitrability is one which does not meet the "essence of the agreement" standard of United Steelworkers v. Enterprise Wheel and Car Corp.104 This standard is much less intrusive than the reasonableness test of Ontario.105 There is no statutory authority in the United States granting an arbitrator power to relieve against noncompliance with mandatory time limits as there is in Ontario.

b. Award Exceeds Scope of Submission

Because his jurisdiction is defined by the submission, an arbitrator has no authority to decide a matter not before him,106 and a court may vacate an award where an arbitrator fails to decide the question submitted.

Local 791, International Union of Electrical Workers v. Magnavox

100. Id.
101. See supra note 30 and accompanying text.
102. 600 F.2d 322 (1st Cir. 1979). See generally Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976).
105. See supra notes 59-61 and accompanying text.
is illustrative of the point. In Magnavox, the arbitrator was asked to decide whether the company had violated the agreement in speeding up the assembly line of one of the articles used in its finished product. The arbitrator ruled that there was no violation and proceeded to order the parties to bargain about the matter. The court vacated and set aside the portion of the award which related to the obligation to bargain, stating, inter alia, that

the arbitrator went beyond the grievance submitted to him for arbitration and beyond the provisions of the collective bargaining contract; that such portion of his award was not subject to his consideration and arbitration; that he thereby exceeded his powers as to the grievance submitted to him and the provisions of the contract; and that that portion of the award was properly vacated and set aside.\(^{108}\)

In Amalgamated Food & Allied Workers Union, Local 56 v. Great Atlantic & Pacific Tea Co.,\(^ {109}\) an arbitration board was asked to decide whether there was just cause for a discharge. The board limited its consideration to whether the penalty of discharge violated the agreement.\(^ {110}\) The court of appeals affirmed the district court's refusal to sustain the award, holding that the board had not decided the question submitted.\(^ {111}\)

Similarly, in Retail Store Employees, Local 782 v. Sav-On Groceries,\(^ {112}\) an arbitrator was asked to determine an employer's fairness in disallowing an employee to displace less senior employees in the performance of certain duties. The arbitrator awarded backpay to the employee. The court refused to sustain the award, holding that the limited submission did not encompass the backpay remedy formulated by the arbitrator.\(^ {113}\)

This analysis is comparable to that in Ontario relating to an arbitrator addressing the wrong question or failing to answer the question submitted. Magnavox\(^ {114}\) may also be explained as an award which had the effect of modifying the agreement.

c. Award Not Drawing its Essence from the Agreement

In United Steelworkers v. Enterprise Wheel and Car Corp.,\(^ {115}\) the United States Supreme Court stated that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitra-

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107. 286 F.2d 465 (6th Cir. 1961).
108. Id. at 466.
109. 415 F.2d 185 (3d Cir. 1969).
110. Id.
111. Id. at 189-90.
112. 508 F.2d 500 (10th Cir. 1975).
113. Id. at 502-03.
114. 286 F.2d 465 (6th Cir. 1961).
tion under collective bargaining agreements.”

In the course of the same decision, Mr. Justice Douglas, the pioneer of judicial restraint in the area of supervisory review of arbitration awards, enunciated what has remained a national labour policy:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Further,

the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

The case of Truck Drivers Union Local 784 v. Ulry-Talbert Co., illustrates a restrictive application of the principles set out in Enterprise Wheel. In Ulry-Talbert, an arbitrator determined that an employee had been dismissed for proper cause. Nevertheless, the arbitrator, believing the discharge excessive, substituted reinstatement without backpay. This was done in the absence of evidence of bargaining history, past practice, or a provision giving the arbitrator authority to reduce discipline meted out by the employer. The court refused to sustain the award, holding that it did not draw its essence from the agreement. The court reasoned that the arbitrator had authority only to uphold or set aside the discharge. The agreement did not permit him to substitute his opinion for that of the employer.

The Supreme Court of Canada reached the same conclusion in Port

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116. 363 U.S. at 596.
117. Id. at 597.
118. Id. at 599.
119. 330 F.2d 562 (8th Cir. 1964). The court came to the opposite and preferable conclusion in Lynchburg Foundry Co. v. United Steelworkers, Local 2556, 404 F.2d 259 (4th Cir. 1968). The divergence of opinion between the authorities emanates from the Enterprise Wheel decision which employs language indicative of both a broad and a restrictive approach regarding an arbitrator's remedial authority. The better and prevailing view is that, in the absence of a provision in a collective agreement to the contrary, an arbitrator has great latitude in fashioning an appropriate remedy, to which the judiciary will accord considerable deference. Local 369, Bakery Workers Int'l Union v. Cotton Baking Co., 514 F.2d 1235, 1237 (5th Cir. 1975), cert. denied, 423 U.S. 1055 (1976); International Ass'n of Machinists v. Cameron Iron Works, 292 F.2d 112, 119 (5th Cir.), cert. denied, 368 U.S. 926 (1961). See generally Fireman & Oilers, Local 935-B v. Nestle Co., 630 F.2d 474 (6th Cir. 1980); International Union of Operating Eng'rs, Local 670 v. Kerr-McGee Ref. Corp., 618 F.2d 657 (10th Cir. 1980); Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977).
120. 330 F.2d at 564-66.
Arthur Shipbuilding Co. v. Arthurs. However, Port Arthur Shipbuilding would be decided differently today, since an arbitrator is empowered by the Labour Relations Act to substitute such other penalty as is just and reasonable where no specific penalty is provided for in the collective bargaining agreement. It nevertheless appears that an arbitrator in neither jurisdiction has the authority to substitute lesser discipline where the agreement contains a specific penalty for the infraction that is the subject matter of the arbitration and where the meaning of such a provision is unaffected by extrinsic evidence. In the absence of a provision restricting her remedial power, an Ontario arbitrator, like her counterpart in the United States, may substitute a lesser penalty in the absence of contractual authorization. She may not do so, however, where the agreement does not contain a specific penalty for the employment related offence.

As discussed above, an Ontario court will refuse to sustain an award if the interpretation provided is one which the language of the agreement will not reasonably bear. One commentator has suggested that if a court strongly feels that an award is incorrect, the intensity of this feeling will be determinative. The validity of this comment is illustrated by the Ontario case of United Glass Workers Local 246 and Dominion Glass Co. The lower court held that the language of the agreement could not reasonably bear the interpretation placed upon it by the arbitration board. The dissenting justice held that the interpretation was not only one which the agreement might reasonably bear, but was, in fact, the correct interpretation. The case was reversed on appeal, the court holding that the language of the agreement could reasonably bear the interpretation placed upon it by the board and dissenting justice.

This is in marked contrast to the situation in the United States where courts routinely refuse to vacate awards based upon what an Ontario court may characterize as an unreasonable interpretation of an agreement. Although the approach taken by the Fourth and Sixth Circuits

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121. 70 D.L.R.2d 693, 696 (Can. 1968). The Court concluded that the arbitrator modified or amended the agreement.

122. See infra note 304 and accompanying text.


124. See supra note 119 and accompanying text.

125. See infra note 304 and accompanying text.

126. See infra notes 59-60 and accompanying text.


129. Id. at 640.

130. Id. at 637.


132. See generally Amalgamated Butcher Workmen, Local 641 v. Capitol Packing Co., 413 F.2d 668 (10th Cir. 1969); San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407
closely resembles that of courts in Ontario, more deferential treatment is generally accorded an arbitrator's interpretation of an agreement in the United States than in Ontario. In Local 77, American Federation of Musicians v. Philadelphia Orchestra Association, for example, the question submitted to the arbitrator was whether musicians were required to travel by airplane. The arbitrator ruled that the orchestra association could require its musicians to travel by airplane, excepting those who were able to show a genuine physical or psychological incapacity for air travel. There was no provision in the agreement which provided for air travel. That notwithstanding, the court held that the award was one which drew its essence from the agreement. However, it would seem that the award could be otherwise justified based on an interpretation of the past practice of the parties.

An arbitrator has no authority to award punitive damages or attorney's fees in the absence of a contractual authorization. An Ontario arbitrator who later went on to become the Chief Justice of the Supreme Court of Canada has similarly held that an arbitrator may not award punitive damages.

d. Functus Officio

Just as in Ontario, it would appear that an arbitrator in the United States is functus officio once he has executed and delivered his award. His authority is thereafter limited to the correction of clerical

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133. See generally Morris, supra note 1, at 333, 351, 367-72.
135. Id. at 788.
136. Id. at 789.
137. Id. at 791.
138. Id.
139. Id. at 791-92.
140. Bacardi Corp. v. Congreso de Uniones, 692 F.2d 210, 214 (1st Cir. 1982); Baltimore Regional Joint Bd. v. Webster Clothes, 596 F.2d 95, 97-98 (4th Cir. 1979); Westinghouse Elec. Corp. v. IBEW, 561 F.2d 521 (4th Cir. 1977), cert. denied, 434 U.S. 1036 (1978). Contra Sidney Wanzer & Sons, Inc. v. Milk Drivers Union, Local 753, 249 F. Supp. 664, 671 (N.D. Ill. 1966) (held that an arbitrator has authority to award punitive damages, but such authority is extraordinary, and should be reserved for situations which cannot be rectified by other remedies).
141. Polymer Corp. Ltd., 10 L.A.C. 51 (1959) (Laskin, Arb.). The British Columbia position is unclear. There would not appear to be any decisions on point. The issue was discussed, but not decided, in the arbitration case of Pacific Press, Ltd., 15 L.A.C.2d 113 (1977) (Thompson, Arb.).
142. See supra notes 55-56 and accompanying text.
143. United Steelworkers v. Ideal Cement Co., 762 F.2d 837, 842 (10th Cir. 1985).
or mathematical errors\textsuperscript{144} and to the clarification, amplification, or interpretation of an ambiguous award remitted to him by a court.\textsuperscript{145} In all other respects his jurisdiction is exhausted, and he has no authority "to recall the same, to order a rehearing, to amend or to ‘interpret’ in such a manner as may be regarded as authoritative."\textsuperscript{146}

\section*{4. Inconsistency with Law or Public Policy}

In addition to review based on the four types of jurisdictional error, United States courts also will review arbitral awards where an inconsistency with law or public policy exists. As in Ontario,\textsuperscript{147} an award may not be sustained if it approves or compels illegal conduct. Thus, an award based on an illegal contractual provision\textsuperscript{148} or requiring the commission of an unfair labor practice,\textsuperscript{149} violation of the antitrust laws,\textsuperscript{150} or the commission of a crime\textsuperscript{151} is not enforceable.

Similarly, an award will not be sustained if it approves or compels conduct contrary to public policy.\textsuperscript{152} Recognizing the vagaries inherent in such a categorization, the United States Supreme Court, in \textit{W.R. Grace and Co. v. Local 759, International Union of the United Rubber Workers},\textsuperscript{153} stated that the public policy had to be well defined, dominant and ascertainable by reference to the laws and legal precedents.\textsuperscript{154} General considerations of supposed public interests are not sufficient.\textsuperscript{155} Awards which have required reinstatement of a member of the Communist Party\textsuperscript{156} and a truck driver caught drinking liquor on duty,\textsuperscript{157} or

\textsuperscript{144} C. Updegraff, \textit{Arbitration and Labor Relations} 116 (3d ed. 1970).
\textsuperscript{146} C. Updegraff, supra note 144 at 16.
\textsuperscript{147} See supra note 62 and accompanying text.
\textsuperscript{149} Glendale Mfg. Co. v. ILGWU Local 520, 283 F.2d 936, 940 (4th Cir. 1960), \textit{cert. denied}, 366 U.S. 950 (1961); \textit{Botany Indus.}, 375 F. Supp. at 492.
\textsuperscript{150} Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753, 422 F.2d 546, 552-53 (7th Cir. 1970).
\textsuperscript{153} 461 U.S. 757 (1983).
\textsuperscript{154} \textit{Id.} at 766.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} Black v. Cutter Laboratories, 43 Cal. 2d 788, 790, 278 P.2d 905, 906 (1955), \textit{cert. denied}, 351 U.S. 292 (1956), \textit{cited in} Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128-29 n.27 (3d Cir. 1969). The former case is probably no longer good law based, as it is, on a supposed public interest of protection against communists. The case is a sterling example of the type of case to which \textit{W.R. Grace} was directed.
\textsuperscript{157} Amalgamated Meat Cutters, Local 540 v. Great W. Food Co., 712 F.2d 122, 123 (5th Cir. 1983). \textit{See also} Misco, Inc. v. United Paperworkers Int’l Union, 768 F.2d 739 (5th Cir. 1985).
which undermined the effective enforcement of the criminal laws, have been held to be unenforceable.

Inconsistency with public policy has not developed as a ground of review in Ontario. Given that provisions in contracts violative of public policy may be set aside at common law, it is possible that this ground of review could be further developed in the future.

5. Incompleteness, Ambiguity, or Internal Inconsistency

In Enterprise Wheel, the United States Supreme Court stated that a mere ambiguity in an award does not make it vulnerable to review. Indeed, an arbitrator need not supply written reasons. However, a court may deny enforcement of an award which is unquestionably incomplete, ambiguous, or internally inconsistent. Remission to the same or a different arbitrator for reconsideration is the preferred practice in such a circumstance.

Similarly, an Ontario arbitrator need not supply written reasons. Ontario courts are more likely, however, to refuse to sustain an award because of an ambiguity. Remission for ambiguity is the preferred practice in both jurisdictions. Neither the United States courts nor their Ontario counterparts appear to treat this situation as one in which the doctrine of functus officio has any application.

III

BRITISH COLUMBIA: AN EXPERIMENTAL APPROACH

Prior to 1974, the approach in British Columbia relating to review

159. In Smith & Rhuland, Ltd. v. The Queen ex rel. Andrews, [1953] 3 D.L.R. 690 (Can. 1953), Mr. Justice Rand held that an application for certification was improperly refused by the Labour Relations Board where the secretary-treasurer of the applicant union was a communist and exercised a dominant influence over it.
163. Bell Aerospace Co., 500 F.2d at 924-25.
164. For the Ontario position see supra note 4 and accompanying text.
167. For the Ontario position see supra note 56 and accompanying text.
of arbitration awards generally mirrored that which exists in Ontario at the present time. Review was governed by the Arbitration Act which empowered the Supreme Court to set aside an award on the basis of bias, fraud, absence of natural justice, excess of jurisdiction, or error of law on the face of the award where there was a collateral, as opposed to a specific, referral of a question of law to an arbitrator. The interpretation of an agreement was treated as collateral and thus reviewable if unreasonable or clearly wrong.

A new Labour Code came into force in 1974. The Court of Appeal was given exclusive jurisdiction to set aside or remit an award or stay proceedings on the basis of misbehaviour of an arbitrator, error of law affecting jurisdiction, or denial of natural justice.

The Code was substantially amended again in 1975 and, apart from an inconsequential procedural amendment in 1982, remains unchanged. The British Columbia approach to review is characterized by noninterference in the arbitral process. The grounds of review which the Labour Relations Board has jurisdiction to apply are denial of a fair hearing and inconsistency with principles of labour legislation. Where a proper ground of review is established, the Labour Relations Board may set aside or remit an award, stay proceedings, or substitute its decision for that of an arbitrator. The Court of Appeal has a restricted power of review, and may only review an award for a mistake of the general law.

169. B.C. Stat. ch. 14 (1960) provides:
(1) Where an arbitrator or umpire has misconducted himself the Court may remove him.
(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.
173. Id. § 108(1) provides:
Subject to sections 96 and 107, the Court of Appeal has exclusive jurisdiction in all arbitration cases under a collective agreement or under this Act; and may set aside a decision or award of an arbitration board, or remit matters referred to it to the arbitration board for reconsideration, or stay the proceedings before the arbitration board, on the following grounds only:
(a) That an arbitrator misbehaved or was unable to fulfill his duties properly; or
(b) That there was an error of law affecting the jurisdiction of the arbitration board; or
(c) That there was an error of procedure resulting in denial of natural justice.
174. B.C. Rev. Stat. ch. 212, § 108(1) (1979) provides as follows:
On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred back to the arbitration board, stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
(a) a party to the arbitration has been or is likely to be denied a fair hearing; or
(b) that the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act, or another Act dealing with labour relations.
175. Id. § 109(1) provides as follows:
Thus, unlike the other two jurisdictions, review by a specialized Labour Relations Board is the norm. The remedial authority of the Board and Court of Appeal is similar to that of the supervisory bodies in Ontario and the United States.\textsuperscript{176} While there is a statutory basis in Ontario,\textsuperscript{177} but not the United States,\textsuperscript{178} for denying relief once a proper ground of review has been established, it is likely because of the use of the word "may" instead of "shall" in sections 108 and 109 of the Code, that relief is discretionary in British Columbia even where a ground of review has been established. Remission for reconsideration is the preferred practice in British Columbia\textsuperscript{179} and Ontario,\textsuperscript{180} but not in the United States.\textsuperscript{181}

\textit{A. Review by the Labour Relations Board: Locus Standi}

British Columbia, unlike Ontario and the United States, adopts a permissive approach toward standing by refusing to limit status to challenge an award to a signatory of an agreement.\textsuperscript{182} British Columbia allows any party to seek review if its rights are directly affected by an award, whether or not it attended the hearing.\textsuperscript{183} The issue most often arises in the context of jurisdictional disputes.\textsuperscript{184} A union which is not privy to an agreement out of which a grievance arises may challenge an award involving, for example, a dispute between unions over the right to control certain types of work, workers, or areas\textsuperscript{185} or to gain access to a training program.\textsuperscript{186}

It is not, however, in every case that a third party has standing to seek review of an award. An award which only indirectly affects another union—by, for example, altering the bargaining power of an employer or the economics of an operation—is not open to review at the instance of

\begin{itemize}
\item On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award where the basis of the decision or award is a matter or issue of the general law not included in Section 108(1).\textsuperscript{176}
\item See supra note 72 and accompanying text.
\item See supra note 5 and accompanying text.
\item See supra notes 71-72 and accompanying text.
\item Surrey Ironworks, Ltd., 244/84 (L.R.B.); Vancouver Gen. Hosp., L306/82 (L.R.B.).\textsuperscript{179}
\item See supra note 4 and accompanying text.
\item See supra note 74 and accompanying text.\textsuperscript{181}
\item See supra note 72 and accompanying text.
\item British Columbia Inst. of Technology and College of New Caledonia, L138/79 (L.R.B.).\textsuperscript{182}
\item Health Labour Relations Ass'n, 34/85 (L.R.B.); British Columbia Forest Prods., Ltd., Crofton Pulp and Paper Div., [1980] 3 Can. L.R.B.R. 11 (L.R.B.). In the former case, the reason for granting standing was also dispositive of the substantive issue.\textsuperscript{183}
\item British Columbia Forest Prods. (Crofton), [1980] 2 Can. L.R.B.R. 400 (L.R.B.).\textsuperscript{184}
\item Id.\textsuperscript{185}
\end{itemize}
that union.\textsuperscript{187} Thus, as the Labour Relations Board held in \textit{Craigmont Mines Ltd.},\textsuperscript{188} a union which has set up a lawful picket line may not seek review of an award which declares that another union breaches its collective agreement by honouring the line. Similarly, the Board stated in \textit{obiter dictum} that contractors affected by interpretations of "contracting out" provisions or third parties affected by interpretations of "non-affiliation" clauses are not entitled to challenge an award.\textsuperscript{189}

\section*{B. Grounds for Review by the Labour Relations Board}

\subsection*{1. Denial of Fair Hearing}

As in Ontario and the United States, the Labour Relations Board of British Columbia may review an award on the basis of a denial of a fair hearing.\textsuperscript{190} An award will not be sustained if a party has been denied a fair hearing.\textsuperscript{191} While an award need not be fair and reasonable in the eyes of all concerned,\textsuperscript{192} it is clear that a hearing must be conducted by a neutral arbitrator who allows each party a full opportunity to present its own case and meet the position of the other side.\textsuperscript{193} As in Ontario,\textsuperscript{194} and the United States,\textsuperscript{195} the rights to notice, to counsel, and to present evidence are essential.\textsuperscript{196}

The procedural indicia of a fair hearing are governed by what is logical or sensible given the industrial relations context.\textsuperscript{197} Therefore, the elements of a fair hearing are flexible and depend upon the facts and circumstances of each case.\textsuperscript{198} It is inappropriate to require all of the procedures traditionally imposed by the common law. Indeed, the use of the phrase "fair hearing" in section 108 instead of "natural justice" has led one commentator to speculate that the Legislature intended the former to mean something other than a hearing conducted according to the

\begin{itemize}
  \item \textsuperscript{187} British Columbia Forest Prods., Ltd., Crofton Pulp and Paper Div., 3 Can. L.R.B.R. 11 (B.C.L.R.B.).
  \item \textsuperscript{188} [1979] 1 Can. L.R.B.R. 222 (L.R.B.).
  \item \textsuperscript{189} Id.
  \item \textsuperscript{190} See infra notes 308-19 and accompanying text.
  \item \textsuperscript{191} See supra note 174 and accompanying text.
  \item \textsuperscript{192} British Columbia Hydro and Power Auth., [1982] 2 Can. L.R.B.R. 343, 347 (L.R.B.).
  \item \textsuperscript{194} See supra notes 6-7, 9, 11-12 and accompanying text.
  \item \textsuperscript{195} See supra notes 84-87 and accompanying text.
  \item \textsuperscript{196} Fernie Motor Inn, 73/84 (L.R.B.); Pullman Trailmobile Can., Ltd., [1979] 2 Can. L.R.B.R. 458 (L.R.B.). The Ontario position regarding notice as set out in Bradley and Ottawa Professional Fire Fighters Ass’n, 63 D.L.R.2d 376 (C.A. 1967), was adopted by the Board in Construction Labour Relations Ass’n, 315/84 (L.R.B.).
  \item \textsuperscript{197} Fernie Motor Inn, 73/84 (L.R.B.); Pullman Trailmobile Can., Ltd., [1979] 2 Can. L.R.B.R. 458 (L.R.B.).
  \item \textsuperscript{198} Province of B.C., 309/85 (L.R.B.).
\end{itemize}
rules of natural justice. It is likely that the latter term was avoided in an attempt to limit the importation of rigid administrative law concepts into a specialized labour arbitration context.

The Labour Relations Board uses the terms “fair hearing” and “natural justice” interchangeably. It is perhaps this lack of precision which has led to the adoption of the Ontario position requiring notice to “affected employees.” Although the requirement to give such notice does not appear to be followed in Ontario or the United States, it is the British Columbia practice.

As in Ontario, refusal to consider the admissibility of evidence may constitute denial of a fair hearing. All jurisdictions recognize the admissibility of hearsay and corresponding restrictions on its use. In British Columbia, uncorroborated hearsay must not be preferred to direct sworn testimony or admitted to establish a crucial and central question; further, an arbitrator must balance the probative value of hearsay against its dangers before ruling on the question of admissibility.

All three jurisdictions recognize a general prohibition against ex parte fact finding. In British Columbia, an arbitrator may not receive evidence not adduced at a hearing which has been obtained without the knowledge of the parties. Similarly, he may not take into account statements not founded on either direct testimony or inference from testi-

199. Weiler, supra note 170, at 204.
200. British Columbia Hydro and Power Auth., 64/82 (L.R.B.); Workers' Compensation Bd. of B.C., L202/81 (L.R.B.); British Columbia Hydro and Power Auth., 64/81 (L.R.B.); British Columbia Bldgs. Corp., L126/80 (L.R.B.); British Columbia Hydro and Power Auth., 78/80 (L.R.B.); British Columbia Forest Prods., Ltd., Crofton Pulp and Paper Div., 36/80 (L.R.B.); C.A.E. Mach., Ltd., L113/80 (L.R.B.); Fresh-Pak, Ltd., [1980] 2 Can. L.R.B.R. 313 (L.R.B.); Econo Mix, Ltd., 25/80 (L.R.B.); Board of School Trustees of School Dist. No. 68 (Nanaimo), 21/77 (L.R.B.).
201. See supra notes 6-7 and accompanying text.
203. See supra note 8 and accompanying text.
204. See supra note 92 and accompanying text.
205. Information on British Columbia practice was obtained by the author in conversations with various arbitrators.
206. See supra note 15 and accompanying text.
207. Workers' Compensation Bd. of B.C., L202/81 (L.R.B.).
208. See supra notes 18-19, 80 and accompanying text. Although hearsay is admissible in the United States, arbitrators generally qualify its reception by informing the parties that it is admitted only “for what it is worth.” F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 325 (4th ed. 1985).
mony raised at a hearing without inviting further evidence on the point.\textsuperscript{212}

British Columbia is unique in that an evidentiary ruling is open to review if an arbitrator has failed to consider the labour relations impact resulting therefrom.\textsuperscript{213} Thus, where an employer's budget was sought to be introduced in the context of a layoff grievance, the Labour Relations Board held that the arbitrator should have balanced the prejudicial effect on the employer's position in collective bargaining against the probative value of the document prior to ruling on its admissibility.\textsuperscript{214} Apart from this exception, it appears that evidentiary rulings in Ontario, the United States, and British Columbia are not generally reviewable.

All three jurisdictions adopt a permissive approach toward the issue of bias in the area of tripartite arbitration. This is probably because the right to designate an appointee of one's own choice at least implicitly imports partisanship into the process.\textsuperscript{215} In British Columbia, the parties' respective nominees, excluding the chairperson,\textsuperscript{216} are permitted to abandon neutrality in favour of an assumption and aggressive assertion of the role of a second advocate.\textsuperscript{217} It appears to be taken for granted that employees of the union can legitimately sit as nominees.\textsuperscript{218} All three jurisdictions also recognize that the lack of a full opportunity by a nominee to participate in executive deliberations can result in a denial of a fair hearing.\textsuperscript{219}

A breach by a union of its statutory duty of fair representation may, as in the United States\textsuperscript{220} and Ontario,\textsuperscript{221} result in a denial of a fair

\begin{footnotes}
\footnote{212. Surrey Ironworks, Ltd., 244/84 (L.R.B.); Province of B.C., 63/82 (L.R.B.); British Columbia Ferry Corp., 45/82 (L.R.B.).}
\footnote{214. Id. See also Board of School Trustees of School Dist. No. 68 (Nanaimo), [1977] 1 Can. L.R.B.R. 39 (L.R.B.).}
\footnote{215. See supra notes 25, 76-77 and accompanying text. See also Health Labour Relations Ass'n, 75/79 (L.R.B.); Gearmatic Co., [1978] 1 Can. L.R.B.R. 502 (L.R.B.).}
\footnote{216. Health Labour Relations Ass'n, 75/79 (L.R.B.).}
\footnote{218. In Bushnell Div. of Bausch & Lomb, 15/83 (L.R.B.), the Labour Relations Board held that status as an employee of one party does not automatically preclude his appointment as nominee at an arbitration. However, a disqualification on this very basis was granted in Ontario in Canadian Shipbuilding & Eng'g, Ltd. v. Ord, 73 C.L.L.C. 14,185 (Div. Ct. 1973).}
\footnote{219. In Ontario, strict rules of procedure prevail. Nott v. Nott, 5 O.R. 283 (C.A. 1884). There would not appear to be any United States Supreme Court or circuit court of appeals decisions on point. However, state courts have addressed the issue. See, e.g., Simons v. New Syndicate, Inc., 152 N.Y.S.2d 236, 238-39 (Sup. Ct. 1956). In British Columbia, see Metro Transit Operating Co., 219/83 (L.R.B.); Johnston Terminals, Ltd., 24/82 (L.R.B.); and Wilkinson Co., 425/84 (L.R.B.). In the latter case, an award was set aside because the deceased nominee had not been able to discuss the award with the other members of the arbitration board prior to his death.}
\footnote{220. See supra notes 93-94 and accompanying text.}
\footnote{221. See supra notes 95-97 and accompanying text.}
\end{footnotes}
hearing.222

Unlike Ontario, where an award may not be sustained if an arbitrator asks the wrong question or fails to answer the question submitted,223 or the United States, where an award will not be sustained if it exceeds the scope of the submission,224 arbitrators in British Columbia are permitted to change the question or issue submitted in an attempt to resolve the real substance of a dispute.225 The question, which need not in fact be submitted,226 does not define the boundaries of the arbitrator's jurisdiction.227 An arbitrator is not allowed, however, to embark upon a wholly different arbitration than that agreed to by the parties. For example, an arbitrator cannot entertain as part of a discharge arbitration a claim for damages other than those which normally flow from an unjust discharge.228

If the question considered by an arbitrator does not go to the real substance of a dispute, the award may be reviewable.229 Further, if a question is submitted, and an arbitrator changes it, she must give the parties a fair hearing with respect to the substance of the newly characterized dispute.230 An award will not be sustained where an arbitrator dramatically alters the issues without inviting the parties to present further evidence and argument.231

2. Inconsistency with Principles of Labour Legislation

Another ground of review is based upon inconsistency with principles of labour legislation. This ground encompasses six different aspects which include arbitrability, improper delegation, lack of a genuine effort in interpreting the agreement, error in the law of the statute, inadequacy of reasons and functus officio.

222. Weldco, Ltd., L127/82 (L.R.B.).
223. See supra notes 35-45 and accompanying text.
224. See supra notes 106-14 and accompanying text.
**a. Arbitrability**

The British Columbia Labour Relations Board and Ontario courts, unlike their United States counterparts, do not express themselves in terms of substantive or procedural arbitrability. There is a statutory provision deeming most matters substantively arbitrable both in British Columbia and Ontario. Although there is no similar provision in any United States statute, there is nevertheless a presumption in favour of substantive arbitrability. However, collective agreements in the United States may expressly exclude disputes which would be deemed by statute to be arbitrable in the other two jurisdictions. One may therefore avoid the arbitral process in the United States by the use of specific exclusionary contractual language.

There do not appear to be any cases in British Columbia or Ontario which deal with the appropriate level of scrutiny on review. This is undoubtedly due to legislation deeming most matters substantively arbitrable. It is likely that, as in the United States and probably Ontario, an arbitrator's incorrect finding in favour of or against substantive arbitrability is reviewable.

Procedural arbitrability is not a major issue in the Canadian jurisdictions. That is because an arbitrator has a statutory discretion in British Columbia and Ontario to relieve against noncompliance.

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232. See supra note 98 and accompanying text.
233. B.C. REV. STAT. ch. 212, § 93 (1979), provides as follows:

(1) Every collective agreement shall contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision shall require that the employer have a just and reasonable cause for dismissal or discipline of an employee; but this section shall not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.

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

(3) Where a collective agreement does not contain a provision referred to in subsections (1) and (2), it is deemed to contain those of the following provisions it does not contain:

(a) the employer shall not dismiss or discipline an employee bound by this agreement except for just and reasonable cause;

(b) where a difference arises between the parties relating to the dismissal or discipline of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including a question as to whether a matter is arbitrable, either of the parties, without stoppage of work, may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference to arbitration, and the parties shall agree on a single arbitrator, the arbitrator shall hear and determine the difference and issue a decision, which is final and binding on the parties and any person affected by it.

234. See supra note 29 and accompanying text.
235. See supra note 99 and accompanying text.
236. Id.
237. B.C. REV. STAT. ch. 212, § 98(e) (1979), provides that an arbitration board has authority
with mandatory time limits. An arbitrator in British Columbia may also relieve against other procedural requirements. The issue in both jurisdictions is whether such discretion has been properly exercised. Where the procedural requirement in question relates to whether a dispute has been referred to a specific arbitrator, however, it appears that an incorrect finding may be reviewable.

The exercise of statutorily conferred discretion is not subject to close scrutiny. The Board has steadfastly refused to catalogue a series of rigid considerations for fear of hampering the delicate balancing process in which an arbitrator must engage.

In summary, British Columbia arbitrators are given more latitude in determining what is procedurally arbitrable than their Ontario or United States counterparts. Further, they have a unique discretion to refuse to adjudicate upon a procedurally arbitrable matter where there has been undue delay. If an arbitrator makes a bona fide attempt to deal with an objection relating to undue delay, the resulting decision will likely be immune from attack.

b. Improper Delegation

A British Columbia arbitrator may not delegate his powers of adjudication by placing the disposition of a grievance in the hands of another. There is no reason to believe that this rule would be otherwise

"to relieve, on just and reasonable terms, against breaches of time limits or other procedural requirements set out in the collective agreement." This section does not confer authority upon an arbitrator to grant a remedy in the absence of a violation. Lafarge Concrete, 5/86 (L.R.B).

238. See supra note 49 and accompanying text.
239. An American arbitrator may relieve against time limits if the resulting award draws its essence from the agreement; that is, the common law of the collective agreement allows for such an interpretation. See, e.g., Manhattan Coffee Co. v. International Bhd. of Teamsters, Local 688, 571 F. Supp. 347 (E.D. Mo. 1983), aff'd on other grounds, 743 F.2d 621 (8th Cir. 1984), cert. denied, 105 S. Ct. 2323 (1985) (arbitrator's finding of "continuing occurrence" in transfer of work overcomes 5-day filing limit where grievant filed on 26th day) (arbitrator finding of estoppel on third step filing limit where employer told grievant to "sit tight," and where employer attended third step meeting).
240. See supra note 237.
241. See supra note 49 and accompanying text; Astor Hotel, L56/81 (L.R.B.).
244. Malakwa Cedar Prods., Ltd., L29/80 (L.R.B).
245. See supra notes 29, 49 and accompanying text.
246. See supra note 104 and accompanying text.
247. B.C. REV. STAT. 212, § 98(f) (1979) provides that an arbitration board has authority to "dismiss or reject an application or grievance, or refuse to settle a difference, where in the arbitration board's opinion, there has been unreasonable delay by the person bringing the application or grievance, or requesting the settlement, and the delay has operated to the prejudice or detriment of the other party to the difference."
248. Cowichan Valley Regional Dist., L233/82 (L.R.B).
in Ontario or the United States. However, no cases have been found on this point in either jurisdiction.

c. Lack of a Genuine Effort by the Arbitrator in Interpreting the Agreement

The Labour Relations Board will not review the merits of an award. The British Columbia case of Simon Fraser University follows United Steelworkers v. Enterprise Wheel and Car Corp. and makes it clear that there is a policy of curial deference to the adjudication of an arbitrator who interprets an agreement. The Labour Relations Board in Simon Fraser University quoted extensively from Enterprise Wheel and adopted the ratio decidendi from that case. The following extract sets out the approach to review by the Labour Relations Board:

There are a number of alternative approaches theoretically available to the Board in reviewing interpretative awards of labour arbitrators. We could adopt an approach similar to that taken by Canadian courts acting under statutes such as the Arbitration Act. The courts have said that they will not overturn an arbitrator’s interpretation of contract language, even if they would have come to a different conclusion, so long as the interpretation given is one which the language of the contract can reasonably bear. We could go to a different extreme by declining to set aside an award unless the arbitrator has clearly been guilty of an intentional flaunting of the language of the collective agreement. Neither of those two approaches is permitted by §108 of the Code. Errors of interpretation, even though relatively serious, are not in themselves errors of labour relations policy. On the other hand, it does not require a clearly intentional disregard of a collective agreement to find that an arbitrator has acted inconsistently with his statutory duty to interpret and apply the terms thereof. In our view, the approach contemplated by §108 is this: does the material before the Board indicate that the arbitrator was making a genuine effort to reach his conclusions on the basis of the relevant provisions of the bargain struck by the parties? If so, his interpretation of those provisions (an interpretation made by a person selected by the parties themselves to assist in the self-government of their relationship) will be beyond review by us.

Thus, the reasonableness standard of Ontario has been rejected in favour of a U.S.-like approach. The result is that the Labour Rela-

254. See supra notes 59-60, 126-28 and accompanying text.
255. See supra notes 115-18 and accompanying text. In Miller Brewing v. Brewery Workers,
tions Board will almost invariably resist the temptation to overrule an arbitrator's interpretation of an agreement. The Board must be presented with an extreme case before review will be granted on this basis. Such a case was *Gulf Concrete Products* where the arbitrator based his award on extrinsic evidence which related to the master agreement but did not form part of the common law of the collective agreement in issue. The Labour Relations Board, in that case, remitted the award; it could not be said that the arbitrator had made a genuine effort to interpret the collective agreement before him.

A number of factors may be seen as evidence of lack of a genuine effort on the part of the arbitrator to interpret the agreement such that review by the Labour Relations Board is invoked. One such factor is where the arbitrator, in rendering an award, has changed, varied or amended the agreement. All three jurisdictions recognize that an arbitrator may not render an award which has the effect of changing, varying, or amending the provisions of an agreement, thereby converting a rights arbitration into an interest dispute. British Columbia and the United States, but not Ontario, allow an arbitrator to rectify an agreement where it does not reflect the mutual intention of the parties.

This reviewable error may manifest itself in an arbitrator's treatment of extrinsic evidence. In *University of British Columbia*, the Labour Relations Board set out its policy regarding extrinsic evidence. An arbitrator has no authority to consider evidence tendered to establish a variation of the agreement. Where there is a *bona fide* doubt relating to the interpretation of an agreement, however, extrinsic evidence of past practice and negotiating history is admissible for the purpose of clarification. Such evidence may not be taken in preference to the terms of an

Local 9, 739 F.2d 1159 (7th Cir. 1984), cert. denied, 105 S. Ct. 912 (1985), the court stated, in words strikingly similar to the prevailing standard in British Columbia, that so long as an award manifests an attempt to interpret an agreement, it should be upheld.

256. 42/82 (L.R.B.). *See also* Health Labour Relations Ass'n, 34/85 (L.R.B.) (award set aside because the arbitrator provided two conflicting interpretations of the collective bargaining agreement).


260. There would not appear to be any United States Supreme Court or circuit court of appeals decisions on point. The question relating to an arbitrator's authority to rectify was answered in the affirmative in the arbitration case of Huntsville Mfg. Co., 6 Lab. Arb. (BNA) 515 (1947) (McCoy, Arb.).

261. *See supra* note 47.


263. *Id.; see also* Pacific Vocational Inst., L129/81 (L.R.B.). An arbitrator must consider the intention of the parties who adopt a Master Agreement, not that of the parties who negotiated it. *Gulf Concrete Prods.*, 42/82 (L.R.B.).
agreement. It may be used solely to assist the arbitrator in defining existing contractual rights, not to create new obligations.264

Thus, as in Ontario,265 a British Columbia arbitrator may use extrinsic evidence only to clarify a provision the meaning of which is unclear. However, the Labour Relations Board appears to be more lenient in conceding the existence of an ambiguity than the Ontario courts. It has been suggested that arbitrators in the United States may go one step further than their Canadian counterparts in exercising authority to rely on such evidence to interpret an unambiguous provision.266

A recent case may have expanded the use of extrinsic evidence in British Columbia. The Labour Relations Board has stated that an arbitrator may, in certain cases, imply terms in a collective agreement from the conduct of the parties in negotiations or subsequent to the signing of a collective agreement.267 It remains to be seen whether this exception will swallow the rule.

A second factor which indicates a lack of serious effort by an arbitrator to interpret the collective agreement is a failure to give effect to the presumptive framework of arbitral law. Although an arbitrator’s manifest misunderstanding of arbitral jurisprudence is not reviewable, a failure to give effect to the presumptive framework of such law may give rise to a reviewable error.268 For example, an arbitrator may incorrectly apply a particular line of arbitral authority,269 but he must not, in his effort to interpret an agreement, entirely fail to consider relevant authorities and the principles for which they stand.270

This does not impose an obligation on an arbitrator to render an award which follows a preferred line of authority.271 Rather, an arbitra-

264. British Columbia Forest Prods., Ltd. (Caycuse Logging), L72/80 (L.R.B.); Columbia Hydro Constructors, 71/80 (L.R.B.).
265. See supra notes 66, 88 and accompanying text.
266. See supra note 89 and accompanying text.
267. Hub City Paving, Ltd., L63/82 (L.R.B.).
271. Metro Transit Operating Co., 40/85 (L.R.B.); Genstar Cement, Ltd., 403/83 (L.R.B.); Government Employee Relations Bureau, [1977] 2 Can. L.R.B.R. 30 (L.R.B.). See also Park & Tilford Can., Inc., L203/81 (L.R.B.). One exception to this general statement is where an arbitrator renders an interpretive judgment which is inconsistent with the principles of the Labour Code. For example, in Dillingham Constr., Ltd., 55/86 (L.R.B.), an arbitrator’s interpretation of a subcontracting clause in a collective agreement in the construction industry was set aside because it conflicted with principles of the Labour Code as interpreted by the Board in earlier decisions.

An arbitrator is not normally bound to follow earlier arbitration decisions. Government of B.C., 344/83 (L.R.B.). There have been indications from the Board, however, that the arbitrator must do so in certain circumstances, such as where a prior award is founded on an interpretation of peculiar contract language and a new grievance generated simply in order to obtain a rehearing of evidence of what the chief negotiators actually intended some five years earlier, see Board of School Trustees, School Dist. No. 57, Prince George, [1977] 1 Can. L.R.B.R. 45 (L.R.B.), or where the collective agreement makes it clear that previous awards are binding on the parties. Skeena Saw-
tor must simply realize that such jurisprudence is the backdrop against which the parties have negotiated their agreement. Arbitral law therefore establishes the framework within which the arbitrator interprets the agreement. Any principle is capable of being set aside in a particular case.

In summary, a failure to consider a central arbitral principle may be reviewable. Similarly, a substantial misconception of the effect of arbitral law may be reviewable if indicative of a failure to grapple with the relevant authorities.

Incongruity is another factor evidencing an arbitrator’s lack of genuine effort to interpret the agreement. An award may be reviewable if part of the analysis is missing and the award is incongruous given the positions of the parties and the terms of the agreement. It is difficult to speculate as to what type of award will give rise to reviewable error because this ground of review has been the subject of only brief commentary by the Labour Relations Board. It is likely that an award which lacks any recitation of facts, law, or reasons would be reviewable.

d. Error in the Law of the Statute

While arbitrators in Ontario and British Columbia must interpret and apply any employment statute which relates to the grievance before them, an award in the United States will not be enforced if it “is
based ‘solely upon the arbitrator’s view of the requirements of enacted legislation, rather than on his interpretation of the collective bargaining agreement.’\(^{281}\) United States courts are seldom presented initially with the question of whether an arbitrator’s interpretation or application of a statute is correct. The statutory issue is usually raised for the first time in an existing action to vacate or enforce an award.\(^{282}\)

All three jurisdictions recognize that an award inconsistent with an employment statute is reviewable.\(^{283}\) In British Columbia, errors relating to statutory terms and concepts such as “employee,”\(^{284}\) “strike,”\(^{285}\) “collective agreement,”\(^{286}\) “unfair labour practice,”\(^{287}\) and “successorship”\(^{288}\) are reviewable.

The Labour Relations Board may also review an award where an arbitrator has considered himself bound by narrow judicial concepts such as estoppel instead of adapting these doctrines into the specialized labour arbitration context.\(^{289}\) The obligation to apply principles consistent with labour relation realities arises out of the statutory mandate of section 92(3) of the Labour Code.\(^{290}\) In comparison, the Ontario courts appear to adopt a narrower and more legalistic approach,\(^{291}\) while arbitrators in the United States appear not to require the establishment of the elements of estoppel as commonly understood in a commercial law context.\(^{292}\)

A common example of arbitral errors in applying statutory law involves the failure to apply British Columbia’s statutory scheme for the disposition of culpable discharge grievances. The determination of just

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284. British Columbia Hydro, 289/84 (L.R.B.); Province of B.C., 78/77 (L.R.B.).
286. Gulf Concrete Prods., 42/82 (L.R.B.); Province of B.C., 78/77 (L.R.B.).
289. Board of School Trustees School Dist. 41 (Burnaby), 365/83, app’n for reconsideration dismissed, 256/84 (L.R.B.); City of Penticton, 26/78 (L.R.B.). See also District of Chilliwack, L362/82 (L.R.B.).
290. See infra note 302 and accompanying text.
291. See, e.g., Metropolitan Toronto Civic Employees’ Union, Local 43, 18 D.L.R.4th 409 (Div. Ct. 1985) (Under proper circumstances arbitration boards may apply equitable doctrine of estoppel.).
292. American Synthetic Rubber Corp., 47 Lab. Arb. (BNA) 1078 (1966) (Sales, Arb.). There would not appear to be any United States Supreme Court or circuit court of appeals decisions directly on point. However, in Local 1445, United Food Workers Int’l Union v. The Stop & Shop Cos., 776 F.2d 19 (1st Cir. 1985), the court held that an arbitrator need not follow principles of contract law. Id. at 22.
cause is a matter of general statutory concern in British Columbia. Because of the mandate contained in sections 93(1) and 98(d) of the Code, an award involving discharge for culpable reasons is reviewable unless the arbitrator poses to himself the following specific questions:

First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

Accordingly, an award based on the common law approach to cause, assigning fixed consequences for specified forms of conduct, is reviewable. Moreover, there may be reviewable error where, for example, an arbitrator considers herself bound by a provision in an agreement mandating full compensation in the event of reinstatement if there are grounds for not allowing such relief. Further, an award which grants a grievor damages in lieu of reinstatement in view of a finding that discharge is excessive may be reviewable, unless the employment relationship is incapable of restoration. In addition, although an arbitrator may award less than full compensation, the reason for such a denial will be closely examined. Finally, because of the combined mandates of sections 98(a) and 92(3), there is a presumption in favour of the

294. B.C. Rev. Stat. ch. 212, § 93(1) (1979), provides that every collective agreement shall contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision shall require that the employer have a just and reasonable cause for dismissal or discipline of an employee; but this section shall not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.
295. B.C. Rev. Stat. ch. 212, § 98(d) (1979), provides that an arbitration board has authority to "determine that a dismissal or discipline is excessive in all circumstances of the case and substitute other measures that appear just and equitable."
296. Wm. Scott & Co., [1977] 1 Can. L.R.B.R. 1, 5 (L.R.B.). See also Doric Holdings, Ltd. (Bosman's Motor Hotel), 352/85 (L.R.B.); Johnston Terminals, Ltd., L281/82 (L.R.B.); Moduline Indus. (Can.), Ltd., L228/81 (L.R.B.); Forest Indus. Relations, 69/79 (L.R.B.); Loomis Armored Car Serv., Ltd., 77/77 (L.R.B.); Government Employee Relations Bureau, [1977] 2 Can. L.R.B.R. 30 (L.R.B.). It is unclear whether the three-step analysis is applicable to an award involving discharge for nonculpable reasons. In MacMillan Bloedel, Ltd., 79/81 (L.R.B.), the Board held that the test stated in Wm. Scott does not automatically apply to nonculpable discharge cases. Contra British Columbia Ferry Corp., L27/83 (L.R.B.) (Section 98(d) does apply to nonculpable discharge cases.).
298. Simon Fraser Univ., [1978] 1 Can. L.R.B.R. 263 (L.R.B.). However, "[w]hile an arbitrator cannot be bound by the dictates of the parties regarding dismissal grievances, by the same token the arbitrator may—indeed, should—consider and be guided by the criteria which the parties have agreed to insert in their collective agreement." Id. at 269.
299. British Columbia Central Credit Union, Central Data Sys. Dep't, 7/80, app'n for reconsideration dismissed, 299/84 (L.R.B.).
301. B.C. Rev. Stat. ch. 212, § 98(a) (1979), provides that an arbitration board has authority to:
granting of interest on back wages in the absence of fault on the part of the grievor.\footnote{303}

Because of the similarity between section 98(d) of the Code and section 44(9) of the Labour Relations Act,\footnote{304} it is likely that an Ontario arbitrator commits a jurisdictional error if he fails to apply the above three-step analysis. However, where an agreement contains a specific penalty for the infraction which is the subject matter of a grievance, an Ontario arbitrator, by reason of section 44(9), and unlike his British Columbia counterpart,\footnote{305} must apply, and not merely consider, such a provision.\footnote{306} By comparison, a British Columbia arbitrator possesses statutory authority to substitute just and equitable measures in any case where she determines that a disciplinary response is excessive.

The approach to culpable discharge cases which appears to have found favour in the United States holds that, in the absence of a provision in a collective agreement restricting his remedial authority, an arbitrator is not limited to an “all or nothing” decision. That is because employment offences vary in degree. While there is no statutory provision in the United States which mandates a three-step analysis, British

\begin{itemize}
  \item make an order fixing and determining the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value.
  \item B.C. REV. STAT. ch. 212, § 92(2)-(3) (1979), provides as follows:
    \begin{enumerate}
    \item It is the intent and purpose of this Part to constitute method and procedure for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
    \item An arbitration board, to further the intent and purpose expressed in subsection (2), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute.
    \end{enumerate}
  \item British Columbia Hydro & Power, 32/82 (L.R.B.). See also Revelstoke Home Improvement Centres, Ltd., L337/82 (L.R.B.).
  \item ONT. REV. STAT. ch. 228, § 44(9) (1980) provides as follows:
    Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances.
  \item Baptist Housing Soc'y, L82/83 (L.R.B.).
\end{itemize}
Columbia and United States arbitrators generally appear to be engaged in a similar analytical process.\textsuperscript{307}

e. \textit{Inadequacy of Reasons}\textsuperscript{308}

All jurisdictions recognize that an arbitrator need not give written reasons.\textsuperscript{309} However, when the arbitrator does supply reasons, and such reasons are woefully inadequate, remission for clarification is the preferred practice.\textsuperscript{310}

When analyzing an award for incompleteness, ambiguity, or internal inconsistency, the early British Columbia decisions rejected the Ontario position\textsuperscript{311} in favour of the United States approach.\textsuperscript{312} The Labour Relations Board has stated that an award should be given a "sympathetic reading."\textsuperscript{313} This means that an assumption should not be made by the reviewing authority that, because the arbitrator has not referred to evidence, an argument, or a provision of the agreement, she has failed to address those matters.\textsuperscript{314} The arbitrator is given the benefit of the doubt.\textsuperscript{315}

More recently, the Labour Relations Board has retreated from its early decisions. For example, an award may be reviewable for incongruity.\textsuperscript{316} Similarly, a failure to mention a central arbitral principle and to frame an award against that backdrop may lead the Labour Relations Board to find a reviewable error in concluding that the principle was not considered.\textsuperscript{317} Moreover, the Labour Relations Board has stated that an award is not entitled to a sympathetic reading where the grievance relates to a failure to follow the statutory procedure in a culpable discharge.

\textsuperscript{307} See, e.g., Lynchburg Foundry Co. v. United Steelworkers, 404 F.2d 259 (4th Cir. 1968).

\textsuperscript{308} The Labour Relations Board has invoked both §§ 108(1)(a) and (b) when discussing this ground of review. The Board's approach under both sections is the same. Therefore, all cases decided under these sections will be discussed under this topic for convenience.

\textsuperscript{309} See supra note 165 and accompanying text. Dominion Bridge Co. (Constr. Labour Relations Ass'n), L73/80 (L.R.B.).

\textsuperscript{310} See supra notes 4, 162-63, 167 and accompanying text. In British Columbia see Smith Bros. & Wilson, Ltd., 84/86 (L.R.B.).

\textsuperscript{311} See supra notes 39-43 and accompanying text. However, there has been a recent tendency in Ontario to refrain from reviewing an award because of an arbitrator's poorly articulated reasons. See, e.g., Dominion Stores, Ltd. v. Retail Stores Union, Locals 545, 579 and 582, 6 O.A.C. 157 (Div. Ct. 1984).

\textsuperscript{312} See supra notes 160-61 and accompanying text.


\textsuperscript{314} Lornex Mining Corp., [1977] 1 Can. L.R.B.R. 377 (L.R.B.). See also Health Labour Relations Ass'n, 38/86 (L.R.B.); Quest Constr., Ltd., L124/81 (L.R.B.); Lornex Mining Corp., L123/81 (L.R.B.); City of Revelstoke, 31/81 (L.R.B.); Ocean Constr. Supplies, Ltd., L Nov. 5, 1980 (L.R.B.); West Fraser Timber Co., 64/80 (L.R.B.).

\textsuperscript{315} Lornex Mining Corp., L123/81 (L.R.B.).

\textsuperscript{316} See supra notes 277-78 and accompanying text.

\textsuperscript{317} See supra note 275 and accompanying text.
grievance or to the burden of proof regarding the duty to mitigate damages.

f. Functus Officio

As in Ontario and the United States, a decision or award rendered by an arbitrator who is functus officio is reviewable. However the doctrine does not retain its strict common law meaning, as it has no application where it conflicts with the statutory obligation of an arbitrator to resolve disputes in a final and conclusive manner. Accordingly, a response by an arbitrator to a request for clarification is permissible.

Even in the absence of an express reservation of jurisdiction, an arbitrator may complete his award with respect to any issues raised by a grievance and left unresolved in the initial award. Accordingly, it is perfectly proper to request the parties to work out for themselves the details of any monetary aspects of an award and to later, failing agreement between the parties, make an award in respect of those details itself. Further, if an arbitration board withholds adjudication on any aspect of a grievance, and reserves to itself jurisdiction to deal with that aspect pending the outcome of certain events or discussions, it can later issue an award in respect of that aspect and in respect of any matter intrinsically related thereto.

If there is a gap in an award, such as where an arbitrator concludes that discipline is warranted but discharge is excessive, and he neglects to specify what is appropriate, he may subsequently issue an award containing the missing disciplinary response. However, an arbitrator may not reverse the substance or alter the nature of an award in the absence of a remission. He may not allow,

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318. See supra note 296 and accompanying text.
319. See supra note 55 and accompanying text.
320. See supra note 143 and accompanying text.
321. See supra note 296 and accompanying text.
324. Id.
for example, a discharge grievance and subsequently uphold the dis-
charge or determine that a monetary remedy is appropriate and subse-
quently order reinstatement.\footnote{330}

C. Grounds for Review by the Court of Appeal

1. Mistake of the General Law

As noted above, jurisdiction to review arbitration awards in British
Columbia is divided between the Labour Relations Board and the Court
of Appeal.\footnote{331} The primary jurisdiction to review is vested in the Labour
Relations Board. The Court of Appeal will review an award where an
arbator, in drawing upon general principles of the law, misconceives
that law. This review jurisdiction is narrow and does not encompass
matters which are reviewable by the Board. The Court of Appeal has
stated that, except where an award is challenged on the basis of a denial
of a fair hearing, jurisdiction is determined as follows:

1. That if the real substance and determinative constituent of an award
is inconsistent with the principles expressed or implied in the Labour
Code, or other Act dealing with labour relations, then, even if the real
substance is or involves a matter or issue of the general law, and even if
there are subsidiary aspects of the award which could not, in themselves,
found jurisdiction in the board, the Labour Relations Board and only the
Labour Relations Board has jurisdiction, and it can grant all or any of
the remedies set out in § 108(1);
2. If the real substance and main constituent of an award is a matter or
issue of the general law, and if the Labour Relations Board does not have
jurisdiction, then this court has jurisdiction and can grant any appropri-
ate remedy, notwithstanding that other subsidiary aspects of the award
would not, in themselves, be a ground for giving this court jurisdiction;
3. If the real substance of an award is not such as to give jurisdiction to
either the Labour Relations Board or this court, then the award is final
and conclusive.\footnote{332}

One commentator has suggested that the division of supervisory au-
thority is based on the respective areas of expertise of the two bodies.\footnote{333}
Accordingly, matters of general law are relegated to the Court of Appeal
because it has the required expertise. An alternative explanation is that,
by conferring a limited authority to review awards on the Court of Ap-
peal, the Legislature sought to protect section 108 from constitutional
scrutiny.\footnote{334}

(L.R.B.).}
\footnote{331. See supra notes 174-75 and accompanying text.}
\footnote{332. Kinsmen Retirement Centre Ass'n v. Hospital Employees' Union, Local 180, 63 B.C.L.R.
292, 298-99 (C.A. 1985).}
\footnote{334. The argument is that § 96 of the Constitution Acts, 1867 to 1981, which provides for federal
A policy of noninterference with arbitration awards was set down in the leading decision of the British Columbia Court of Appeal, A.I.M. Steel, Ltd.\textsuperscript{335} In that case, the court adopted a restrictive approach toward judicial review, rejecting the suggestion that the review jurisdiction is "virtually unfettered." The court declined to incorporate administrative law concepts into its supervisory jurisdiction. On the particular facts of the case, the court held that the interpretation of a clause in a collective agreement is not a matter of the general law.

As a result of the Court of Appeal's restrictive definition of its jurisdiction, there has been a paucity of challenges under section 109. The scarcity of cases makes it difficult to determine in what circumstances a decision or award is a matter or issue of the general law. To date, the court has stated that a failure to resolve conflicts in evidence is reviewable,\textsuperscript{336} as is the question of assessment of damages arising out of an illegal strike.\textsuperscript{337} However, neither the existence of a settlement of a dispute\textsuperscript{338} nor the admissibility of evidence\textsuperscript{339} would appear to be matters reviewable by the Court of Appeal.

The Labour Relations Board has held that the Court of Appeal may review an arbitrator's determination of the legality of common law picketing by a federally certified union since the Code does not apply to picketing emanating from a federal labour dispute.\textsuperscript{340} Further, conclusions relating to the general law of mistake may be reviewable.\textsuperscript{341} Given that an arbitrator is not bound by narrow judicial concepts, the implication may be that, although an award may be reviewable by the Board where an arbitrator fails to adapt narrow judicial concepts into a labour relations context, the same award may be reviewable by the Court of Appeal if a common law concept has been incorrectly applied.\textsuperscript{342}


\textsuperscript{336} Insurance Corp. v. Office Employees Union, unreported (C.A. Sept. 20, 1985).


\textsuperscript{338} Western Mines, Ltd. v. United Steelworkers, Local 954, unreported (C.A. June 2, 1978).


\textsuperscript{340} Canadian Kenworth Co., L214/82 (L.R.B.).

\textsuperscript{341} Police Bd. of the Corp. of the Dist. of Saanich, L257/82 (L.R.B.).

\textsuperscript{342} \textit{Id.}
2. Other Grounds For Review

Review by the Court of Appeal may be available in other situations. If there is a principle of law not unique to labour relations that is incorrectly applied by an arbitrator, there may be a reviewable error. An example may be where an arbitrator compels a lawyer to respond to questions which elicit responses protected by solicitor-client privilege. An award which orders reinstatement of an illegal alien or unqualified nurse may likewise be reviewable on the basis that statutes dealing with authorization to work and professional qualifications preclude such a result. Although there are no cases so holding, it would seem that there is reviewable error where an award compels illegal conduct such as reinstatement of a truck driver whose motor vehicle license has been suspended.

A matter of the general law can be reviewable in the other two jurisdictions. For example, awards which misinterpret a statute or approve or compel illegal conduct may not be sustained. However, misinterpretation of a labour-related statute in British Columbia is reviewable by the Labour Relations Board because of the wording of the Labour Code.

In summary, the Court of Appeal has given effect to a policy of noninterference with the arbitral process in its approach toward supervisory review. Consequently, it is unlikely that the above statutory provision will be the subject of any extensive judicial development.

CONCLUSION

Supervisory review of grievance arbitration awards varies significantly in the three jurisdictions examined. British Columbia is the model which other jurisdictions should emulate because its noninterventionist policy, facilitated by the restructuring of labour laws in British Columbia in the 1970's, fosters the values of speed, economy and finality which are so important to the arbitral process. While the situation in the United States is somewhat similar, the British Columbia model is preferable because of the innovative placement of the primary reviewing authority in a specialized Labour Relations Board which, unlike the courts, can apply a unique knowledge in the area of labour relations in rendering its decisions. The adoption of a similar policy in Ontario is desirable, as a failure in that jurisdiction to give full effect to the values of the labour arbitration process could conceivably result in a collapse of grievance arbitration in the future.

343. See supra notes 147-51 and accompanying text.