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Article abstract

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Grievance Arbitration and the Charter
The Emerging Issues

Donald D. Carter

The Charter has had the effect of casting a long shadow of uncertainty over our established industrial relations institutions. Nowhere is this more true than in the area of grievance arbitration. In this paper, the author deals with the issues at stake, and the reasons why both arbitrators and judges are having such difficulty in deciding upon the extent to which grievance arbitration should be influenced by the Charter.

My earlier reflections on the Charter and its implications for Canadian industrial relations made the point that the Charter has had the effect of casting a long shadow of uncertainty over our established industrial relations institutions[1]. Nowhere is this more true than in the area of grievance arbitration where we are now faced with a confusing collection of both arbitration awards and lower court decisions dealing with the interaction between the Charter and grievance arbitration. Judicial decision-making is an exceedingly slow process at the best of times and, given the complexities of Charter issues, one can predict with some confidence that it will be a long time before this shadow of uncertainty is removed from grievance arbitration. In the meantime, however, it is important to understand the issues that are at stake, and the reasons why both arbitrators and judges are having such difficulty in deciding upon the extent to which grievance arbitration should be influenced by the Charter.

Much of this difficulty can be attributed to the fact that Canada's system of grievance arbitration is the child of both legislation and collective bargaining. Looking first at grievance arbitration's legislative parent, one can observe that Canadian collective bargaining legislation, since its inception in the 1940s, has always required that a union and employer provide in

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1 See D.D. CARTER, «Canadian Labour Relations under the Charter — Exploring the Implications», *Relations Industrielles, vol. 43, no. 2, 1988, pp. 305-322.*

their collective agreement a procedure for the binding resolution of disputes arising from that agreement. Indeed, our legislation goes further by establishing a basic framework for grievance arbitration to ensure that arbitrators may exercise the powers essential to carrying out their function of resolving collective agreement disputes. It is this legislative presence, at its point of conception, that lends a certain public element to the grievance arbitration process.

After the point of conception, however, collective bargaining emerges as the dominant parent of grievance arbitration. Through the private process of collective bargaining the parties may build upon this basic legislative framework by creating their own procedures so long as they are compatible with the legislation. The role of private ordering extends much further, moreover, as the substantive norms that form the content of grievance arbitration are clearly the product of negotiations rather than legislation. These standards expressed in the provisions of the collective agreement itself are essentially private in nature, reflecting the internal value system of the parties to that agreement. The institutional expectation is that the arbitrator will adhere to this internal value system by not venturing outside the parameters established in the collective agreement — an expectation that is reflected in our arbitral jurisprudence with its emphasis upon adherence to the language of the agreement.

Not surprisingly, the hybrid nature of grievance arbitration has given rise to a certain amount of tension when its public and private elements come into conflict. Considerable debate has been generated in the labour relations community by such issues as whether arbitrators should take into account general notions of fairness, and whether they should apply more specific equitable doctrines such as estoppel. The same kind of debate arises, as well, when arbitrators are faced with the problem of dealing with general legislation which is inconsistent with a standard clearly expressed in the language of the collective agreement. Here one is faced with the central question of whether grievance arbitration should function as a purely private process, or whether there is some public dimension to the process that requires a consideration of standards found outside the confines of the collective agreement.

The resolution of such issues reflects the hybrid nature of Canada's grievance arbitration structures. The application of general notions of fairness to the task of collective agreement interpretation has only received qualified approval by the courts. Such an approach appears to be acceptable where these notions of fairness arise from an implied principle of reasonable contract administration,[2] but this principle still appears to be

2 *Re Wardair Canada Ltd. and Canadian Air Line Flight Attendants* (1988), 63 O.R. (2d) 471 (Ont. C.A.).

rooted in the internal value system set out in the collective agreement itself. The use of estoppel has found greater favour with arbitrators and judges[3] but it should be pointed out that even this approach to the interpretation of the collective agreement emphasizes the internal values of the parties, albeit that these values are expressed through the conduct of the parties rather than in the language of the agreement. External values, however, do take precedence when arbitrators are faced with a conflict between the provisions of a public statute and the language of the collective agreement, as arbitrators must not give effect to the language of the collective agreement at the expense of the overriding norms of public legislation[4].

Up until now the conflict between the internal values of the collective agreement and the external values of general legislation has occurred only infrequently. Often the internal standards established by the collective agreement are far more favourable than the external standards imposed by legislation as, for example, in the case of most minimum standards legislation so that arbitrators need not resort to legislative norms. The Charter, however, has the potential to alter substantially this existing balance between public and private ordering.

The Charter articulates very broad political values, such as freedom of speech and expression, freedom of conscience and religion, equality under the law, and due process. These values, being much broader and much more open-ended than the standards found in ordinary legislation, have far greater potential to come into conflict with the internal values established by the collective agreement. Charter arguments could be used to challenge virtually every aspect of the present arbitral jurisprudence defining just cause for discipline and discharge, and even the hallowed principle of seniority could run afoul of the Charter's guarantee of equality if the courts were to hold that the Charter does apply to collective agreements. If this should occur, Charter values would then be given priority and the onus would be upon those who wish to uphold the internal value system created by the parties in their collective agreement.

Such a shift in the onus would not only alter radically the present emphasis upon the value of private ordering, but it would also change the nature of the grievance arbitration process itself. The fact is that the use of Charter arguments at grievance arbitration has the immediate effect of transforming an industrial relations issue into a constitutional issue. Once an issue becomes a constitutional issue then legal expertise takes precedence over industrial relations wisdom, tightening the grip of lawyers over the

3 *CN/CP Telecommunications* (1982), 4 L.A.C. (3d) 205 (Beatty); affirmed by (1982), 82 C.L.L.C. para. 14, 163 (Ont. Div. Ct.).

4 *McLeod* v. *Egan* (1974), 46 D.L.R. (3d) 150 (S.C.C.).

grievance arbitration process. Not only may the parties wish to retain legal counsel rather than rely upon a lay advocate, but they may also insist that the issue be resolved by an arbitrator well versed in the mysteries of constitutional law. Even if the parties choose the legally trained arbitrator, that arbitrator's award would still be open to full judicial review since, while the courts may defer to arbitrators on industrial relations issues, they have no such hesitation when it comes to constitutional issues.

The full implications of the Charter for grievance arbitration are just beginning to be appreciated. So far there have been some fifteen reported arbitration awards dealing with the Charter and, in eight of these cases, arbitrators indicated that they were prepared to give some weight to the Charter. After this initial flurry of arbitral activity, however, there has been a conspicuous absence of arbitration awards dealing with the Charter in any significant manner. One can only conjecture as to the reasons for this pause in Charter activity at the arbitration level. One possibility is that the parties themselves have become more aware of the costs, delays, and uncertainty created by using Charter arguments at arbitration. Another possibility is that arbitrators have discouraged the parties from using the Charter by their reluctance to embrace Charter arguments fully. A closer look at the arbitral jurisprudence reveals that in only two cases — both involving mandatory retirement — would the application of the Charter make any difference in the ultimate result. A third explanation for the lack of recent arbitration awards dealing with the Charter, and perhaps the most plausible, is that the parties may simply be waiting for the courts to resolve the Charter issues raised in earlier arbitration cases.

THE ISSUES

A number of these outstanding Charter issues need to be resolved before the air is cleared. Four of these issues in particular have fundamental implications for the grievance arbitration process.

1. Does the Charter apply to the basic legislative framework established for grievance arbitration?
2. Does the Charter apply directly to collective agreements negotiated between the parties?
3. Does the Charter have indirect application to collective agreements because general legislation must now be read subject to the Charter?
4. Do arbitrators have the authority to apply the Charter, or is this task the exclusive responsibility of the courts?

Each of these issues has been considered by both arbitrators and lower court judges, but no clear consensus has yet to emerge from this process. While this lack of consensus may be attributed to a lack of familiarity with an entrenched bill of rights, it also appears to reflect the internal tension that results from the hybrid nature of our grievance arbitration process.

THE APPLICATION OF THE CHARTER TO THE BASIC LEGISLATIVE FRAMEWORK

At first glance it would appear that there should be very little debate over the application of the Charter to the statutory powers exercised by arbitrators. Section 32 of the Charter states quite explicitly that the Charter applies to the Parliament and government of Canada in respect of all matters within its authority and to the legislatures and governments of each province in respect of all matters within their authority. Collective bargaining legislation is a matter falling within such authority so that a compelling argument can be made that the legislative provisions establishing the basic framework for arbitration must be read subject to the Charter.

Such a conclusion would appear to be supported by judicial decisions prior to the Charter which have treated arbitrators as statutory tribunals subject to the rules of natural justice. These decisions recognize that, while arbitrators may be applying a set of private rules formulated by the collective agreement, they must still adhere to procedural standards of more general application that are external to the collective bargaining relationship. Courts have told arbitrators that they are required to provide notice to parties other than the employer and the union where such parties have an interest in the outcomes of the proceedings;[5] courts have also made it clear that an arbitration board may not include members who have too close a relationship with one of the parties;[6] and some courts have indicated that external procedural standards also entitle a party to legal counsel and to cross-examine the evidence of the other party at the hearing[7]. These legal trappings have been added to the arbitration process, not by the agreement of the parties, but through the courts supplementing the basic statutory framework with an overlay of external standards of due process.

5 *Hoogendorn and Greening Metal Products and Screening Equipment Co.* (1968), 65 D.L.R. (2d) 641 (S.C.C.).

6 *Canadian Shipbuilding and Engineering* (1973), 73 C.L.L.C. para. 14, 185 (Ont. Div. Ct.).

7 *Men's Clothing Manufacturers Association of Ontario* (1979), 79 C.L.L.C. para. 14, 224 (Ont. Div. Ct.).

One likely effect of the Charter is to reinforce these standards of procedural fairness through the Charter's own guarantees of due process. A strong argument can be made that the procedural powers conferred upon grievance arbitrators by statute must now be qualified by these Charter guarantees. Indeed this conclusion is entirely consistent with the already established principle that grievance arbitrators, as a form of statutory tribunal, are subject to the rules of natural justice.

In *Canada Post,*[8] one of the first arbitration awards dealing with the application of the Charter to grievance arbitration, it appears to be assumed that the procedural powers exercised by arbitrators are subject to the Charter's guarantees. That case dealt with the power of the arbitrator to compel certain journalists to testify at an arbitration hearing. One argument raised was whether subpoenas issued to the journalists, requiring them to appear at the hearing and to bring with them certain documents, were inconsistent with the Charter's guarantee of freedom of the press. While the arbitrator found that on the facts no *prima facie* violation of this guarantee could be established, what is interesting about this case is the unquestioned assumption that the Charter applied to the exercise of an arbitrator's procedural power.

A similar conclusion was reached by the Ontario Court of Appeal in *Roy* v. *Hackett*[9]. In that case a decision of an arbitration board constituted under the *Canada Labour Code* was before the court on judicial review. The argument in this case focussed on whether a grievor who had requested simultaneous translation could later be cross-examined on his ability to understand English, as it was argued that this cross-examination was inconsistent with the Charter's guarantee of the assistance of an interpreter. While the court concluded that the grievor's right to the assistance of an interpreter had not been impaired, what is of primary interest in this case is the court's conclusion that the Charter did apply to the exercise of a grievance arbitrator's procedural power. This conclusion rested in part on the fact that the employer in this case, the Royal Canadian Mint, was an agent of the Crown, but the court also made it clear that an arbitration board, because it was quasi-judicial in nature and subject to the rules of natural justice, would also be bound by the Charter's guarantees of due process. In reaching this conclusion the Divisional Court quite clearly rejected the grievor's argument that «a dispute resolved by an arbitration board established under a voluntary collective agreement is the result of a purely contractual arrangement and does not include any government action in the form of a law or regulation»[10].

8 (1985), 19 L.A.C. (3d) 161 (Swan).

9 (1988), 62 O.R. (2d) 365 (Ont. C.A.).

10 *Ibid.*, p. 370.

This very argument, however, was given a more sympathetic reception by the Ontario Divisional Court only a month earlier. In *Greater Niagara Transit Commission* v. *Amalgamated Transit Union*[11] that court was reviewing the decision of an arbitration board to exclude certain evidence since, in an earlier criminal proceeding, a court had found this evidence to be inadmissible by virtue of the Charter. The Divisional Court gave a number of reasons for quashing the decision of the arbitration board and, somewhat surprisingly, one of these reasons was that it was inappropriate for the Charter's guarantee of due process to be applied to «what are essentially private employment disputes concerning the suitability of an employee to continue in the employment relationship»[12].

The approaches taken by these two different levels of the same court would appear to be diametrically opposed. A closer examination of the *Greater Niagara Transit Commission* case, however, reveals that it dealt with an accused's right to retain and instruct counsel upon being arrested or detained. Because of a lack of compliance with this guarantee by police, the criminal court had refused to accept certain admissions made to the police and the griever was acquitted. What was really at issue in this case was the application of the Charter's guarantees of due process to the police rather than to the procedures of the grievance arbitration board itself. Viewed in this light, the case may simply be saying that an arbitration board has no business excluding evidence so as to ensure compliance with the Charter by some other authority, and so should not be read as saying that an arbitration board has no responsibility to ensure that is own procedures comply with the Charter's guarantee of due process.

Even though the jurisprudence in this area is far from settled it does appear that the Charter will have the effect of reinforcing the standards of procedural fairness now applied by arbitrators. Such a development, while contributing an additional element of legalism to the process, is unlikely to have much impact upon the internal value system of the parties to a collective agreement. Of much greater significance is the potential for the Charter to be applied directly in the interpretation of the collective agreement.

DIRECT APPLICATION OF THE CHARTER TO THE COLLECTIVE AGREEMENT

The resolution of this second issue undoubtedly has the greatest implications for the grievance arbitration process. If it were held that the

11 (1987), 87 C.L.L.C. para. 14.051 (Ont. Div. Ct.).

12 *Ibid.*, p. 12, 361.

Charter does have direct application to the collective agreement, the effect would be to bring into conflict the particular internal value system established in each collective agreement with the more general external value system found in the Charter. These two value systems are by their very nature incompatible. The norms established by the collective agreement are the product of a process of private ordering, reflecting the values considered to be important for a particular workplace. These workplace values place emphasis upon such considerations as the maintenance of discipline in the workplace and the use of length of service to determine the allocation of work opportunities. The Charter, on the other hand, is the product of a public process, expressing general political values considered to be fundamental in our society. Here the emphasis is upon freedom of action and equality of opportunity, values that may often clash with workplace values. Where such conflict occurs, it is clear the onus will be upon those attempting to justify the internal value systems as reasonable limits that qualify the Charter's broad guarantees of political rights.

Arbitrators, and more recently courts, have differed on this issue of the direct application of the Charter to collective agreements. A broad application of the Charter was called for in *Surrey Memorial Hospital*[13] where it is stated:

> We believe the Charter is intended to stand four-square as the guarantor of fundamental rights and freedoms in all corridors of our Canadian society. We therefore conclude that the Charter applies in the administration of the collective agreement and exercise of our jurisdiction. The Charter therefore becomes another of the already diverse and extensive sources for defining the rules of industrial citizenship[14].

This statement clearly expresses the view that Charter values are so fundamental that they must be taken into account when arbitrators apply the internal value systems established by collective agreements.

A quite opposite view of the application of the Charter was taken in *Algonguin College*[15] where the arbitration board was dealing with the application of the Charter to a collective agreement between a union and a Crown agency. The majority of that board stated:

> By specifying that the governments of the provinces are subject to the Charter 'in respect of all matters within the authority of the legislature of each province', it would appear that the sphere of application is being limited to the activities of government as government, or to the government as enactor or administrator of law rather than the subject of law [...] Private contracts are not of general application to the population of the province as a whole, even though they may affect individuals in

13 (1985), 18 L.A.C. (3d) 369 (Dorsey).

14 *Ibid.*, p. 385.

15 (1985), 19 L.A.C. (3d) 81 (Brent).

various parts of the province. If the rights of the grievors guaranteed by s. 6(2) of the Charter are being violated they are [...] being violated by a collective agreement between their union and a Crown agent which is not of general application throughout the province[16].

This approach treats the collective agreement, even where one of its parties is a Crown agent, as the product of a process of private ordering and beyond the reach of the Charter.

Some clue to the resolution of this debate about the appropriate reach of the Charter may be found in the Supreme Court of Canada's decision in the *Dolphin Delivery* case[17]. That particular decision dealt with the issue of whether a court injunction restraining picketing was inconsistent with the Charter's guarantees. The union's challenge was dismissed as the court concluded that litigation between private parties completely divorced from any connection with government fell outside the Charter's reach. This conclusion suggests that, if collective agreement disputes can be characterized as unconnected with government action, they too would be immune from the Charter. The Supreme Court of Canada, however, was far from clear as to what element of governmental intervention would bring the Charter into play, although Justice McIntyre does suggest that the Charter would apply to the legislative, executive, and administrative branches of government «whether or not their action is involved in public or private litigation»[18].

Canada's lower courts, moreover, are still not of one mind in dealing with the question of whether the Charter should be of direct application to a collective agreement. In *Bhindi and London* v. *B.C. Projectionists' Union, Loc. 1348*[19] the British Columbia Court of Appeal was faced with the issue of whether a closed shop provision in a private sector collective agreement was inconsistent with the Charter. Chief Justice Nemetz, speaking for the majority, found no element of governmental action that would attract the Charter despite a provision in the British Columbia legislation that expressly recognized the validity of closed shop provisions. He concluded:

In my opinion the government's enactment of the *Labour Code* with a provision allowing the closed shop does not transform the closed shop provision into governmental action. The collective agreement before us was not mandated by the legislature. It was entered into by two parties to a contract. Its contents do not reflect government policy. The *Labour Code* establishes the procedure whereby private parties may conclude an enforceable collective agreement but clearly it does not require the parties either to reach such an agreement or to include in it a closed shop provision.

16 *Ibid.*, p. 93.

17 (1987), 87 C.L.L.C. para. 14, 002 (S.C.C.)

18 *Ibid.*, p. 12, 047.

19 (1986), 86 C.L.L.C. para. 14, 052 (B.C.C.A.).

The union and the employer are performing no public role in ordering their affairs through their private contract (the collective agreement). The *Labour Code* neither mandates nor encourages the parties to include a closed shop provision. The provision is merely recognized by the *Labour Code* as one of the possible varieties of contractual terms resulting from collective bargaining in the field of industrial relations[20].

This statement sets out the classic view of the collective agreement as an instrument of private ordering contained within a basic framework established by legislation. Since the collective agreement itself is the product of private ordering, it follows that the Charter should have no application even though the legislative framework might still loom in the background.

This conclusion, however, has not been embraced by other Canadian courts which have been reluctant to view the collective agreement as an instrument of private ordering where the employer is the government itself. In *Lavigne* v. *Ontario Public Service Employees Union,*[21] for example, the Ontario Supreme Court gave a very broad meaning to «governmental action», holding that it included the collective bargaining activity of government. According to Justice White, the agreement of a Crown agency to include a check-off clause in a collective agreement constituted sufficient government action as to justify the direct application of the Charter to this collective agreement provision. It would appear to follow from this conclusion that the Charter would apply, not just to the check-off provision, but to every other provision of that collective agreement and to any provision of a collective agreement to which a governmental authority was party.

Such a broad application of the Charter, however, would have far-reaching implications for our present system of grievance arbitration. Public sector collective agreements would be treated as instruments of public ordering and the standards established in these agreements would have to be consistent with the broad political values set out in the Charter. One result would be the emergence of a quite different arbitral jurisprudence for public sector grievance arbitration, creating the possibility that employees in the public sector would receive more favorable treatment than their private sector counterparts. If such drastic departure were to take place, it is to be hoped that it would be supported by fuller and more convincing reasoning than can be found in the *Lavigne* case.

In two cases that followed after *Lavigne* this issue did receive further consideration. In *Roy* v. *Hackett*[22] one panel of the Ontario Divisional Court held that the Royal Canadian Mint, as a Crown agency, was subject

20 *Ibid.*, p. 12, 295.

21 (1986), 86 C.L.L.C. para. 14, 039 (S.C.O.).

22 See footnote 9, *supra.*

to the Charter because its authority flowed from a statutory mandate. The court clearly rejected the argument that the Charter did not apply to its collective agreement with the union, since it was unprepared to treat that agreement as a purely contractual arrangement unconnected to any form of governmental action. On the other hand, the Court also indicated clearly that it would have reached the conclusion that the Charter did not apply if it had been faced with a dispute between two non-government parties.

Just a month later, however, a judge of the Ontario Supreme Court held that the collective agreement of another Crown agency, Canada Post, was not subject to the Charter[23]. At issue in this case was whether the extinguishment of an employee's common law right to sue for wrongful dismissal where that employee is covered by a collective agreement was inconsistent with the Charter's guarantees. Justice Henry held that the collective agreement itself did not attract the Charter's guarantees, since «the creation of a relationship through collective bargaining is not part of the process of governing». In his view, even though the employer may be a crown agency, the collective agreement itself was a bargain, rather than an administrative decision, and should be treated in the same manner as an agreement reached by a private sector employer. Mr. Justice Henry, however, did make it clear that the provision of the *Canada Labour Code* establishing the basic framework for grievance arbitration, and extinguishing the common law right of action, did attract the Charter. Nonetheless, he concluded that these provisions were not inconsistent with the Charter's guarantee of equality and so he dismissed the action for wrongful dismissal.

The conflicting approaches found in these cases means that we must await resolution of this important issue in higher courts, where one hopes that the reasoning of Mr. Justice Henry will be preferred. What Mr. Justice Henry has recognized is that a collective agreement is the product of negotiations involving two parties, and that the union has as much ownership of this agreement as the employer. This duality of the collective agreement is not altered by the fact that the employer happens to be the government, and such an arrangement should not be treated as just another form of government action. Moreover, to draw a distinction between public sector and private sector, collective agreements would result in the application of an entirely different set of principles in each sector, creating an inequality of treatment that would be inconsistent with one of the basic premises underlying the Charter itself.

23 *Bartello* v. *Canada Post Corp.* (1988), 62 O.R. (2d) 652 (O.S.C.)

INDIRECT APPLICATION OF THE CHARTER TO THE COLLECTIVE AGREEMENT — THE EFFECT OF GENERAL LEGISLATION

A conclusion that the Charter should not be of direct application to collective agreements does not mean that the administration of collective agreements would be conducted entirely outside the influence of the Charter. The basic legislative framework establishing the grievance arbitration process would still have to be read subject to the Charter, reinforcing the standards of procedural fairness now applied by arbitrators. Even more important, however, the collective agreement would still have to be read in light of general legislation, such as human rights statutes, which themselves are subject to the Charter.

The indirect application of the Charter to collective agreements in this manner could have a significant impact upon the internal value systems found in collective agreements, as can be seen in a recent decision of the Ontario Court of Appeal dealing with the constitutionality of mandatory retirement policies in Ontario universities[24]. In this case the court held that, while the Charter did not apply directly to the universities and to the employment contracts made with their faculty members, it still had to consider whether the provision in the Human Rights Code restricting protection against discrimination based on age to persons between the ages of 18 and 65 was inconsistent with the Charter's guarantee of equality. A majority of that court held that, although this restriction was inconsistent with the Charter's guarantee of equality, it nevertheless constituted a reasonable limit that could be justified in the university context. This conclusion, however, does not preclude similar challenges to be made to mandatory retirement policies arising out of different contexts.

The indirect application of the Charter to collective agreements in this manner has important implications for grievance arbitration. Given the extensive legislative framework that governs employment relations of both organized and unorganized employees, there is a great deal of scope for the Charter to be applied in this indirect manner to collective agreements. Such an approach, however, is open to the criticism that the role of the arbitrator is to interpret the collective agreement and that arbitrators should not be in the business of applying the Charter to general legislation. This criticism brings me to the final question: Do arbitrators have the constitutional authority to apply the Charter themselves, or must this task be left to the courts?

24 *McKinney* v. *University of Guelph* (1988), 63 O.R. (2d) 1 (Ont. C.A.).

THE ROLE OF ARBITRATORS IN APPLYING THE CHARTER

The constitutional competence of an arbitrator to apply the Charter may depend on the route being used to mount a Charter challenge. If the challenge is directed against the basic legislative framework establishing grievance arbitration, a strong argument can be made that the arbitrator does have a responsibility to ensure that these basic procedures of arbitration are consistent with the Charter's guarantees. While the arbitrator's decision would always be subject to judicial review, it does appear to make sense to have the initial determination made by an arbitrator with first hand knowledge of arbitration procedures.

The same argument would apply in the case of a Charter challenge that involves the direct application of the Charter to the collective agreement. While I have already argued that there are good reasons for not applying the Charter directly to collective agreements, if the courts should decide otherwise, then it would appear to make some sense to have the arbitrator at first determine the appropriate balance between the internal values of the collective agreement and the external values of the Charter before the matter moves on to the courts. Indeed our pre-Charter jurisprudence has already made it clear that an arbitrator is under an obligation to take into account laws of general application even though such laws may be inconsistent with the provisions of the collective agreement[25].

A recent decision of the British Columbia Court of Appeal supports this view of the arbitrator's role in interpreting and applying the Charter[26]. In that case the British Columbia Court of Appeal held that an arbitrator had properly applied the Charter to a mandatory retirement provision in a collective agreement between Douglas College and its faculty association. In reaching this conclusion the court first found the Charter was of direct application to the collective agreement, since the College was a delegate of government and since the agreement itself was subject to review by a government administrator under the *Compensation Stabilization Act*. The court concluded that the collective agreement, being the result of the exercise of government powers, was more than a private internal matter between the parties. More importantly, the court also held that the arbitrator was under a general duty to ensure that the collective agreement was not enforced in a manner that would be contrary to the Charter, making it clear that arbitrators have both the authority and responsibility to ensure that they act in a manner consistent with the Charter. In this case it meant that the ar-

25 See footnote 4, *supra*.

26 *Douglas/Kwantlen Faculty Association* v. *Douglas College* (1988), 21 B.C.L.R. (2d) 175 (B.C.C.A.).

bitrator could strike down a mandatory retirement provision in the agreement if it were inconsistent with the Charter. The court, however, made it clear that it was not dealing with the more difficult issue of whether grievance arbitrators could exercise the much wider remedial authority provided by S.24 of the Charter.

It is at this point that the jurisdiction of the arbitrator to apply the Charter becomes more problematic. While it is one thing for an arbitrator to ensure that arbitral procedures, or the enforcement of the collective agreement itself, are consistent with the Charter, it is quite another for an arbitrator to interpret, and possibly strike down, legislation over which the arbitrator holds no mandate.

This issue was addressed in an arbitration award dealing with a Charter challenge by employees resident in Québec who argued that a collective agreement provision that provided health coverage under the Ontario Health Insurance Plan only was inconsistent with the Charter[27]. The arbitrator held that, if the Charter had been breached, it was being breached by either the collective agreement or Ontario's health insurance legislation. In the former case the Charter did not apply since, even though the employer was a Crown agent, the Charter did not apply to its negotiating activities. As for the latter case, the arbitrator made it clear that the proper forum for determining the constitutionality of the legislation was the courts rather than grievance arbitration.

This arbitration award was subsequently considered by the courts on judicial review[28]. In dismissing the application the Ontario Divisional Court made it clear that an arbitration board should not be considered as a court of competent jurisdictionn for the purpose of granting direct relief under S.24 of the Charter. According to the court, the power of arbitrators to interpret legislation that is necessarily incidental to the performance of adjudication does not extend to the interpretation of constitutional enactments. The proper course, in the view of the court, was for a Charter challenge to be brought directly to the court with the arbitration to follow once the court had provided its ruling.

Again we see the courts taking what appears to be polar positions on an important Charter issue. The ultimate resolution of this issue may well depend upon the extent to which the Charter is held to apply to grievance arbitration. If it is determined that the Charter is of direct application, not just to arbitral procedures, but to the collective agreement itself, then it

27 *Algonquin College,* footnote 15, *supra.*

28 *Ontario Public Service Employees' Union* v. *Algonquin College of Applied Arts and Technology,* as summarized in Charter Cases/Human Rights Reporter, vol. 3, no. 5.

would appear to make little sense to limit the role of the arbitrator in the application of the Charter[29]. To hold otherwise would effectively transfer a significant amount of the arbitral case load to the courts since Charter challenges could be frequent. Such challenges, moreover, would require, not just a reading of the Charter, but also an understanding of the collective agreement and an appreciation of the arbitral process — functions to which grievance arbitration is more suited than the courts.

On the other hand, if it is held that the Charter is not of direct application to either the grievance arbitration process or to the collective agreement, then its presence would only be felt indirectly as part of the legal environment external to grievance arbitration. The interpretation of this external legal environment is primarily the task of the courts and other tribunals, and arbitrators should take care not to usurp that role. Here arbitrators should wait for direction as to the proper application of the Charter to this external legal environment before then interpreting the collective agreement in this context.

The present judicial uncertainty surrounding the extent of the Charter's impact upon grievance arbitration reflects the lack of a clear perception by the courts of the institutional role of the collective agreement and grievance arbitration. What the courts must decide is whether the collective agreement and grievance arbitration are essentially instruments of private ordering or whether they play some wider public role. Complicating this issue is the very substantial presence in Canada of public sector collective agreements where governments are themselves the employer. The danger here is that the courts may fail to recognize that such public sector collective agreements are not the creation of government alone. The reality is that public sector trade unions play an equal role in their creation and the collective agreement resulting from their bargaining process is just as much an exercise in private ordering as any private sector collective agreement. Once the courts clearly understand these realities then much of the present shadow cast by the Charter over grievance arbitration may be lifted.

29 Support for allowing arbitrators to perform a wider role can be found in *Moore* v. *The Queen in Right of British Columbia* (1988), 88 C.L.L. para 17,021 (B.C.C.A.)

L'arbitrage des griefs et la Charte des droits et libertés ce à quoi on peut s'attendre

Le système d'arbitrage actuel au Canada, qui découle tant de la législation que du processus des négociations collectives, a toujours reflété une tension entre les systèmes des normes internes qu'on retrouve dans les conventions collectives et les normes exprimées dans la législation. La Charte des droits et libertés peut maintenant modifier de façon substantielle l'équilibre existant entre ce qui est d'ordre public et ce qui est d'ordre privé. La Charte a pour effet de faire ressortir les valeurs extrinsèques aux rapports de négociations collectives comme la liberté de parole et d'expression, la liberté de conscience et de religion, l'égalité devant la loi et l'équité procédurale. Si l'on appliquait la Charte aux conventions collectives, les principes d'ordre général auraient plus de poids en faisant porter un fardeau plus lourd sur ceux qui cherchent à maintenir les systèmes de valeurs intrinsèques établis par les conventions collectives.

À l'heure actuelle, on n'a pas encore établi clairement dans quelle mesure la Charte peut s'appliquer au mécanisme d'arbitrage des griefs. Quatre aspects de cette question exigent une solution: 1) La Charte s'applique-t-elle au régime constitutif de la législation touchant l'arbitrage des griefs? 2) La Charte s'applique-t-elle aux conventions collectives négociées entre les parties? 3) La Charte a-t-elle une incidence indirecte sur les conventions collectives parce que la législation en général doit maintenant être conforme à la Charte? 4) Les arbitres ont-ils l'autorité pour interpréter la Charte ou cette obligation relève-t-elle exclusivement des cours de justice?

Tant les arbitres que les juges de première instance ont étudié les questions précédentes, mais il ne se manifeste encore aucun consensus clair.

On peut fort bien soutenir que les dispositions législatives qui fondent les mécanismes de l'arbitrage doivent s'interpréter en conformité avec la Charte. Si c'est de cette façon que la Charte doit s'appliquer à l'arbitrage des griefs, elle aurait pour conséquence de renforcer les normes d'impartialité procédurale déjà suivies par les arbitres. Même si ceci peut ajouter un élément de légalisme au processus, il n'est guère probable que, pour cette raison, les systèmes de valeurs internes mis au point dans les clauses des conventions relatives à l'arbitrage s'en trouveraient beaucoup influencés.

La réponse à la deuxième question, où l'on se demande si la Charte s'applique directement aux conventions collectives, comporte des conséquences beaucoup plus considérables pour les régimes privés d'arbitrage des griefs. La réponse à cette question relève du rapport qu'il peut avoir entre la convention collective et la législation. Dans le cas des conventions collectives du secteur privé, il serait difficile d'établir un tel lien, mais en ce qui a trait aux conventions collectives du secteur public, on pourrait considérer qu'il s'agit là d'une forme d'activité de l'État. Il nous faut toutefois reconnaître que les conventions collectives conclues dans le secteur public sont aussi le résultat de négociations entre les parties et non pas simplement une forme diffé-

rente de l'activité du gouvernement. En outre, établir une distinction entre les conventions collectives du secteur privé et du secteur public aurait pour conséquence l'utilisation d'un ensemble de principes entièrement différents dans chaque secteur, ce qui créerait une inégalité de traitement incompatible avec l'une des valeurs fondamentales énoncées dans la Charte.

Même si l'on décidait que la Charte ne touche pas directement les conventions collectives, elle s'appliquerait tout de même à la législation générale comme les prescriptions se rapportant aux droits de l'homme auxquels les arbitres doivent accorder un certain poids lorsqu'ils ont à interpréter les clauses formelles des conventions collectives. Étant donné les lois nombreuses qui régissent maintenant les relations de travail tant des salariés syndiqués que non syndiqués, il est fort possible que la Charte s'applique aux conventions collectives d'une manière indirecte.

L'application indirecte de la Charte aux conventions collectives soulève le problème du rôle de l'arbitre dans l'interprétation et l'application de ce texte. Là où l'on conteste les mesures législatives relatives à l'arbitrage des griefs, on peut soutenir avec force qu'il revient à l'arbitre de décider d'abord si les mécanismes d'arbitrage sont conformes à la Charte. De même, si l'on estime que la Charte vise directement les conventions collectives, il serait normal que l'arbitre soit le premier à trancher de façon appropriée entre les normes internes exprimées dans les conventions collectives et les normes extérieures énoncées dans la Charte avant que l'affaire prenne le chemin des cours de justice. Cependant, dans les cas où se pose le problème de l'application indirecte de la Charte aux conventions collectives résultant de l'interprétation de la législation à la lumière de la Charte, il vaudrait mieux que les arbitres exercent un rôle plus limité, car l'interprétation de ce qui relève du domaine juridique proprement dit revient en premier lieu aux cours et aux autres tribunaux compétents.