Tenure of Employment v. Industrial Peace*

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The principal figures are in the foreground; the crowd is in the background. Woe to the details! Posterity neglects them all; they are a kind of vermin that undermine large works.

Voltaire 1694-1778, *Age of Louis XIV*

Abstract

This paper amounts to a discussion about justice: it is about whether just outcomes for the individual vis-à-vis 'lines of jurisprudence' and case law should matter within the democratic framework of Canada's governing institutions. In the case of *Alberta Union of Public Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28[1] the Supreme Court of Canada overturned the highest Court in Alberta in the latter's ruling that an employee deprived of both her employment and right to tenure without cause must receive the justice of reinstatement. Even at the close of the original appeal before a split arbitration board, one arbitrator of three, like the Alberta Court of Appeal later ruled, decided that reinstatement was the only option the employer had under the law. In this paper I will argue that the Supreme Court erred in its decision in this instance because it chose to support its own dictum of preserving "industrial peace" over and against what the Alberta Court of Appeal, labour arbitrator Bartee, and I see as the most important issue: the upholding of an employee's rights as spelled out in the collective agreement.[2] This was not a case where industrial peace should have been the underlying concern primarily because a Canadian employee was robbed by her employer of contractual and statutory rights under the collective agreement and the law respectively.

The Court, more concerned with what this decision might mean in future for "industrial peace," felt they could justify their decision by employing the tactic of a long discussion on the jurisprudence relating to the broad remedial powers given to arbitration boards to settle disputes arising from their own dicta but yet in conflict with the collective agreement and statute law. Notwithstanding how

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[1] Hereinafter *Lethbridge*.
[2] *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768. *Vide infra*.

one wishes to order the nexus of factors which need to be considered in a case such as this, for instance the rights of the employee/employer, power of the board, right to an appeal, etc., I argue the court erred by not choosing the breach of a Canadian citizen's legal and contractual rights as the single most important factor in this case. Cases involving dismissal really turn on whether the employee was fired for cause or without cause, and if the latter, then, as the Alberta Court of Appeal saw clearly, reinstatement is the only option. The Supreme Court, though, had something else at the front of their minds and front and centre in their decision: their own mantra of "industrial peace" pre-empted by a long, philosophically dislocated, discussion about the broad remedial powers of arbitration boards. I will argue that this decision needs overturning because it extinguishes a fundamental principle of justice in Canada: citizens cannot be deprived of their tenure of employment without just cause under a collective agreement.

Introduction

This paper is as much a work in jurisprudence as it is one concerning labour law. This paper assumes the famous Lockean calculation on which democratic projects have long – since the eighteenth century – based themselves on in some kind of written constitutional instrument that people join or intend to join in a united society for the mutual preservation of their lives, liberty, and property upon which they are able to subsist.[3] Necessary to this basic proposition is the assumption that those agreeing to unite will lay down their power to punish or take vengeance and that this power will go to one among them according to rules the community agrees on together.[4] Locke writes that "…in this we have the original right and rise of both the legislative and executive power as well as of the governments and societies themselves."[5] So by entering this compact which moves a people from a state of nature to a united society, keeping in mind the aforementioned intentions, these people agree then that:

…whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign

[3] John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*: Book 2, *Two Treatises of Civil Government*, *Everyman's Library* 751 (London: J.M. Dent & Sons Ltd., 1960): 9.123, 180.
[4] Ibid., 9.127, 180-181.
[5] Ibid., 9.127, 181.

injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people.[6]

There is no need to emphasize in italics what Locke already has done so succinctly here. His emphasis that those in power govern and decide cases by standing laws only, not on "extemporary decrees" – and the latter referring to decrees which *appear* to be laws, but come suddenly and without due process or notice to the community – guards against illegitimate laws appealing to powerful interests in the commonwealth of citizens. I argue in this paper that in the case of *Alberta Union of Public Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28 the Supreme Court erred by not relying on the plain wording of standing laws and instead employed their own version of an extemporary decree, known to them as a "line of jurisprudence," which was bereft of any instrument of due process overseen and approved by an elected official. By the Court so doing, a Canadian employee was unable to rely on the standing laws and plain wording of a contract she had entered, and she was subsequently robbed of a potential lifetime of gainful employment.

Besides claiming that the Court erred in their decision, in this research I also employ an interdisciplinary approach to convince the reader of my suggestion that the Court could have made *Lethbridge* an important decision for the protection of employee rights, instead of merely padding the idea of preserving industrial peace. I hope to be able employ the areas of jurisprudence, history, and the law[7] to suggest that there are important issues at stake in the *Lethbridge* decision which are better understood by examining the Supreme Court's Judgment in this way. The main question I examine is, quite simply, whether the employee received justice in the successful appeal of "industry" against her in which her guaranteed rights were quashed at the behest of more important "underlying contextual considerations."[8] I argue that the evidence presented shows she did not received justice. Further, I argue that the court made a crucial error of historical significance because their decision's tendency is to move Canada backwards towards a Master and Servant model and away from an employee's right to protection under collective agreements and statute law. Questions which I think will help the reader understand my claim, and should be kept at the front of their minds while reading this paper are: who exactly *are* the

[6] Ibid., 9.131, 182.
[7] C.G. Bateman, "Law as Referent," *The Journal Jurisprudence*, Vol. 10: Jurisprudence Today (Trinity Term, 2011): 225-270; "They Are Not Gods: Lon L. Fuller, H.L.A. Hart and a proposed extension to the legal system equation - Freedom of the People, Equality for the People, & Sovereignty by the People," *The Journal of Law and Social Deviance* (Vol. 2, 2012: Forthcoming).
[8] *Vide infra.*

masters in this nexus of events involving a real person deprived of her rights?; should it be lawful for "industry" to fire employees without cause and refuse to reinstate them with the support of arbitration boards and the courts? Further, a more philosophically layered question, should one pretend that the Supreme Court – a court that by definition will regularly present society with split decisions (5-4, etc.) – will always come down on the side of justice and never err in its decisions, even if honestly?

This research will be presented in two major sections, the first dealing with some of the history of arbitration boards and the courts to bear out the contention that "tenure of employment" does exist for employed Canadian citizens, especially those under collective agreements. The second section will focus on the *Lethbridge* case and here I argue one can reasonably see how the Supreme Court erred in its choice of primary objective and thereby missed what should have been the central point of the case, which was to uphold a principle of justice protecting Canadian employees from unjust dismissal. Had the Supreme Court chose to focus their attention on this latter consideration, I think the judgement would have been far different. In my analysis, I will be employing an analytical tool pursuant to the importance of historical events suggested by noted historian, John Lukacs.[9]

Lukacs, in his well-known treatise *Historical Consciousness*,[10] divides historical events into two distinct categories, *important* and *significant*. He writes:

> For historical importance and historical significance are not the same things: while the opening of the transisthmian canal or the first automobile assembly line in 1914 are important rather than significant events, Mussolini's turn from international socialism toward a nationalist ideology, or the sudden jump in the American divorce rate – "minor" events, these – are significant rather than important.
> They are significant because they mark the appearance of tendencies that were to become eventually important.[11]

Using this heuristic tool, I here conclude that the Supreme Court's judgements in labour cases involving dismissal without cause – and leading up to *Lethbridge* – were indeed historically significant, because they signified a tendency of the Court to protect "industrial peace," expand the powers of the arbitration boards

[9] John Lukacs, *Historical Consciousness: The Remembered Past* (New Brunswick, New Jersey: Transaction Publishers, 1994).
[10] Ibid.
[11] Ibid., 130.

against the plain wording of statutes and collective agreements, and leave aside the rights of employees in cases which are near the borderline separating what constitutes 'dismissal with cause' and 'dismissal without cause'. I argue this border is absolutely fundamental and ought to be guarded by the high Court with deference to the exactitude with which the employee rights appear in the collective agreement and legislation, versus their chosen tactic of supporting, instead, industry and its unwritten right to be at peace, apparently. This latter contrast is real rather than rhetorical.

That this case is actually about one Canadian woman who lost a potential lifetime of employment security as against "industry" owned mostly by fabulously wealthy people – mostly men – is a prima facie factor which ought to be considered by all of us, especially the nine well paid Canadians who decided on the side of industry. Of course, to write this involves understanding the real and living persons and interests who are affected by this, and not merely the labyrinthine and oftentimes confounding, cross-purposed, and mis-applied world of 'precedent' or 'lines of jurisprudence.' Nothing clears the minds of legal functionaries on this point like recalling Jeremy Bentham's words on one of the tools of 'lines of jurisprudence:' the actual court records:

> …if a fit of curiosity happens to take the judge, such an [sic] one as shall not take him thrice perhaps in a twelvemonth, they are handed down: if not they are let alone: one out of a thousand becomes a law: the nine hundred and ninety nine others remain waste paper.[12]

Bentham is just as scathing on another source of law which lawyers and judges are still wrestling with, Holmes' "oracles of the law," the reports. Bentham writes that as the records are largely useless, another smaller collection of documents is assembled, in which, as he notes: one third, tenth, twentieth, or hundredth part of various cases are shown to the public, which if equally known would be just as likely to become law.[13] He writes:

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[12] Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart, *The Collected Works of Jeremy Bentham: Principles of Legislation*, ed. J.H. Burns (London: The Athlone Press, 1970), 15.3, 186: 185-188. To put Bentham's purpose into a breath, he wanted to take laws out of the maze of records, reports, and treatises and have them all put into one "pure body of statutory law" (19.1, 232). For instance, Bentham ridiculed the fact that court records were stowed away in some dark cavernous place which was totally inaccessible to those whose fate depended on them. He noted that the trouble of finding these records, their scanty information and indecisiveness, meant that it was not more than once in a hundred that the judges employing the decisions could endure even looking at them.

[13] Ibid., see generally 185-188.

> Sometimes by commission from that high authority, a judge who had been dead and forgotten for half a century or for half a dozen centuries, starts up on a sudden out of his tomb, and takes his seat on the throne of legislation, overturning the establishments of the intervening periods….[14]

I see the Court in *Lethbridge* moving dangerously close to overturning establishments from intervening periods – such as the advance of employee rights in Canada, discussed below. I argue that if the Court had of just altered their goal from the protection of industry to the protection of employees rights, they could have produced a case which would have inhered to positive tendencies in future decisions which both respected the border of rights over which an arbitration board or court may not transgress, except at their peril, as well as stayed within the bounds of precedent and statute law in Canada.

A Legacy of Tenure of Employment

Imbedded in the evolving Canadian legacy of protecting the rights of workers in collective bargaining agreements is an immutable and inalienable principle which protects the employee from arbitrary and unjustified dismissal. Inherent in this principle is a right to "tenure of employment." Under the erstwhile common law rules of 'master and servant', in our Canadian past, an employee could be terminated at will with mere "bare notice" as a recompense for their time and effort, whether it had been months of service or even many years of the same. Employers could be sued for damages under breach of contract, but even in the result a suit was successful, the reward could not be imagined to replace the lost remuneration and human contentment of a life's work, and the average hard-working Canadian employee continued on with no protection from dismissal for, basically, any reason the employer wished to concoct. Quite clearly, collective agreements and statute law have changed all that.

The impetus behind, and hence the purpose for, the changes to the law in this area are succinctly put forward in the case of *B.C. Central Credit Union v. Office and Technical Employees' Union, Local No. 15* (1980) L.R.B.B.C. Decision No. 7/80.[15] In this case, the board drew on the observations of George Adams in his article "Grievance Arbitration of Discharge Case."[16] In his piece Adams laid out several aspects of master and servant law which gave rise to general dissatisfaction.[17]

[14] Ibid., 15.4, 187.
[15] Hereinafter *B.C. Credit Union.*
[16] George Adams, "Grievance Arbitration of Discharge Case," Industrial Relations Centre at Queens University, (1978): 36.
[17] Ibid.

1. *The law of master and servant*, as it developed, took a narrow contractual approach to employee misconduct. The court allowed dismissal for a broad spectrum of employee misconduct and the intermediate step of suspension and reprimand, not fitting within this contractual approach, [was] simply not relevant. Thus the only practical legal remedy available to the employer came to be the most severe form of disciplinary action -- dismissal.

2. *The single minded pursuit of the employer's interest.* …as the law of master and servant developed, significant qualitative distinctions were not made between different types of misconduct. Lateness, excessive absences, [etc]… were all treated the same. Similarly, all employees who misconduct themselves, regardless of their personal attributes or circumstances, met the same end.

3. A third shortcoming was and remains *the law's retrospective approach to employee misconduct*. Contract law does not concern itself with whether a breach is likely to happen again. The innocent party is "entitled" to his remedy whether or not the particular breaching party is likely to violate his obligations again. [This arose out of temporary contractual relationships and, unfortunately, the employer could repudiate an on-going employment contract on the same basis.]

4. *Absence of judicial control over the way in which a dismissal is effected.* [no reasons need be provided. There is little attention to procedural fairness]

5. A final shortcoming, and one that is most visible today, is *the lack of protection master and servant law offers an employee against arbitrary dismissal.* While the employer's interest in reacting to employee misconduct is overprotected by the remedy of dismissal, the remedies provided to the employee who has his contract terminated without cause are quite inadequate.

These conditions led naturally to the formation of trade-unions and the rise of collective bargaining.[18]

All this in aid of the fact that the employer's rights under the master servant model far outweighed those of the employee, and it was no surprise that in the environment of advancing human rights in the twentieth century, for which Canada was a vanguard state, these conditions simply could not endure. The absence of an employee's right to tenure was soon replaced by an era of strong collective agreements and complimentary provincial labour codes in the middle of the twentieth century.

[18] Ibid. 36-38. Emphasis added.

Further, the board in *BC Credit Union* looked to another arbitration board's view of an analogous matter in *Hiram Walker & Sons Ltd. et al*, (1976) BCLRB Decision No. 38/76. Here the board used the word "tenure" to describe the new rights that were emerging under collective agreements.

Thus it should be clear now that the historical and common law position has been altered radically. We are no longer talking in terms of traditional master-servant laws and relationships, where an employee has no expectation of tenure, let alone fringe benefits of employment such as health and welfare plans, seniority, grievance and arbitration procedures available, etc. The reasoning of Mr. Justice Laskin in the Court of Appeal decision in the *Port Arthur Shipbuilding* case has now been translated into statute law under the B.C. Labour Code. *Now, an employee does have tenure*, and rights, and in the event of discharge, each case must be looked at in relation to the particular collective agreement in existence between the parties, and all the other factors having to do with that person's employment.

Under collective agreements today, a different environment exists; there is a continuing relationship, where an employee has an expectation of continued employment. The old common law position no longer applies to situations where collective agreements are in existence.[19]

Other decisions,[20] such as this one did, recognized the need to steer clear of any jurisprudence which thwarted the progress of the employees' right to tenure. Yet the case of *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1969), 70 D.L.R. (2d) 693 (S.C.C.),[21] however ironically, did just that. That is to say the Supreme Court decision in this case[22] ultimately moved the employees' relationship back closer to the master-servant model: but originally, when brought before the Labour Arbitration Board,[23] the employee's tenure prevailed and was subsequently

[19] *Hiram Walker & Sons Ltd. et al*, (1976) BCLRB Decision No. 38/76 p. 38,39. [Emphasis added].
[20] *Wm. Scott & Co. Ltd. And Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. Following the legislative backlash to *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1969), 70 D.L.R. (2d) 693 (S.C.C.); [1969] S.C.R. 85, a case which took the employer-employee relationship back dangerously close to a master servant model (*Wm. Scott & Co.*, 5) which allowed the harshest punishments for the most minor infractions, the provinces rallied against the court's decision and legislated that the boards were now to be given supreme deference in deciding not only whether the employers had just cause, but also in fashioning a remedy which would be final and reasonable in the circumstances.
[21] Hereinafter *Port Arthur*.
[22] *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1969), 70 D.L.R. (2d) 693 (S.C.C.).
[23] *Port Arthur Shipbuilding* (1967), 17 L.A.C. 109.

upheld up by a judge on the Ontario Appeal Court, in much the same fashion as the *Lethbridge* case under discussion where right to tenure was again supported by the Alberta Appeal Court. In the former case, the appeal court judge responsible for upholding the board's decision was to be the future Chief Justice of Canada and one of the foremost authorities in the area of Canadian labour law, former Chief Justice Bora Laskin. He agreed that "…the collective agreement does create an entirely new dimension in the employment relationship: it is the immunity of an employee from discharge except for just cause, rather than the former common law rule of virtually unlimited exposure to termination."[24] Further, "…an employee who has served the probation period secures a form of tenure, a legal expectation of continued employment as long as he gives no specific reason for dismissal."[25] In the *Port Arthur* board decision, these comments were placed alongside the co-existent and relatively new rights of an employer to discipline their employees, something that did not exist under the common law: unless one takes the untenable position that termination is a constructive form of discipline. This bifurcation of rights struck a balance between the employee's right to tenure alongside the "broad management right" to discipline in a variety of ways. The correlation shows how the collective agreement changed the nature of both sides of the employment relationship. So while discipline is recognized by the collective agreement, so to the right to tenure of employment is also guaranteed unless the employer can show just cause.

The right to tenure is an absolutely central principle in the construction of the collective agreement and to commit a fraud on the purpose of the agreement, the protection of an employee's tenure, by allowing an employee to be stripped of their living without cause is to allow a patently unreasonable and irrational result. Judge Laskin, then sitting with the Ontario Court of Appeal, in his *Port Arthur* decision,[26] supported the Labour Board's conclusion by stating that:

> … it is sometimes forgotten that collective bargaining and the collective agreement have given the individual worker *security of continuing employment*, depending by and large only on his seniority in relation to the employer's production needs (in terms of numbers of workers and their skills) and on his good behaviour which avoids giving just or proper grounds for discharge. What are generally called seniority and discharge clauses represent the *employees' charter of employment security*; and it is reinforced by removing from the employer, not his initiative in acting against an employee, but his previously unreviewable right to rid himself of

[24] *B.C. Central Credit Union*, B.C.L.R.B. No. 7/80, [1981] 2 W.L.A.C. 132, at p. 39.
[25] Ibid. p. 40.
[26] *R. v. Arthurs Ex parte Port Arthur Shipbuilding Company* A.C. [1967] 2 O.R. 49, 62 D.L.R. (2d) 342.

> employees, even if it cost money damages to do so. [27]

In *Port Arthur*, involving discipline for cause, unlike *Lethbridge*, Laskin still emphasizes the ideal of security in the employees' tenure or "continuing employment" and yet he goes on to back up the Board's 'decision making power', regardless of their decision. He affirms the purpose of the collective agreements but also says he would have defended the board's decision if it went the other way as well, which was a prescient, if regrettable,[28] indication of which side of the question the Supreme Court would ultimately tend to fall on. In other words, the Supreme Court does their best to leave board decisions alone unless "patent unreasonableness" can be shown. Yet here arises the seminal question: if a board decision meets the Supreme Court's "standard of reasonableness" test, how is it that the latter's support is enough to void a Canadian's right to tenure in a job they already possessed when they are dismissed without cause? I maintain this state of affairs amounts to an affront to the principle of justice since it revokes the employees "right to reinstatement" in cases where there is no cause. The 'standard of reasonableness' dicta of the Supreme Court should not trump the plain reading of the laws themselves because, otherwise, we are slipping, however imperceptibly, backwards towards dark days in common law history when judges could create their own rules.[29] According to Lukacs taxonomy, *Port Arthur* is historically significant because it marked a tendency that would be repeated, ultimately leading to the historically important transaction of *Lethbridge*, the case in which a line of jurisprudence made up of a number of decisions significant to the outcome resulted in guaranteed rights being ignored in favour of judge-made principles. Judges are not elected lawmaking officials in the Canadian system of democracy. They are theoretically constrained to both the laws of an elected parliament and the laws of the many legislatures across Canada.

How can high Court dictum replace guarantees in the collective agreement and statute law? Of course, they should not. Let us remind ourselves continually that

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[27] Ibid., 363. Emphasis added.

[28] *Vide infra.*

[29] Vide supra on Bentham. Also, one might point to the history of the the Star Chamber: a secret English Court from which there were no appeals, no juries, and which ultimately fell due to politically charged abuses. It was finally closed in the seventeenth century. The Star Chamber is an extreme example of the abuse of power and is only meant as an illustration of how far wrong things went in the history of common law courts wherein the ideas and opinions of judges were the true canon. It also serves as an fine example of Lukacs point that even though once created to deal with certain matters to assist other courts, the significant mutations of lack of public accountability, no juries, and its accessibility to the Monarchy led to an ultimately important series of abuses which had such a negative impact that it was permanently closed.

the Supreme Court is not any kind of elected assembly of lawmakers; they are interpreters of law in situations where legal instruments can reasonably bear more than one meaning, and thus lead to a dispute. Yet, in such plain language circumstances specifying either just cause or no cause, there is no need to create a line of jurisprudence to alter the meaning of collective agreement rights and labour code provisions to protect a barely veiled industrial peace by giving arbitration boards the unwieldy power of fait accompli-decision-making where they merely 'avoid' patent unreasonableness. And yet, in Canada that is exactly what has happened, as I discuss briefly here below.

It may also be countered that the above statement by Laskin was informative on the subject of the purposive intent behind the collective bargaining agreement rather than starkly conclusive on an employee's right to reinstatement in cases where there was an absence of cause. Yet Laskin's characterization of the employee's rights was anything but indecisive or indeterminate. Rather, he stated the existence of an "employees' charter of employment security" in such a way that future arbitration boards used his preliminary and significant declarations as a basis to further unearth this key concept of a *right* to tenure.

A compelling example of this reasoning is found in *Tenant Hotline and Peters and Gittens* (1983), 10 L.A.C. (3d) 130 where Arbitrator R.O. MacDowell unequivocally re-states Laskin's earlier position.

> Discharge can have devastating consequences for the individual and his family, and is no neutral event for the general community which must frequently absorb related unemployment or welfare costs. Employees invest a part of themselves in their jobs, and, as a matter of fairness, this investment should not be arbitrarily or unjustly extinguished.
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> From these hundreds of individual cases, there has now developed a coherent and generally accepted body of principles which differ significantly from those of the common law - that is, from those legal principles so aptly named the law of "master and servant". At the core of this arbitral jurisprudence, is the notion that employees are no longer "servants" who can be disposed of at will on the giving of notice or the payment of some sum of money. They have a legitimate expectation *and a legal right* to tenure of employment, unless there are justifiable grounds for termination…. Tenure in employment unless there is cause for termination is one of the twin pillars (the other is seniority) of what Mr. Justice Laskin has described as "the employees' charter of employment

security."[30]

Here again, the stark contrast is painted between master and servant law and the current "legitimate expectation and a legal right to tenure of employment, unless there are justifiable grounds for termination…."[31] We also see here Laskin's twin Pillars of Hercules for the worker, tenure and seniority, beyond which the employer and courts may only cross at their peril. This is an important aspect of the greater debate on the rights of the employee: the fact is that when there are justifiable grounds for dismissal, best known as "just cause," the employee, according to the collective agreement, cedes his right to tenure. Yet this is not allowed in cases where employers dismiss employees without cause, because as MacDowell wrote, in these cases "they have a legitimate expectation *and a legal right* to tenure of employment."[32] Yet currently, in cases where there may be grounds for discipline inhering no just cause for dismissal, the arbitration board has now been accorded the power to offer "some lesser penalty" which may *include* discharge. What is going on here?[33]

Damages Indeed

How is it that in the absence of just cause for dismissal, and even where there may be non-culpable behaviour justifying disciplinary action, that employees under the jurisdiction of arbitration boards are now losing their right to tenure and sent packing with damages amounting to four months wages against a prospective career wage total? We must take a moment to consider that a four month "reward" of damages on, let's say, an annual salary of 25,000 dollars equals a paltry $8332 versus the $750,000 represented by a thirty year career at the same rate. These are "damages" in the true sense of the word. The sum of $8332 represents an infinitesimal percentage of the whole, coming in at a shocking 0.01110% - a.k.a. one tenth of one percent. How does one tenth of one percent suffice to make up for the loss of employment where that employee was protected by a right of reinstatement under the collective agreement? Like MacDowell poignantly noted above, discharge can be a devastating experience for the individual and the community and there should be no way an employer can hope to rely on arbitration boards and the courts to victimize Canadian workers as was the status quo under the grotesque master-servant law of former

[30] *Tenant Hotline and Peters and Gittens* (1983), 10 L.A.C. (3d) 130 at 138-39. Emphasis added.
[31] Ibid.
[32] Ibid.
[33] A heuristic turn-of-phrase made popular by the eminent historian Dr. John Toews: emeritus professor and former Dean of the Department of History at the University of Calgary; emeritus professor at Regent College Graduate School, Vancouver, BC.

times. Notwithstanding the semantic gymnastics used with phrases like 'reasonableness of the decision' and 'poisoning the work environment' – which are wide open to criticism on the grounds of malfeasance on the part of arbitration boards who hold in their hands the public trust but yet are allowed to legislate outside the scope of the collective agreement and have courts simply rubber stamp their so-called "reasonable" decisions.

In light of *Lethbridge*, it seems very likely that the Supreme Court of Canada has let the law slip backwards towards a master and servant context by not forcing the arbitration boards to rule within their mandate – at least not their contractual or legislated mandate because the Court argued that according to their own version of the mandate, the arbitration board was within some kind of allowable jurisdiction. Arbitration boards are not supposed to be acting as judges who alter the law or, even worse, set aside the laws before them: they are merely there as functionaries ensuring the collective agreement is applied as they receive it. Perhaps the judicial setting and appealable nature of their decisions has partly confounded many judicial actors involved into thinking that this mini-court is not only part of the legal system, but that their "judgments" should be protected in some kind of fraternal and partisan way, neither of which states of affairs is either correct or defendable.

While an arbitrator does have a broad remedial power to fashion remedies, she or he does not have the power or right to award damages in lieu of reinstatement where there is no just cause for discharge. This is a fact because the relevant statute law[34] cannot be interpreted to infer such an authority and, indeed, because such a power would be inconsistent with the statute's recognition that there must be cause for discharge of an employee under a collective agreement. Additionally, such an award would not be "remedial" in the sense that it would not attempt to put the person back in the position they were in before the breach. Simply awarding damages for dismissal without cause permits a return to the old system of master and servant where the rule was dismissal with notice: only in the context of *Lethbridge* the employer was forced to pay a fee/damages for dispossessing the employee of her statutory rights.

As the board in *BC Credit Union* points out, "[w]hereas the common law relies upon monetary damages to compensate the victim of most such breaches, the evolution of collective bargaining law has included a much greater reliance upon remedies in kind or in specie."[35] This statement builds on a previous board decision by the highly esteemed arbitrator Paul Weiler in *Re: International Chemical*

[34] *Public Service Labour Relations Act*, (S.C. 2003, ch. 22, s. 2).
[35] *BC Credit Union* Ibid., 41. Emphasis in original.

Workers, Local 346 and Canadian Johns Manville Co. Ltd. (1971) 22, L.A.C. 396 in which Weiler pointed out that "[i]f there is no other and better way of restoring the employee to his proper situation, then damages are a proper way of approximating the law's objective, even though the defendant may be penalized somewhat. In theory, though, the better remedy would be to compensate the grievor in kind, rather than money."[36]

It is acknowledged that in some cases where the employer goes out of business or where the reinstatement becomes practically impossible that, even though damages may be a poor substitute for the lost right, they may be the only reasonable solution. I would argue, though, as alluded to above, that if "damages" are the only option due to a supervening impossibility on the part of the employer, then the compensation should reflect a greater percentage of a potential lifetime of employment that was lost.

On this point there remains a very important constraining principle which imbues all agreements, not just collective agreements, in case of a fundamental breach. This is the aforementioned principle of contract law which directs that remedies for breach should be aimed at putting the aggrieved person back in the position he was before the breach. That position, in the case of an employee who is dismissed without cause, would be back at work since the common law right to dismiss with notice (or damages) doesn't exist under a collective agreement. In an earlier arbitration decision decided by Laskin himself, which was ultimately affirmed by the Supreme Court of Canada, he states that "*the board's remedial authority*, if it has any, *must be addressed to the vindication of violated rights by putting the innocent party, so far as can be reasonably done, in the position in which he or it would be if the particular rights had not been violated*."[37] Even at this early date – 1959 – Laskin is talking in the language of *rights* and how the board's remedial authority needs to be addressed only to the violation of those rights. Again, in cases where there has been discharge without cause, regardless of any other considerations such as discipline, etc., it is patently unreasonable and stands in direct contravention to the collective agreement, the statute law, and the principle of justice to disenfranchise an employee of their guarantee to tenure of employment and make a mere award of damages.

[36] *Re: International Chemical Workers, Local 346 and Canadian Johns Manville Co. Ltd.*, 402. Emphasis in original.

[37] *Re Polymer Corporation and Chemical and Atomic Workers International Union, Local 16-14* (1959), 10 L.A.C. 51 at 57. Emphasis added.

No Discharge Without Cause - Right to Tenure

The board's decision making power must always give a result which the collective agreement and statutes can reasonably bear. Dickson J., as he then was, in *Heustis v. New Brunswick Electric Power Commission* (1979), 98 D.L.R. (3d) 622 (S.C.C.)[38] states that "there being nothing in either the agreement, or the Act, which expressly precludes the adjudicators exercise of remedial authority, I am of the opinion that an adjudicator under the *Public Service Labour Relations Act of New Brunswick* has the power to substitute some lesser penalty for discharge where he has found just and sufficient cause for some disciplinary action, *but not for discharge*."[39] Again, and from perhaps one of the most senior minds who ever sat on the Canadian Supreme Court bench, Dickson clearly states that the adjudicator has the power to substitute some lesser penalty in cases involving remedial disciplinary action, but *not* for discharge. The logical corollary of this common sense assertion by Dickson is that a board would not have the power to substitute damages where there is no just cause for dismissal. This must logically follow if we are to rely on the former statement of Dickson from *Heustis*. There was nothing in the agreement to preclude the arbitrator's authority in the *Heustis* case where cause for discipline was determined, but his authority ended there because he had also found that there was no just cause for dismissal. Dickson, J. as he then was, writes:

> "[t]he language of the [arbitrator's] decision, for example the sentence "Had I the authority to do so I would have substituted one month's suspension without pay", leads to the conclusion that the adjudication found just cause *for discipline only*. Impliedly he found an absence of just and sufficient cause for *discharge*."[40]

Similar to the *Lethbridge* case, and in agreement with what Dickson maintained, in situations of dismissal without just cause, the adjudicator must be re-tasked with the decision so that they can correct their finding according to the law rather than the predilection of the employer.[41] In fact, both the agreement and the legislation which ensures that employees will not be dismissed save for cause precludes any other order but reinstatement, unless it be an impossibility. In *Heustis* the Court is saying that the right to award a lesser penalty could be

[38] Hereinafter *Huestis*.
[39] Heustis at p. 632-633. Emphasis added.
[40] *Heustis v. N.B. Elect. Power Commiss.*, [1979] 2 S.C.R. 768: 769. Emphasis in original.
[41] Ibid., Dickson: "I would allow the appeal, set aside the judgment of the Appeal Division of the Supreme Court of New Brunswick, and restore the order of Stratton J. quashing the decision of the adjudicator and directing the adjudicator to proceed with the adjudication according to law." 783.

inferred from the power to review dismissal but that is a long way from saying that an arbitration board who has found no cause for discharge can divest an employee of their rights of being entitled to job tenure under the collective agreement. This appears patently unreasonable.

Discharge Without Cause is Patently Unreasonable

The Doctrine of "Patently Unreasonable" has been spelled most clearly in the case of *Canada (A.G.) v. P.S.A.C.* [1993] 1 S.C.R. 941[hereinafter PSAC]. The Supreme Court of Canada has broken down the development, in regards to the court's treatment of administrative tribunals, into three stages based on the case of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 [hereinafter CUPE]. In the PSAC case, Justice Cory, for the majority, makes reference to the categories of pre-CUPE cases, CUPE itself, and post-CUPE cases. The pre-CUPE cases were ones where the courts expanded their understanding of judicial review and "in each case this Court substituted its own opinion of the correct interpretation of the statue for that of the administrative tribunal."[42] The CUPE case itself was written by Dickson J (as he then was). Speaking on the *Public Service Labour Relations Act* in CUPE, Dickson says "the *Act* calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of the Board members is all the more required if the twin purposes of the legislation are to be met."[43] Further, the question the court should ask itself is:

> "did the Board so misinterpret the provisions of the Act as to embark on an inquiry or answer a question no remitted to it? Put another way, *was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation* and demands intervention by the court upon review?"[44]

These passages reveal two important aspects of the CUPE decision. The respect for the purposes behind the statute and a recognition that sometimes the Board's "construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review."[45] This is the question the courts must answer before interfering with the Board's decision, and it is a high standard indeed: it has even been further translated to mean "irrational" as the

[42] PSAC at 953.
[43] PSAC at 954 quoting Dickson J. in CUPE at p. 235-36.
[44] PSAC at 954 quoting Dickson J. in *CUPE* at p. 237. Emphasis added.
[45] Ibid.

Supreme Court relied on dictionary definitions to aid itself in defining the concept. While dictionary definitions expanding what Dickson meant by patently unreasonable may help in a single case, it surely cannot be something that replaces the former dictum since variations in definitions of words meaning similar things may lead quickly off the map of what was intended (i.e. Fresh = New = Unused = Useless = Worthless = Garbage = Rotten). While the example is exaggerated to make a point, it is rather an observation that words which merely help define other words have different definitions, by definition. While PSAC moves patently unreasonable into the realm of the "clearly irrational", other courts may want to exercise caution in taking the meaning away from the original standard in CUPE.

Along this theoretical tack, Justice Cory states in PSAC that, among other things, "it is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational." Hence the warning about moving too far afield. And this is part of what has come out of the post-CUPE cases, the expansion of Dickson's original dictum. Another change Cory points to is what Beetz J. had delineated in *U.E.S., Local 298 v. Bibeault* [1998] 2 S.C.R. 1048.

1. If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;

2. If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.[46]

An argument could be made that since dismissal *without cause* and with damages goes against the privative clause of the collective agreement and the Canada Labour Code, and that it is in a very real sense a limiting clause; then, as in these provisions set out by the Supreme Court, a mere error will cause it to lose jurisdiction. In *Lethbridge*, dismissal without cause is much more than a mere error. Even if the breach of the collective agreement falls under the first stipulation, which it would seem to on a prima facie view of the purpose of arbitration boards, then it cannot be understood that discharge without cause is a mere error or wrong. It is a flagrant bypass of the principles protecting an employee's right of tenure under the collective agreement and statutory provisions, and thus clearly "irrational" in the circumstances. Not to intervene

[46] PSAC at 956-57.

would contravene and offend the statute, the collective agreement, and the purposes behind them, as well as the hundreds of cases of employees who have had their tenure of employment protected. Again, it would mean a moving closer to master and servant law if the employer could discharge without cause on even the smallest expectation that the arbitration Board would order an award of damages instead of reinstatement.

Justice Cory ends his discussion in PSAC of by pointing to the importance of judicial review with labour arbitration, which is something that, regardless of the trend to unfetter the hands of boards in these kinds of disputes, is uncontested by all. The courts are a guarantor of correctness and, at the very least, natural justice.

> In summary, the courts have an important role to play in reviewing the decision of specialized administrative tribunals. Indeed, *judicial review has a constitutional foundation*. See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. In undertaking the review courts must ensure first that the board has acted within its jurisdiction by following the rules of procedural fairness, second, *that it acted within the bounds of the jurisdiction conferred on it by its empowering statute*, and third, that the decision it reached when acting within its jurisdiction was not patently unreasonable. On this last issue, courts should accord substantial deference to administrative tribunals, particularly when composed of experts operating in a sensitive area.[47]

That the board act within the bounds of the jurisdiction set out for it is a key element of the equation and cannot be understated when determining the principle of 'tenure of employment'. The 'no dismissal without just cause' has a logical corollary, that being 'dismissal without just cause means reinstatement'. The only exceptions must be a supervening inability[48] on the part of the employee, or impossibility on the part of the employer.

Another separation of the doctrine is in the treatment of error of fact and error of law by the court *Toronto Board of Education v. O.S.S.T.F.* [1997] 1 S.C.R. 487. In this case the Supreme Court sets out the questions to be asked with an error in law. Where a tribunal is interpreting a legislative provision, the test is:

> …was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation

[47] Ibid. at 962. Emphasis added.

[48] Professor Jim MacIntyre, UBC Law, Labour Arbitration Specialist, Labour Arbitrator.

> and demands intervention by the court upon review? See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227, at p. 237
>
> A slight variation of this test applies to arbitrators interpreting a collective agreement. In those circumstances, a court will not intervene "*so long as the words of that agreement have not been given an interpretation which those words cannot reasonably bear*": Bradco, supra, at p. 341[*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316][49]

'No dismissal without cause' is clear as to its meaning, and any decision by a board which is the exact opposite, i.e. dismissal without cause and damages in lieu of reinstatement, is giving an interpretation which the words of the agreement *cannot bear*: nor the statute for that matter as this is read into all agreements in any event.

Further in this jurisprudence of the Supreme Court of Canada is the separation between patently unreasonable and simply unreasonable. The case of *Canada Safeway Ltd. V. RWDSU, Local 454* [1998] 1 S.C.R. 1079 deals with this bifurcation. Justices Cory and MacLachlin rely on an earlier case, *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 57, to delineate between merely unreasonable and patently unreasonable. Iacobucci J. for the court stated that:

> [t]he difference…lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable."[50]

This would further strengthen the contention that dismissal without cause in light of a 'no dismissal without cause' clause is something which requires judicial intervention. Dismissal without cause in the face of the statute and collective agreement which require the opposite is clearly a decision defective on its surface. Any other construction of an alternate view would, in my opinion, be subterfuge in the process of obfuscation of the real issue.

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[49] *Toronto Board of Education v. O.S.S.T.F.* [1997] 1 S.C.R. 487 at p. 507. Emphasis added.
[50] *Canada Safeway Ltd. V. RWDSU, Local 454* [1998] 1 S.C.R. 1079 at 1109.

Lethbridge

The Supreme Court's syntactical delivery in the Lethbridge case is very telling pursuant to what I argue was the main semantic import of their judgment, protecting "industrial peace." In the following pages I will briefly look at some of this content and structure to show just how concerned the court was to set aside the respondent in her plight while focusing almost exclusively on a split arbitration board decision which supported the Court's bi-furcated goal of allowing the board wide remedial powers which would in turn protect the industrial peace.

All actors sitting in judgement on this case were compelled to deal with the Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1 (Hereinafter *Code*). Specifically in this case, Section 142 (2) became germane as it was this part of the *Code* which apparently gave the board these wide remedial powers to fashion another decision apart from the guarantee of reinstatement found in the Collective Agreement. The controversial section reads:

> 142(2) If an arbitrator, arbitration board or other body 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, arbitration board or other body may substitute some other penalty for the discharge or discipline that to the arbitrator, arbitration board, or other body seems just and reasonable in all the circumstances.[51]

How narrowly this reads: "in *all* the circumstances." Perhaps an arbitration board member's "opinion" of an employee would therefore figure in to the overly broad category of "all." One would hope and assume not, based on a reasonable reading of the statute, but certainly if the two members of the board who decided that the dismissal without cause "seemed" just to them, "reasonable" to them, and inclusive of *all* circumstances, it seems perhaps they were acting within the arbitrarily broad wording of the statute.

Yet, there is another historically situated jurisprudential problem at work here, because we know that the wording of 142(2) was in part taken right from Dickson's own words in *Heustis*:

> There being nothing in *either* the agreement *or* the Act to preclude the adjudicator's exercise of remedial authority, an adjudicator under the

[51] *Alberta Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 142. Emphasis added.

> *Public Service Labour Relations Act of New Brunswick* has the power to substitute some lesser penalty for discharge where he has found just and sufficient cause for some disciplinary action but not for discharge.[52]

But Dickson was not, as the jumbled wording of 142(2) leaves us wondering, thinking or writing about "cause" for discharge in *Heustis*, he was clearly writing about grounds for discipline "but not for discharge." Even the statute itself approaches logical coherence when it states "…the arbitrator, arbitration board or other body may substitute some other penalty for the discharge or discipline that to the arbitrator, arbitration board, or other body seems just…."[53] Are we to believe that this statute can be interpreted to mean that when the board is considering an alternate penalty for either *discharge or discipline* that it would be free to read the terms backwards and substitute discharge for discipline? How would that make any logical sense at all? The statute is empowering the boards, in one instance, to choose something besides discharge, something by definition lesser in degree such as discipline, and in the other instance, it is doing the same for the prospect of discipline, opening the door for something less than the discipline sought, a lesser discipline.

Further, to include the mantra of 'industrial peace' from *Heustis* as the Supreme Court did in *Lethbridge*, is a pure category mistake. While both are cases involving collective agreements and arbitrator's decisions, in my opinion the factual similarities ground to a halt at this point. In *Heustis*, the facts involve, first, employee A driving through picket lines and hitting a striking employee with his vehicle. In the near future, fifteen to twenty men ambushed six other employees including A, for revenge, and A was violently struck on the back, knocked to the ground, and then violently kicked in the face by employee B, causing a triple fracture of the nose to A.[54] In stark contrast, *Lethbridge* only concerned a woman whose productivity was being challenged, at that not even in the correct manner as she was given no warning before discharge by her employer. The facts of *Lethbridge* involve no violence whatsoever, no "triple fractures," no kicking, no knocking people over, with vehicles or otherwise, and yet we are supposed to believe that maintaining the "industrial peace"[55] in the case of *Heustis*, a laudable goal given the facts, should be brought to bear in the former, a case with no factual relationship at all to the protecting principle in question. "Industrial peace" seems strangely out of place in the *Lethbridge* decision.

[52] *Heustis*, 770.
[53] *Alberta Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 142.
[54] *Heustis*, 768.
[55] Ibid., 781.

What is also curious about *Heustis*, in contrast with *Lethbridge*, is the Court's diverse treatment of the appellants. In *Heustis*, employee B, who kicked A in the face causing the triple fracture to the nose, had his discharge order overturned by Dickson and the Court, since in that case the arbitrator felt there was just cause for discipline but not for discharge, and claimed he felt that suspension without pay was in order, but the arbitrator also felt he was compelled adhere to the employer's decision since they were permitted to discipline in *some* manner.[56] In *Lethbridge*, as with *Heustis*, the arbitrators, all three, admitted there was cause for discipline but not discharge, and further, in both cases, the arbitration board decided to go against their own judgment pursuant to cause and support the employer's discharge order as if the employer's rights to discipline engaged an open door to whatever discipline the employer thought was appropriate. In *Heustis*, the Supreme Court a la Dickson saw clearly that if the arbitrator decided there was no cause for discharge but for discipline, and if this was evident in his decision, then discipline should have been ordered, not merely the rubber-stamping of the employer's wish to discharge which took place. In *Lethbridge*, curiously enough, notwithstanding the culpability issues which make this employee's case look like a cake walk in comparison with the criminally laced behaviour at issue in *Heustis*, the abitrators' admissions about no cause for discharge are nearly identical,[57] but yet radically different conclusions by the two different Supreme Court line-ups were reached.

In *Lethbridge* the employee was summarily dismissed in a situation where her only fault was that she was not performing her duties in an efficient enough manner, and instead of getting any remedial training which would alleviate this, she was fired, we know for a fact, without just cause.[58] The employee and the Alberta Union of Provincial Employees alleged dismissal without just cause and in contravention of the collective agreement. Let me now point directly to the Supreme Court's opening structural move in their written decision: they opened with a review of all "relevant" instruments, statutory or otherwise, yet displayed only selections which supported the wide powers of the arbitration board. From the collective agreement, on the other hand, clearly the most important document before the court as far as the employee was concerned, the court cited only and lastly from section 12.16:

> 12.16 The decision of the Arbitration Board shall be final and binding on the employee and the Parties.

[56] Ibid., 773-774.
[57] *Lethbridge*, 3.5.
[58] Ibid. See also: *Re. Edith Cavell Private Hospital and Hospital Employees' Union, Local 180* (1982), 6 L.A.C. (3d) 229.

Here is the first indication of an unbalanced approach in this decision. There was no mention of the pertinent section from the Collective Agreement which guaranteed no discharge without just cause.[59]

But 'without just cause' is *sin qua non* for this case. Even the members of the arbitration board who voted for damages, admitted that mere performance deficiency does not amount to just cause, it was simply not shown by the employer.[60] The board found that employee was never made aware of the seriousness of the situation and no effort on the employer's part had been made to train or find her a new position more suitable.[61] Yet even in light of this, two of the board members imagined they could substitute an award of damages. The Appeal Court of Alberta in *Lethbridge* ruled that the only way such an award could stand is if there were proven "exceptional circumstances." This Court described the arbitration board's remedial power in regards to such circumstances by writing:

> [47] Two important principles of Canadian labour law balance the scope of this remedial jurisdiction: security of tenure and confidence in dispute resolute mechanisms.
>
> [48] An employer's common law right to dismiss an employee without just cause, but on reasonable notice, does not exist under a collective bargaining regime. Consequently, where an employee is dismissed without just cause, the appropriate arbitral response is usually reinstatement.
>
> [49] On the other hand, the ultimate goal of labour law is industrial harmony, a key to which is the expeditious, skilled, and final resolution of disputes. Arbitration boards seek to find a permanent and meaningful resolution of the issue for the parties. Where an employee has been dismissed or disciplined without just cause, the Board may be entitled to craft a different solution where reinstatement will not achieve that objective, *but only in very exceptional circumstances*.[62]

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[59] For instance, the analogous sections of the current agreement, COLLECTIVE AGREEMENT BETWEEN THE BOARD OF GOVERNORS LETHBRIDGE COLLEGE AND THE ALBERTA UNION OF PROVINCIAL EMPLOYEES, LOCAL 071/001 (JULY 1, 2008 – JUNE 30, 2011), include management rights at Article 5.01which give them authority to discharge, inter alia, only with with "just cause" (8). Article 13.01, on discipline, stipulates that "No Employee shall be disciplined without just cause" (14).

[60] *Lethbridge*, 3.5.

[61] *Vide supra* regarding the Edith Cavell "rules."

[62] *AUPE v. Lethbridge Community College*, 2002 ABCA 125, 9. Emphasis added.

The Court then stated:

> [51] Exceptional circumstances cannot be categorized or limited, but have been described as those that "totally destroy" the viability of the employment relationship. These circumstances must be rare and truly exceptional….
>
> [52] An examination of cases finding "extraordinary circumstances" shows that they usually involve an employee engaging in culpable behaviour, particularly theft or other deceit. There are very few cases of "extraordinary circumstances" where the conduct of the employee was nonculpable.
>
> [53] While acknowledging that an Arbitration Board may have broad remedial jurisdiction to award damages rather than reinstatement where an employee has been unjustly dismissed for a non-culpable deficiency, *this power is not unbridled, but is severely restricted in application*. In this case, the Board did not rely on this power and did not consider and determine if extraordinary circumstances existed. On the record, it is doubtful that such a finding could have been justified or sustained.

Discharge without just cause, then, would be restricted to those cases involving circumstances which "totally destroy" the employment relationship due to theft, deceit, or other culpable behavior.

Language Games

One of the things which became clear to me as I poured over the Court's decision is that the semantic import of many passages leaves the reader feeling like the Court was on the defensive, as if they had a vested interest of some kind. I do not argue the latter claim, but the former is clear on even a first read. Let me now point the reader to a number of excerpts in order to make my point clearer. In the opening statements of the judgment, we read:

> While the provision [142(2)] can reasonably support an interpretation which limits its application to culpable dismissals, the board had ample reason to adopt a broader, but equally reasonable, interpretation and conclude that the provision applied to both culpable and non-culpable dismissals.[63]

[63] *Lethbridge*, para. 2, opening statements.

Can 142(2) truly be read so that one concludes "reasonably" that the instructions are aimed at cases involving firing without just cause? The sub-section reads, "[i]f an arbitrator, arbitration board or other body determines that an employee has been discharged or otherwise disciplined by an employer for cause…."[64] This looks at first as if it is only applicable to cases involving "just cause," and everything that follows in the sub-section[65] only comes in to force when the necessary clause[66] of the statute has been borne out. Of course, in this case, the employee was fired without cause. But as we read above, the Supreme Court chose to follow a line of jurisprudence that would allow them to read this statute as if it applied to both cases, cause and no cause. What the statute seems to indicate is that boards are free to lower the penalty in cases of both discharge and discipline, but what is not clear is whether the cause is *just cause*. Obviously, if the board is lessening the punishment, the statute cannot be referring to "just cause," otherwise the penalties should stand.

The language then begins to intensify from mere intention to outright rhetoric. Keeping in mind the Court's stated intention of supporting the split board decision, we read that "[a]rming arbitrators with the means to carry out their mandate lies at the very core of resolving workplace disputes."[67] Is this really the case? The word "arming" means to be given weapons. Is that what the Supreme Court wants to give the arbitration boards, weapons? Who are they fighting? Should not the core of resolving these disputes come solely from the rights and authority given either side of the disagreement, including the board, which stems from the collective agreement and the Code? As alluded to, "Arming arbitrators" also reads unnecessarily in a military fashion – is not "equipping" the neutral choice – which shows the disposition of the authors, whether it was clerks or judges, who obviously felt that arbitrators must be allowed to impose their decisions with force, backed up, one could assume, by not only an arbitrator's arsenal, but with the "arms" of the high Court's decision.

We read in the next paragraph, "[g]iven the object of the legislation and its overall purpose, there is no practical reason why arbitrators ought to be *stripped* of remedial jurisdiction when confronted by labour disputes that turn on a distinction between culpable and non-culpable conduct…."[68] Stripped? This word can produce quite violent possibilities as to its meaning given our cultural context, but what are they really saying here? It seems that while they want to

[64] *Vide supra*.
[65] *Vide supra*.
[66] The "necessary" as opposed to merely "sufficient" cause.
[67] Ibid.
[68] *Lethbridge*, para. 3, opening statements. Emphasis added.

ensure the arbitration board has arms or weapons sufficient enough to decide cases almost by fiat, given the Supreme Court interpreted herculean boundaries of their powers, they also wish to divest themselves of any responsibility by characterizing any challenge to the board's decision as a "stripping," and therefore the reader is semantically pulled towards believing what "eminent" sense it is to avoid "stripping" the humble arbitration board.

These examples show the purposed aim of the authors who chose to employ emotionally and physically charged language – armed and stripping – to attempt to convince the reader that, on at least some level, the Court was absolutely within its rights to allow the appeal, as it had stated at the very opening of the case. The proximity of their "held" decision in the first paragraph to the charged language of the second and third paragraphs are no mere coincidences. Woven together like this at the beginning, the Court attempts to sets the rest of its decision on some kind of high ground, wherefrom they can – using their own nomenclature – fire their arguments downwards at the reader.

The Court's opening concludes by stating, inter alia, "[c]ommensurate with the notion of exceptional circumstances, as developed in arbitral jurisprudence, is the need for arbitrators to be liberally empowered to fashion remedies, taking into consideration the whole of the circumstances."[69] Again, this disturbingly wide language used in reference to public servants who are yet called upon to enforce the rights of employees as against the employer under specific instruments, the collective agreement and applicable statute law. While the court admits a few sentences later, the general rule is that when an employee's collective agreement rights are violated, reinstatement is the normal order. I would suggest it should not only be the "general rule" and "normal order" but without an supervening impossibility the likes of a plant or school closure, reinstatement should be as fixed a rule as it reads in the collective agreement. The Court instead writes "[d]eparture from this position should only occur where the arbitration board's findings reflect concerns that the employment relationship is no longer viable."[70] Is the Court allowed to re-write the plain wording of the collective agreement, relevant to reinstatement? Here they are saying that a majority arbitration board's opinion that the employee would no longer be able to have a relationship with the employer – ironically, and likely due to the dismissal – means that the arbitration board is actually allowed to legislate beyond the collective agreement and statute law in cases like these where there is no cause. In cases of cause, they are allowed by both statute and collective agreement, as shown above in s. 142(2), to do exactly that, fashion remedies which they think appropriate and

[69] Ibid. para. 4.
[70] Ibid.

reasonable in the circumstances. But, by the board's own admission in this case, this was a distressing event in a woman's life where there was no just cause for her dismissal. While the Court finished their introduction by maintaining that the board decision fell "well within the bounds of arbital jurisprudence" pursuant to finding exceptional circumstances before giving their own remedy, the facts of this case relating to the dismissal without cause show that rather than "arbital jurisprudence," it should have been the plain wording of their primary instruments of consideration which led their decision, as in fact it did in the case of arbitrator Bartee, who maintained "…the board had made a jurisdictional error with respect to remedy"[71] and insisted that reinstatement was the only just remedy.

Concluding Observations and Suggestions

The nub of the matter lies in the basic principle which is implicit in the statute and collective agreement. This principle is that *employees have an entrenched right of tenure as against their employer when dismissed without cause*. That there shall be 'no dismissal without cause' leads inexorably to the conclusion that where there has been dismissal without cause, there is a patently unreasonable breach of the legislation which is evident on the surface of the claim. Alongside this right of tenure implicit in dismissal without cause is the acknowledgement that there are two clearly marked instances where the arbitration board must fashion 'some lesser penalty' in these situations. The first is a supervening inability of the employee to engage in such an order, as articulated by Labour Arbitration Specialist and former Professor of Law at UBC, Jim MacIntyre. If the employee is moving out of province or cannot physically do the work, then the supervening event *dicta* comes into force and the arbitration board must fashion a remedy. The other exception is impossibility on the part of the employer. Bankruptcy or loss of an entire division of production would be cases where it is impossible to enforce the right of tenure and again it must be compensated in some other reasonable way such as a monetary settlement.

As for the Court's current disposition regarding the jurisdiction of arbitration boards, Chief Justice MacLachlin in *Weber v. Ontario Hydro* (1995), 125 D.L.R. [Hereinafter *Weber*], reaffirmed the court's support of arbitration boards to hear all matters coming within their jurisdiction, even though *Charter* and torts matters arise. The majority's concern was not wanting to open the door to concurrent paths of litigation[72] but keep disputes of this matter in the court of first instance,

[71] Arbitrator Bartee. *Lethbridge*, chap. 3, para. 7.

[72] The conclusion in Weber from MacLachlin C.J. was:To summarize, the exclusive jurisdiction model gives full credit to the language of s. 45(1) of the *Labour Relations Act*. It accords with this

wherever possible. Within the judgement are important statements for the law in this area in general.

> …the appellant Weber argues that jurisdiction over torts and *Charter* claims should not be conferred on arbitrators because they lack expertise on the legal questions such claims raise. The answer to this concern is that arbitrators are subject to judicial review. Within the parameters of that review, their errors may be corrected by the courts. The procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the dispute in the first instance. This does not mean that the arbitrator will consider separate "cases" of tort, contract or *Charter*. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the *Charter*.[73]

As her ruling indicates, arbitration boards, notwithstanding the affirmation of their responsibilities in hearing cases which fall under their legislated jurisdiction and engage *Charter* and tort law, will be subject to judicial review. This review is circumscribed by Dickson's threshold doctrine of patently unreasonableness found in CUPE. The Supreme Court has further explained what patently unreasonable means and where it does and doesn't apply, yet all the judges who have put a further gloss on Dickson's rule, such as Beetz J, Cory J, et al., have affirmed the basic premise of that original ruling and clearly support Dickson's earlier ruling. As Cory J underscored in PSAC, Dickson's question for the reviewing court is clear: " was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?"[74] What Cory underscored in PSAC is what all courts have looked at subsequently. In the case considered here where there has been dismissal without cause, I respectfully suggest that the board's interpretation so construed as to reverse a principle which is imbedded in the legislation, is, on the surface of the matter, patently unreasonable. My suggestion is that the court ought to uphold the implicit 'right

Court's approach in *St. Anne Nackawic*. It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts: see *Ontario (Attorney-General) v. Bowie* (1993), 110 D.L.R. (4th) 444 (Ont. Div. Ct.), *per* O'Brien J.

[73] Weber at para. 55. Emphasis added.

[74] PSAC at 954 quoting Dickson J. in *CUPE* at p. 237. Emphasis added.

of tenure' employees have in accordance with the wishes of Parliament and collective agreements between the parties: keeping in mind the two noted exceptions of supervening inability and impossibility. What is just and what is correct under lines of jurisprudence are not always the same thing, and it is my suggestion that wherever the court can uphold the former and put aside the latter while staying within the bounds of Constitutional instruments, so they should.

Postcript

'Right of Reinstatement' is still a live issue in Canadian courts, but it remains a very weak instrument of justice due to the fact that the Courts are allowed to overturn reinstatements made by Arbitration Board adjudicators in a variety of fashions. In a recent case the court stated that reinstatement is *not* a right: *Payne v. Bank of Montreal*, 2013 FCA 33.

> [86] In *Atomic Energy of Canada Ltd. v. Sheikholeslami*, 1998 CanLII 9047 (FCA), [1998] 3 F.C. 349 (C.A.) at para. 12, leave to appeal denied S.C.C. Bulletin, 1998, p.1399, the Court noted that adjudicators have full discretion to choose among the remedies listed in subsection 242(4) of the *Code*, including compensation and reinstatement. While reinstatement is not a right, in practice it is the remedy favoured by adjudicators for unjust dismissal, save for exceptional circumstances.
>
> [87] Even given the degree of deference due to an adjudicator's exercise of the broad remedial discretion conferred by the *Code*, the reasons given in this case do not, with all respect, provide a cogent justification for the decision to order reinstatement.

So, here again, we see an adjudicator's decision, using the right of reinstatement as a legal, permitted, and just remedy for a Canadian citizen, being trumped by a higher court. Philosophically, the Canadian courts are no closer to making the right of reinstatement a true right for employed Canadian citizens than they were in *Lethbridge*. Only the most extreme of circumstances ought to negate this right of employment given how important it is for a citizen to keep their gainful employment and be able to pay their bills and live in a society that continues to see a widening in the gap between the very rich and the very poor. While it may be true that adjudicators have full discretion to choose reinstatement, the appeal courts also continue to have full discretion to overturn such decisions, even in cases where there is nothing like an extreme circumstance to negate it.