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**Interpreting the Collective
Agreement:
The Duty to Be Reasonable**

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Executive Summary

The authority of arbitrators to require management to act fairly and reasonably in exercising its discretion under a collective agreement is unsettled. In one case, for example, the Ontario Court of Appeal found that management may exercise the discretion conferred on it by the management rights clause as it sees fit, except when it is constrained by express collective agreement provisions. But in another case, in a ruling that appeared to be diametrically opposed, the same court reinstated a ruling by an arbitrator that management had exercised its discretion unreasonably. Arbitrators have subsequently attempted to reconcile the two cases. Although the authority of arbitrators in this area remains largely unsettled, some common themes run through most recent decisions.

- Obviously, if a provision of a collective agreement specifically requires reasonableness, any decision made under that provision must be reasonable. However, there is not a generally implied duty to act reasonably.
- Arbitrators are entitled to review management's decisions to ensure they were based on bona fide business reasons and only on bona fide business reasons. Management must therefore act honestly and in good faith and avoid arbitrariness and caprice.
- A consensus seems to be forming around the proposition that when a decision conflicts with another right under the collective agreement, the employer has a duty of reasonableness. For example, if a collective agreement requires that overtime be spread evenly around all members of the bargaining unit capable of doing the work, management must be reasonable in judging the ability of employees to do the work. However, the law in this regard is not entirely clear.
- The duty of reasonableness is clearer when disciplinary matters are involved. In such cases, arbitrators are more likely to find a duty of reasonableness implied in the collective agreement.
- Some balance between the rights of employees and employers has been struck, since a limited duty of reasonableness has been developed in the case law. Consequently, the need of employers to make business decisions without them being questioned unnecessarily and the need of employees to be treated fairly and reasonably in the workplace can be recognized.
- The author concludes that although this state of balance could be made a permanent feature of the workplace through legislation, a more satisfactory outcome would be for appropriate provisions to be made through bargaining between parties to a collective agreement.

Contents

Introduction / 1

The Legal Framework / 1

The Controversy over the Duty of Reasonableness / 6

The Aftermath of the Controversy / 13

Conclusion / 17

References / 19

Cases / 20

About the Author

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Introduction

The authority of arbitrators to require management to be fair and reasonable in exercising its discretion under a collective agreement is unsettled, despite a long series of attempts by arbitrators to reconcile the case law. There are two main schools of thought on this subject. The reserved rights school of collective agreement interpretation argues that management has a duty to act reasonably only with respect to those items specifically set down in the collective agreement. The rights of management which remain are reserved to management to exercise as it sees fit. Advocates of the broad reasonableness school, on the other hand, believe that a requirement of reasonableness is implicit in every collective agreement.

This study argues that some middle ground must be found between the two schools. Such an approach would recognize employees' needs and their expectations of fairness in the workplace while allowing managers to manage and avoiding management by arbitrators.

Prior to the Ontario Court of Appeal decisions in *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.* (hereinafter *Metro Police*) in 1981 and *Re Council of Printing Industries of Canada and Toronto Printing Pressman Assistants' Union No. 10 et al.* (hereinafter *Council of Printing Industries*) in 1983, arbitrators, although unable to agree that there was an implied duty for management to act fairly or reasonably, were able to agree that management could not treat employees in an arbitrary or discriminatory manner. Prior to *Metro Police*, many arbitration decisions followed the broad reasonableness school of interpretation, based on the assumption that a broad reading of the collective agreement was necessary, since it reflected a bargain arrived at by two equal parties. In *Metro Police* the Ontario Court of Appeal (at 687) called this approach into question:

The management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause, unless these powers are circumscribed by express provisions of the collective agreement.

However, in *Council of Printing Industries*, an appeal of a Divisional Court finding that reversed an arbitrator's decision, the Court of Appeal reinstated the arbitrator's finding that a decision of management had been unfair and therefore discriminatory. Some arbitrators subsequently expended a great deal of effort attempting to reconcile these two cases, which, on the surface at least, seemed diametrically opposed. Other arbitrators found them untenable. As a result, in certain cases, such as cases where the decision may have an impact on employees' rights under the collective agreement or where discipline may result from a breach of a rule, the duty to act fairly has a reasonably clear application, while in other circumstances the existence and extent of the duty remain uncertain. Few questions have been subjected to more attention by arbitrators and the courts than the extent of management's duty to act fairly or reasonably, yet this uncertainty persists.

The Legal Framework

'Reasonableness' and 'Fairness' Defined

It is important to understand the meaning of the terms 'reasonableness' and 'fairness.' According to Beattie (1993, 249),

Few questions have been subjected to more attention than the extent of management's duty to act fairly or reasonably.

The common law view of fairness is the foundation of the concept of fairness or reasonableness in labour relations.

no fine distinction should be made between the two, in the arbitration context; generally speaking, arbitrators and courts have not been inclined to make any such fine distinctions.

There is a difference, however, between the terms in everyday usage. The *Concise Oxford Dictionary* defines reasonable as ‘having sound judgment, not absurd, not greatly less or more than might be expected.’ The meaning of the word ‘fair,’ on the other hand, seems to be more precise. *Oxford* defines it as ‘just, unbiased, equitable’ (8th ed., s.v. ‘reasonable,’ ‘fair’). If everyday usage can be applied to the labour context, these definitions suggest that fairness has more to do with treating one employee as other employees are treated—in other words, without discrimination. Reasonableness, however, seems to involve questions of judgment and, therefore, decision making and the quality of decisions.

Black’s Law Dictionary defines ‘reasonable’ as ‘fair’ (6th ed., s.v. ‘fair’). Accordingly, in the legal context ‘the meaning “not greatly less or more than might be expected” is appropriate, since it indicates that there may be more than one reasonable response or course of action’ (Beattie 1993, 251). The legal definitions, then, do not appear to support such fine distinctions between the meanings of the two words. Juxtaposing the distinct everyday definitions of the terms against the virtually indistinguishable legal definitions highlights one source of the confusion surrounding the concepts of reasonableness and fairness in the workplace.

The Common Law Doctrine of Fairness

Because the common law view of fairness is the basis of many of the decisions central to the issue of reasonableness in collective agreement administration, it is the foundation of the concept of fairness or reasonableness in labour relations (Beattie 1993, 251). The line of authorities has come down so firmly in requiring reasonableness under certain conditions that a doctrine of fairness has developed in the common law.

One early example is *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, a British case decided in 1947 that summarized the factors a statutory board may and should consider when reviewing the exercise of a sole discretion. Two basic principles were enunciated in this case (at 233):

- All relevant matters must be taken into account, and
- No irrelevant matters may be considered.

Once these matters are decided in favour of the statutory authority, wrote Lord Greene (at 234),

it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

Thus, this case stands for the existence of a duty of reasonableness but finds that the remedial authority of the court is limited.

In another British case, *Re H.K. (An Infant)*, the court found that not only must judicial and quasi-judicial bodies make reasonable decisions, but public officials (in this case, an immigration officer) must also act fairly. Lord Parker wrote (at 630):

Good administration and an honest or *bona fide* decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of justice apply, which in a case such as this is merely a duty to act fairly.

In a final British case in this progression, *Breen v. Amalgamated Engineering Union and Others*, it was found (at 1153-4) that not only are the decisions of statutory bodies subject to review on the grounds of reasonableness, so also are the decisions of domestic decision-making bodies:

The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account then the decision must not stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside.

This case further developed the duty of fairness—acting in good faith is not sufficient to imply reasonableness.

An important Canadian decision in the development of the doctrine of fairness was *Greenberg v. Meffert et al.*, a nonlabour case written after *Metro Police* and *Council of Printing Industries*. Mr. Greenberg, the appellant, was a real estate agent who obtained a listing for the sale of a piece of property. He began to arrange a sale, but the deal was not finalized until after the termination of his employment. Mr. Meffert, another agent with the firm, arranged for the office manager to pay the commission to him in consideration of a secret payment. Although in normal circumstances the commission would have been split between Greenberg as the listing agent and Meffert as the selling agent, the company refused Greenberg compensation, based on a company policy that read in part as follows (at 549):

In the event that a listing is sold after the sales agent's employment is terminated, any commission he or she receives will be at the sole discretion of the company, and the commission earned on the listing will be disbursed at the company's discretion.

It is understood that all listings shall be the property of the company and that you shall be entitled to commission or other remuneration only if you are an agent of the company on the date the property is sold or listed.

In deciding this case, Robins J.A., writing for the court, stated (at 554):

[T]he company's . . . discretion is not unbridled, firstly, because the . . . company's decision should be construed as being controlled by objective standards; and secondly, because the exercise of the discretion, whether measured by subjective or objective standards, is subject to a requirement of honesty and good faith.

Greenberg v. Meffert
is often held out as a
ruling setting out the
standard of
reasonableness.

Indeed, the court found that the proposition that a discretion must be exercised in good faith 'is so fundamental as to require no elaboration' (at 557). Not only must the company act in good faith but, upon a review of the case law, the Court found (at 554) that a decision must be reasonable '[i]n the absence of explicit language or a clear indication from the tenor of the contract or the nature of the subject matter.' The Court had the following to say (at 555) about the company's interpretation of the clause:

[T]he clause would mean no more than 'we will pay you your commission if we feel like it.' That construction renders the clause meaningless, indeed illusory.

In the result, the appeal was allowed, with the Court finding (*ibid.*) that the provision is meaningful only if the discretion is 'exercised in a reasonable way, not arbitrarily or capriciously, but for good reason.'

This case is often held out as a ruling setting out the standard of reasonableness. What really happened, however, was that the company and some of its employees acted not only unreasonably but also in bad faith when they conspired to deny Greenberg the commission in return for a secret payment. While the court does survey the case law to conclude that 'the tendency of the cases is to require the discretion . . . to be reasonable,' and while it then renders an opinion as to the reasonableness of the parties, in this case this was not necessary. The evidence of the egregious behaviour of the defendants alone ought to have been adequate to decide the case. Thus, the court went on to decide matters not before it. The comments on the reasonableness of the company's exercise of its discretion are, therefore, less helpful than they initially appear.

Management Rights

In the traditional employment relationship, management was free to make decisions in good faith, subject only to the constraints placed on it by the express language of the collective agreement (Brown and Beatty 1998, 4-43). In this manner, the employment relationship, which was (at least in theory) entered into freely by the parties, was modified only in those ways specifically agreed to by the parties to the collective agreement. Thus, management rights remained largely intact.

Some labour relations practitioners, managers, advocates, and adjudicators believe that the law should not have progressed beyond this 'traditional view' (Palmer and Palmer 1991, 565). Adherents to this 'school of strict construction' (Sack 1991, 210) insist that the terms of the collective agreement must be literally interpreted so as to reserve to management all rights not expressly given up through collective bargaining. In labour relations jargon, this is the 'reserved rights' theory referred to in the introduction to this study.

The opposing school of thought supports 'a broad reading of the agreement based on the premise that it is a bargain struck by two equal parties' (Beattie 1993, 250). As mentioned earlier, some proponents of the broad reasonableness school of interpretation go so far as to say that a general requirement of reasonableness must be implied throughout the collective agreement.

The Implied Term of Reasonableness in Collective Agreements

The authority to judge the reasonableness of a decision of management must be found explicitly in the collective agreement, unless it can be considered to be implied by the collective agreement. The power of arbitrators to assume that a requirement of reasonableness is implied in a collective agreement is frequently an issue to be decided before proceeding to judge the reasonableness of a decision. Arbitrators and the courts have found

both that they may imply such a term into a collective agreement—to use the legal terminology—and that they may not do so. Thus, the case law is inconsistent.

In *Canadian Pacific Hotels Ltd. v. Bank of Montréal and Morris Sands* (hereinafter, *Canadian Pacific Hotels*), which was not a labour case but was relied on in a labour case to be examined here, LeDain J. described two situations where terms may be implied into contracts, the first of which is relevant here. In the first situation, which is ‘implication based on presumed intention’ (at 233), he described two tests that a decision maker can apply to find that a contract provision should be implied: (1) the implication on the basis of custom¹

test, and (2) the ‘officious bystander’ test. According to the first test, if the parties to a contract have by their actions shed some light on the effect that the language in question was expected to have, it is permissible for a court to consider evidence of this sort. This is analogous to arbitrators’ use of evidence of past practice in collective agreement interpretation. Using the second test, the court may imply a ‘term which the parties would say, if questioned, that they had obviously assumed’ (at 234).

In *Re McKellar General Hospital and Ontario Nurses’ Association*, which preceded *Canadian Pacific Hotels*, Arbitrator Saltman (at 107) used a similar two-part test to decide whether an arbitrator may imply terms into a collective agreement. The first step is to rule whether ‘it is necessary to imply a term in order to give “business or collective agreement efficacy”’ to the agreement. In other words, an arbitrator may proceed to the second step of the test if the implication of a term is necessary to make the collective agreement work.

Arbitrator Saltman described the second part of the test in terms similar to those used in *Canadian Pacific Hotels*: ‘[I]f having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion,’ the arbitrator may imply the term. Because the test was not met in this case, no jurisdiction to review the reasonableness of management’s decision could be found. Arbitrator Saltman did find, however, that management’s decision could be reviewed to ensure that it was made for bona fide business reasons.

In 1988, in *Re Wardair Canada Inc. and Canadian Air Line Flight Attendants Association et al.*, the Ontario Divisional Court found that an arbitrator had not erred in implying a term

of reasonableness into the collective agreement. The ruling of the Court that it had the power to imply this term into the collective agreement did not, however, meet the test in *Canadian Pacific Hotels*. In this case, an employee had grieved that a rule made by the Company was unreasonable. The presence of a just discipline article, which would have come into play if the grievor had failed to comply with the company’s directives and had been disciplined, was deemed sufficient grounds by the arbitrator and, subsequently, the Court, to imply a term of reasonableness.

In *QBD Cooling Systems Inc. and Canadian Union of Operating Engineers and General Workers, Local 101* (hereinafter *QBD*), Arbitrator Newman found that the language of the management rights clause, which said, in part, that ‘the express provisions of this Agreement constitute the only limitations upon the employer’s rights,’ prevented finding an implied term. This case points out the importance of the wording of the management rights clause. Considering this clause, the arbitrator wrote (at 270):

Thus, regardless of whether some arbitrators have found it appropriate to imply a requirement of reasonableness into the exercise of management’s rights, the parties to this Agreement have prevented me from doing so unless I find an express provision of the Agreement imposing such a limitation.

QBD points out the importance of the wording of the management rights clause.

¹ LeDain J. points out that ‘custom’ in this context means something akin to ‘usage,’ rather than ‘the sense of custom that has become a rule of law.’

It is frequently necessary to consider the intentions of the parties to a collective agreement.

In a 1996 case, *Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 79* (hereinafter *City of Toronto*), Arbitrator Brunner, using the test laid out in *Canadian Pacific Hotels*, concluded that there was no basis to imply a term of reasonableness into the collective agreement. This case revolved around a complaint by the union that a foreperson's conduct violated a provision of the collective agreement specifying that the employer exercise its management rights 'in good faith, fairly and on reasonable grounds.' The arbitrator, in considering whether the actions of the parties gave an indication of the effect that the language was intended to have (the first part of the test in *Canadian Pacific Hotels*), found that there was no evidence presented on the custom or usage of any provision in the collective agreement with respect to the behaviour of supervisors. In considering the second part of the test, the arbitrator commented (at 320) that it need only be applied where it is necessary to give 'collective agreement efficacy.' He then found that implying a term of reasonableness into the collective agreement is not warranted on these grounds. In fact, he concluded from a review of the collective agreement that the limitations on management's discretion set out in the management rights clause were the only limitations that the parties intended to be placed on management's rights.

Conclusion

The law concerning the implied term of reasonableness in collective agreements is not settled. Some arbitrators and some courts find that a broad standard of reasonableness can be implied into all, or nearly all, collective agreements. In contrast, some take the view that a test like that found in *Canadian Pacific Hotels* should be applied to each case before such a term is implied into the collective agreement. Arbitrator Brunner provided a model for other arbitrators in *City of Toronto*. In setting out an objective test, this case provides a means to judge whether a duty of reasonableness may be implied into the collective agreement. Because it is frequently necessary to consider the intentions of the parties to a collective agreement, this case is again useful, since it also provides a framework for judging these intentions. Further, since this decision follows *Canadian Pacific Hotels*, a relevant and correct decision of the Supreme Court, it represents case law that ought to be followed.

The Controversy over the Duty of Reasonableness

The State of the Law before *Metro Police*

An understanding of the law before *Metro Police* is important to understanding the confusion which followed the opposing decisions, discussed above, in *Metro Police* and *Council of Printing Industries* and the subsequent development of the case law. Before the Ontario Court of Appeal rendered its decision in *Metro Police*, there was no consensus among arbitrators as to the extent of the duty of reasonableness, although some preference for the broad reasonableness approach seemed to exist. There was, generally, agreement among arbitrators that employers must not act arbitrarily or discriminatorily, nor could they make decisions in bad faith. It was less clear, however, that managers were required to create reasonable rules or that they had a duty to act reasonably.

Two decisions of the Ontario Divisional Court, decided only a few years before *Metro Police*, also contradicted each other.² It was these contradictory decisions which led the Divisional Court to refer *Metro Police* on to the Court of Appeal without a decision first

² These divergent opinions were delivered in cases between the same two parties. One can only imagine the frustration and confusion this must have created.

being made at the Divisional level.³ The first of these two cases was *Re Municipality of Metropolitan Toronto and Toronto Civic Employees Union, Local 43 et al.* (hereinafter *Stinson*).⁴ In quashing the award of an arbitration board, the Court found (at 56) as follows:

We cannot find anything in the agreement that justifies the board of arbitration in embarking upon the considerations that obviously led to their decision. . . . Thus, whether management acted in an arbitrary manner or whether the request would interfere with the efficient operation of the municipality's incinerator to us are factors that are outside the proper purview of the board's consideration, and as such they are outside the jurisdiction of the board. They are irrelevant. In coming to its conclusion the board thus went beyond the jurisdiction conferred upon it and its decision is therefore defective in that respect.

In contrast, the decision in *Re Municipality of Metropolitan Toronto and Toronto Civic Employees Union, Local No. 43 et al.* (hereinafter *Marsh*) was that any managerial discretion must be exercised in a reasonable manner. The Court, citing *Breen* and *Re H.K. [An Infant]*, mentioned above, found that the duty of fairness which existed in common law applied to the workplace. In a majority decision with one dissenting, the court in *Marsh* held (at 252) that

Any discretion to be exercised by the employer must be exercised in the knowledge that each employee is one of many; no one of them should be singled out for special treatment. This obviously implies that the agreement be administered fairly.

In what has been termed the 'high water mark for the broad reasonableness school of interpretation' (Beattie 1993, 256), Arbitrator Shime stated (at 18) in *Re International Nickel Company of Canada Ltd. and United Steelworkers, Local 6500* (hereinafter *Inco*) that collective agreements should be interpreted

not only as the boundaries of the bargain struck by two equal parties who become co-authors of the collective agreement and responsible for its administration, but also as containing within those boundaries an implicit assumption that the terms and provisions of the agreement must be construed so as to operate reasonably and with good faith during the life of the collective agreement; and this implicit assumption of reasonableness and good faith negates any theory which suggests that a collective agreement which must be fleshed out by arbitration is cast in a context of an implied management rights theory.

In his decision, Arbitrator Shime referred to the 1958 case *Re Oil, Chemical and Atomic Workers and Polymer Corporation Ltd.* (hereinafter *Polymer*), one of the first cases to set out a duty for parties to a collective agreement to act reasonably during the term of the collective agreement. The *Polymer* case had placed a requirement on the union to act reasonably: the arbitrator found that the straightforward 'no strike, no lock-out' clause implied that the union must act reasonably to avoid a strike or, once a strike starts, to end

The Polymer case placed a requirement on the union to act reasonably.

³ Unreported December 4, 1980. The Divisional Court employed a rarely used section of the Judicature Act (R.S.O. 1980, c. 223 [repealed 1984, c. 11, s. 187]) in making this referral.

⁴ The names of these cases are virtually the same. For this reason, the earlier case has come to be known as *Stinson*, the later case as *Marsh*.

the strike. In *Inco* Arbitrator Shime found (at 19) that this ‘must apply equally to the company as to the union and the company must likewise administer its obligations in a reasonable manner.’

The ruling in *Polymer* does not directly address the reasonableness question, since the issue in *Polymer* was not whether a party to a collective agreement had acted reasonably in applying the agreement’s terms; the issue was whether a party to a collective agreement made all reasonable efforts to stop a strike which breached the collective agreement.

Two arbitration decisions issued less than three months apart the year before *Polymer* had left the extent of the requirement of reasonableness unclear. In *Re United Autoworkers, Local 525 and Studebaker-Packard Ltd.* (hereinafter *Studebaker-Packard*), E.W. Cross C.C.J., acting as an arbitrator, ruled that the company was not permitted to contract out the work of janitors, since the basic right to work provided by the collective agreement would be negatively affected by such a decision. This case was the first arbitration award to imply that management had a duty of fairness. However, Arbitrator D.C. Thomas C.C.J., in *Re United Autoworkers, Local 456 and Electric Auto-lite Ltd.* (hereinafter *Electric Auto-lite*) ruled that since there was no clause preventing the employer from contracting out the work of janitors, it was within management’s rights to make such a decision. This case followed the jurisprudence that had begun as early as 1948 when W.D. Roach J., acting as chair of a board of arbitration, ruled in *Re Canadian Industries Ltd., Nobel Works* (at 237) that

if it appears . . . that the employer has acted honestly, we do not feel that a Board of Arbitrators would be justified in interfering by reversing the employer’s decision, for the reason that to do so would result in management by arbitrators rather than management by the employer. In this and every such like case where there is evidence on which a reasonable employer, acting reasonably could have reached the decision, . . . no Board of Arbitrators should interfere.

The first case to apply the broad reasonableness approach, which reached its zenith in the *Inco* case, discussed above, was *United Electrical, Radio and Machine Workers of America, Local 527 in re Peterboro Lock Manufacturing Co. Ltd.* (hereinafter *Peterboro Lock*) in 1954. Arbitrator Laskin (as he then was) asked himself one key question: ‘Is the board then thrown back to consider whether the Collective Agreement must be read as leaving an employer free to do what is not expressly prohibited therein?’ The arbitrator wrote (at 1502) that

In this Board’s view, it is a very superficial generalization to contend that a collective agreement must be read as limiting an employer’s collective bargaining prerogatives only to the extent expressly stipulated. Such generalization ignores completely the climate of employer-employee relations under a Collective Agreement. The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involved the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relationships by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist. Just as the period of individual bargaining had its own ‘common-law’ worked out over many years, so does a Collective Bargaining regime have a common-law to be invoked to give consistency and meaning to the Collective Agreement on which it is based.

Based on this, the arbitrator found that the employer could not unilaterally change the pay structure of employees from one based on incentives to one based solely on an hourly wage. The arbitrator made this decision despite the absence of an express requirement that piecework be continued. Nor was there an express provision permitting the discontinuance of a rate once it was fixed. These two points were found by the board (at 1501) to be important, since '[w]hatever this Board might think of the inherent reasonableness of the views of the Company or Union or employee, it must test them by reference to the Collective Agreement.' This board found that any decisions made by the parties to a collective agreement must be made with reference to that collective agreement. This view that there is no general term of implied reasonableness in a collective agreement, but that the requirement for reasonableness must be grounded in the collective agreement—is a basic test to which arbitrators should return and to which some arbitrators have returned.

The view that the requirement for reasonableness must be grounded in the collective agreement is a basic test to which arbitrators should return.

Metro Police

Metro Police was a judicial review of an arbitration award by Arbitrator Saltman ([1980] 26 L.A.C. (2d) 117). The Board of Police Commissioners requested the review on the grounds that Arbitrator Saltman had exceeded her jurisdiction when she ruled that management had a duty to act fairly in assigning overtime. The Divisional Court, in reviewing the pertinent case law, found that two previous decisions of the Ontario Divisional Court which were very different in their outcome and which dealt with the issue of management's duty to act fairly (*Stinson* and *Marsh*, discussed above) could not be distinguished. Accordingly, as mentioned, the Divisional Court referred ***Metro Police*** directly to the Ontario Court of Appeal to decide the case.

The grievance arose out of a dispute over the distribution of overtime for inventory taking. The three grievors alleged that they had been denied the overtime due to them and that this decision had been made arbitrarily, discriminatorily, unfairly, and in bad faith. Management maintained that it had denied the grievors the overtime for a bona fide business reason—the employees had displayed a poor attitude. The arbitrator found that there were no collective agreement provisions applying to inventory-taking or the distribution of overtime, so she considered whether the management rights clause had been violated. She chose this approach after finding that *Marsh* required that employers must exercise management rights fairly and without discrimination. After reviewing the facts in ***Metro Police***, Arbitrator Saltman found that the employer had unfairly discriminated against the grievors and she allowed the grievance and granted relief.

In reviewing ***Metro Police***, Weatherston J., writing for the Court of Appeal, found that the previous Divisional Court decisions in *Stinson* and *Marsh* had been made on different facts and different collective agreements than the agreement in the instant case. The Court in ***Metro Police*** also found (at 687) that if in *Marsh* the Divisional Court intended to

lay down a general rule that all decisions of management pursuant to a management rights clause which do not contravene any other provisions of the agreement must stand the further test whether in the opinion of the arbitrator they were made fairly and without discrimination, then with respect we do not agree.

In addition, Weatherston J. pointed out in his ruling, the decisions relied on in *Marsh* dealt with procedural fairness before domestic and statutory bodies, not collective agreement interpretation. As a result, the Court found that the ruling in *Marsh* was not compelling in deciding the case before it. The Court then ruled (at 687) as follows:

In our opinion, the management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause, unless those powers are otherwise circumscribed by express provisions of the Collective Agreement. The power to challenge a decision of management must be found in some provision of the Collective Agreement.

In searching the collective agreement for such a provision, the Court was guided (at 687) by the principle that they could not 'imply a term in the Collective Agreement that the management rights clause would be applied fairly and without discrimination' because the collective agreement barred an arbitrator from changing it or making a decision inconsistent with it. Further,

If such a term were to be implied, it would mean that every decision of management made under the exclusive authority of the management rights clause would be liable to challenge on the grounds that it was exercised unfairly or discriminatively. In our opinion, this would be contrary to the spirit and intent of the Collective Agreement.

In other words, any such provision would have to be explicit.

The court in *Metro Police* found that the collective agreement was a detailed document and that the no-discrimination clause in the collective agreement specified a prohibition against discrimination in promotion, demotion, or transfer and prohibited discipline without cause. No other applicable provisions were found. Since no specific provisions governed the taking of inventory or the assignment of overtime, the court concluded (at 688) that

in finding that the grievance could be founded in a failure by the Board [of Commissioners of Police] to exercise fairly and without discrimination the rights conferred on it by the management rights clause [the arbitrator had erred]. When the arbitrator determined that there was no provision in the Collective Agreement that governed the taking of inventory and the distribution of overtime, she should have ruled that she had no jurisdiction to deal with the dispute because of an alleged improper exercise of management rights.

The appeal was therefore allowed with costs.⁵

The ruling in *Metro Police* clearly supports the proposition that an arbitrator may not imply a requirement for management to act reasonably in the exercise of a management function if the exercise of that function is not circumscribed elsewhere in the collective agreement. This is particularly true if the collective agreement contains the standard clause prohibiting arbitrators from altering, modifying, adding to, or amending the collective agreement. This ruling has wide application, since its approach is very general and since the nature of the management rights clause in the particular agreement was common. If the management rights clause is more specific, particularly if an explicit requirement of reasonableness exists, the decision might be different. Although this ruling served to clarify this important aspect of collective agreement interpretation, it was soon called into question.

⁵ The Court referred the matter back to the arbitrator since it found that the reasonable cause provision of the collective agreement may have had application to the case. The arbitrator subsequently ruled that the employer's action had violated the discipline with reasonable cause provision and once again allowed the grievances. This decision was not appealed.

Metro Police supports the proposition that an arbitrator may not imply a requirement for management to act reasonably.

Council of Printing Industries

Less than two years after *Metro Police*, the Ontario Court of Appeal, in *Council of Printing Industries*, found itself in a position to rule on a similar case, although one based on different facts and on a different collective agreement. The Divisional Court had found that it was bound to follow the Ontario Court of Appeal ruling in *Metro Police*, and it reversed the arbitrator's decision. The Court of Appeal was subsequently asked to review the Divisional Court's decision.

In *Council of Printing Industries*, mentioned at the beginning of this study, three employees grieved that they had been improperly denied reclassification from temporary to permanent employment, which would have provided some protection from layoff and increased benefit entitlements. The grievances identified two issues which were the subjects of the dispute: (1) the classifications were done improperly because the seniority clause in the collective agreement was ignored; and (2) the transfer of an employee to permanent status was a promotion, thus the promotion provisions of the collective agreement should apply.

The arbitration board ruled that the seniority and promotion provisions of the collective agreement did not apply in this case. The board then asked itself the following questions (at 55): '[I]s the company given a free hand to make such decisions in any way it pleases? . . . What if its decision was made in bad faith or based on criteria suggesting invidious discrimination?' The board found that it could explore this area, not because it was a ground of the original grievances, but because it did not want to ignore the ramifications for seniority rights of management's decision. The Board outlined its concerns (at 56) thus:

[T]he well-known arbitral concern over the abridgement of seniority rights . . . would support the implication of a contractual intent that the company must exercise its discretion under [the job classification article] in a reasonable manner, without discrimination, bad faith or arbitrariness.

For this reason, even though it ruled that the seniority provision in the collective agreement did not apply in this case, the arbitration board found that management's decision to ignore seniority in making its classification decision had been unreasonable, and it allowed the grievances.

The Divisional Court found that the management rights clause was directly in issue in this case and, hence, ruled that the interpretation of the effect of the management rights clause set out in the *Metro Police* case must apply in this case. Accordingly, the Divisional Court found that the arbitration board had no jurisdiction to examine whether management had exercised its management rights reasonably. For this reason, the Court quashed the arbitration award.

In appealing this ruling to the Court of Appeal, the union submitted that the issue before the Divisional Court was really whether the arbitration board 'placed an interpretation on [the job classification article] which it can reasonably bear' (at 56), not the interpretation of the management rights clause. For this reason, the union submitted, the court's decision had been based on irrelevant grounds.

The Court of Appeal, in reviewing the decision of the arbitrator, found that the board had dealt with the matter as an interpretation of the job classification article and had not purported to deal with the management rights clause per se. Further, the Court found that it was not called upon to review the conclusion that the pertinent article was not applied reasonably but only to decide whether the board, on a reasonable interpretation of the

article, was entitled to enter upon such an assessment. The Court then unanimously ruled (at 60) as follows:

In our view, the interpretation placed on [the job classification article] by the board in light of the whole Collective Agreement was one it could reasonably bear, or to use the words of the authorities in this field, the interpretation is not ‘patently unreasonable.’

Accordingly, the Court allowed the appeal with costs and set aside the decision of the Divisional Court.

Attempts to Reconcile *Metro Police* and *Council of Printing Industries*

A number of arbitration boards have attempted to reconcile the opposing decisions made by the Court of Appeal in *Metro Police* and *Council of Printing Industries*. Some arbitrators have attempted to distinguish the cases from one another. The most frequently identified distinguishing feature is that *Council of Printing Industries* dealt with a decision made by management under a collective agreement provision, while *Metro Police* considered the exercise of management’s discretion under the management rights clause. In *Toronto East General Hospital and Service Employees International, Local 204*, Arbitrator Burkett rejected this distinction (at 407):

In our view the attempt to distinguish the judgments of the Court of Appeal in *Council of Printing Industries* . . . from that of *Metro Police*, . . . on the basis [of the above distinction] is an artificial distinction which misses the point. A closer reading of *Metro Police* . . . and the arbitration awards that were under review in that case makes it clear that the Court of Appeal was concerned with the importation into a collective agreement of ‘a general rule, that all decisions of management pursuant to a management rights clause which do not contravene any other provisions of the agreement must stand the further test of whether in the opinion of the arbitrator they were made fairly and without discrimination.’

Before the *Council of Printing Industries* decision had been made, however, one arbitrator had interpreted the *Metro Police* ruling in such a way as to allow *Metro Police* and *Council of Printing Industries* to be reconciled. In *Re Meadow Park Nursing Home and Service Employees International Union, Local 220*, Arbitrator Swan made the following remarks (at 140):

What the [*Metro Police*] decision decides, in our respectful view, is simply that arbitrators exceed their jurisdiction if they purport to establish general principles for the administration of collective agreements divorced from the language negotiated by the parties in the matter before them, and that they commit errors in law if they purport to treat a judgment of the courts, refusing to interfere with an arbitration board on the basis that it did not give collective agreement language a meaning which it could not reasonably bear, as binding expositions of the general law. Unfortunately, many arbitrators, and indeed some courts, have turned the rationale of [*Metro Police*] upside down, and have taken it instead to mean that there can never be implied into a collective agreement a duty to exercise a management function or prerogative in accordance with tests of fairness and reasonableness.

Arbitrator Swan’s reasoning was applied by Arbitrator Brent in *Re Stelco Inc., Hilton Works and United Steelworkers, Local 1005*, a case that postdated the controversy launched by *Council of Printing Industries*, thus (at 159):

It would therefore appear that where there are specific employee rights in the collective agreement that can be defeated by the exercise of discretion on the part of the employer, the employer's rights to exercise that discretion must be read in the context of the employee right. The collective agreement must therefore be interpreted so that the two can coexist in a reasonable fashion.

This approach strikes a balance between the needs of the employee and the needs of the employer by interpreting the agreement in such a way that the rights of the parties can coexist.

The approach in Stelco strikes a balance between the needs of the employee and the needs of the employer.

The Aftermath of the Controversy

Lights and Siren

In 1990 the Ontario Court of Appeal released a ruling reinstating the decision of a board of arbitration which had been quashed by the Divisional Court. Although this ruling has been viewed by those who support the broad reasonableness school of interpretation as confirming the decision in *Council of Printing Industries*, an analysis of the *Municipality of Metropolitan Toronto v. Canadian Union of Public Employees, Local 43* (hereinafter *Lights and Siren*) ruling does not support such an interpretation.

The Metropolitan Toronto Ambulance Service had unilaterally implemented a rule that required paramedics to use the ambulance's lights and siren on all calls deemed to be 'emergencies.' Six grievances were filed alleging that the rule was unfair. The arbitration board, chaired by Professor Brian Langille, found that there was no bona fide reason for the employer to implement the rule and that any discipline that might be imposed upon employees for breaching such a rule would be unjust. The board found that the employer's power to make rules was not unfettered, in that it must exercise its discretion in a manner consistent with the 'reasonable cause for discipline' provision of the collective agreement. The board further ruled that whether or not management rights were expressly limited in the collective agreement, they must be exercised in a reasonable way.

In quashing this award, the Divisional Court found that the board's interpretation of the collective agreement was patently unreasonable. In arriving at this decision, the Court considered two main questions: (1) Were the grievances arbitrable in the absence of actual discipline? and (2) Was the employer required to act reasonably in promulgating rules with disciplinary consequences?

Although the second question is more germane to this study, the first question was central to the Court's ruling, and it is important to understand the reasons the Divisional Court gave for quashing the Board's decision. The Divisional Court found that the reasonableness provision would come into effect only after an employee had been disciplined and that the Board's decision to take jurisdiction to hear the grievance was patently unreasonable. The Court offered the following reasons for its decision (at 277):

Article 3.01(ii) clearly relates only to grievances where an employee *has been* disciplined without reasonable cause. What the Board did was to amend the agreement to change the employer's exclusive function to make regulations to a reasonable function without the same having been bargained for between the parties. The agreement contains the usual provision prohibiting the Board from altering or amending the agreement. Therefore, the Board erred in so doing. In addition, the Board was substituting its opinion for that of the employer as to the desirability of the directive. It had no right to do so.

The Court also commented that the effect of adopting the board's view would be to make every policy decision of management subject to review and subject, as well, to the substitution of the decision of a board of arbitration for management's decision. This is more than what the collective agreement provides, and a similar argument can be made for most collective agreements. It is important to note that the Divisional Court made no comment on the issue of management rights.

The union, in appealing this decision to the Court of Appeal, made submissions supporting the board's approach. As Tarnopolsky J., writing for the Court, stated (at 284):

The basic thrust of these submissions is that, where a rule has disciplinary consequences and where the Collective Agreement provides, as this one does, that discipline must be for reasonable cause, the Board is correct in assessing the reasonableness of the rule.

The employer, however, objected (at 283-4) to the arbitration board's 'ruling that it would infer from the Collective Agreement that management had a duty to act "reasonably" even when exercising "its uncontrolled discretion"' under the management rights clause.

In reinstating the arbitration board's award, the Court made a telling comment (at 286) on the decision in *Metro Police* and how it was dealt with in the *Council of Printing Industries* decision:

It is worth noting, however, that just before arriving at this conclusion, Houlden J.A. made allowance for the case in which powers conferred on management by a management rights clause 'are . . . circumscribed by express provisions of the Collective Agreement.' It would seem that this is exactly the 'loophole' used by this court in *Council of Printing Industries*, . . . to find a duty to act reasonably. The arbitrator's use of art. 3.02 and of the 'reasonable cause for discipline' provision in art 3.01(ii) is of a similar character. In neither of these cases is the provision relied on *entirely* explicit. However, it does not seem patently unreasonable to view the Collective Agreement in a holistic manner, where even management rights may be circumscribed in order to avoid negating or unduly limiting the scope of other provisions.

Clearly, then, this Court viewed both the decision of another panel of the same court in *Council of Printing Industries* and the decision made in this case by Arbitrator Langille as utilizing a 'loophole.' Nevertheless, the Court found (at 288) that 'in imposing a duty on the employer to exercise its discretion to make rules with disciplinary consequences in a reasonable fashion, the Board gave the Collective Agreement an interpretation that it reasonably and logically could bear.' Although the appeal was allowed and the arbitration award restored, this ruling can hardly be characterized as a whole-hearted confirmation of *Council of Printing Industries*.

The Broad Reasonableness Approach

While the *Lights and Siren* case followed *Council of Printing Industries*, relatively few cases in the last decade have followed the broad reasonableness approach in deciding grievances of the sort examined here.⁶ Of the cases that do follow this school of interpretation, most were decided in the late 1980s and early 1990s.

An example is the *Wardair* case, discussed earlier. The Court in this case found not only that a broad right to imply terms into the collective agreement existed, but also that

⁶ While I have not resorted to counting cases in arriving at this conclusion, extensive reading of the cases lead me to this belief. A review of the annotations to each of *Metro Police* and *Council of Printing Industries*, reinforces this impression, at least for cases decided by the courts.

Relatively few cases in the last decade have followed the broad reasonableness approach in deciding grievances.

the arbitrator did not err in any way related to his jurisdiction in proceeding with the interpretation of the collective agreement as a whole and holding, in effect, that the management rights clause was modified by articles 16.07, 16.08 and 1.02.

An important distinguishing feature in this case is that the preamble to the collective agreement between the parties stated that the agreement was intended to provide 'reasonable' working conditions, which reduces the value of this case in supporting the power of arbitrators to imply a term of reasonableness into the collective agreement. Further, the case does not have broad application, due to its focus on the disciplinary consequences of a breach of the rule.

Re Rio Algom Ltd. and United Steelworkers, Local 5417 was one in a long line of cases which struggled with the duties of an employer to participate in a temporary absence program which allowed inmates of provincial jails to continue their work under certain conditions. In this case, the employer refused to participate in the program, and thus the employee in the case was forced to serve his sentence on thirty consecutive days, thereby missing work. The employer then relied on an article 12.12 of the collective agreement to discharge the employee. The article said, in part, that 'An employee shall lose his seniority standing and his name shall be removed from all seniority lists . . . [i]f he is absent without permission for fourteen (14) calendar days unless he provides a satisfactory reason to the company' (at 287).

The arbitrator found that since there was no automatic discharge for an employee receiving a jail term, the employer must be reasonable in exercising its discretion under the article in determining whether a jail term was an acceptable reason for an employee's absence. The arbitrator (at 291) characterized the employer's duty thus:

In exercising its discretion, it must act reasonably and in good faith and must consider all the circumstances when balancing the needs of the company with the needs of the employee. The board must consider if, on balance, the employer's actions were fair and reasonable.

The board concluded that the employer had not acted reasonably in discharging the grievor, since he would have missed little work while serving his sentence outside of working hours. The board therefore reinstated the employee. Thus we find an example of an arbitration board substituting its decision for that of the company.

The Trend Away from Broad Reasonableness

A trend away from the broad reasonableness decisions began with court decisions overturning the awards of arbitrators who had followed the *Council of Printing Industries* approach. The first of these is the Ontario Divisional Court finding in *Re Sisters of St. Joseph of the Diocese of London and Service Employees Union International et al.* In this decision, the Court allowed the application for judicial review and overturned the arbitration board's decision since the board had exceeded its jurisdiction by reviewing the employer's decision. The Court found that there was no express provision for the arbitration board to review the reasonableness of management's job-posting decision and that one was not implied by the circumstances. Since there was no bad faith, arbitrariness, or unfairness by the employer, the board should have accepted the employer's evidence as 'the basis for the exercise of a management right' (at 189). Thus, this decision followed the reasoning of *Metro Police*.

The principle that arbitrators are not entitled to substitute their decisions for the decisions of management is central to the ability of managers to run their business. Clear sup-

Support can be found for the principle that arbitrators are not entitled to substitute their decisions for the decisions of management.

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port can be found for this proposition in the ruling of Arbitrator Peltz in *Re Burns Meats, Division of Burns Foods (1985) Ltd. and United Food and Commercial Workers' Union, Local 832*. Despite the imposition by the *Manitoba Labour Relations Act* (R.S.M. 1987) of a duty of reasonableness in all collective agreements,⁷ the arbitrator ruled as follows (at 189):

I am not entitled to substitute my opinion for that of management. The arbitrator cannot second-guess the company's decision given the specific wording of art. 1(b) in the collective agreement in this case. The arbitrator is only entitled to scrutinize the company's decision to ensure that the employer is pursuing a reasonable business interest.⁸

Put another way, the arbitrator characterized the power of an arbitrator to review management decisions as 'a limited form of fairness review [which] falls short of review for substantive correctness' (at 197). So, if the employer has a legitimate business objective, the decision of the employer should be upheld, whether or not the arbitrator agrees with the reasonableness of the decision.

Stelco Inc. v. United Steelworkers of America, Local 1005 et al. (hereinafter *Stelco*) followed similar reasoning. The Divisional Court reviewed the decision of an arbitrator who had found that while management had the discretion to change a rule relating to vacation time, it had to ensure that the rule did not have a real potential to undermine any rights conferred by the collective agreement. If the rule had such an effect, the discretion might be found to have been exercised unreasonably. In the result, the arbitrator found that the rule change should have used seniority as a criterion for granting vacation time off and that, since it did not, the company had exercised its discretion unreasonably.

In reviewing this decision, the Court found that the arbitrator had 'cloaked herself with the right to manage the company, rather than leaving management to the employer' (at 668). The Court summarized its decision thus (at 675):

Having found that in the exercise of its sole discretion, management acted honestly and in good faith, and that the policy behind the . . . directive was neither arbitrary nor capricious but rationally connected to those employees most in need, she should have ceased her inquiry.

The award of the arbitrator was, hence, overturned and the grievance denied.

These decisions seem to have redirected the line of jurisprudence, as can be seen in the following arbitration awards. The first of these, *Re York Region Roman Catholic Separate School Board and Ontario English Teachers' Association*, was a preliminary objection by the employer that the board did not have jurisdiction to decide the case, since there was no provision in the collective agreement requiring the employer to exercise discretion reasonably. In upholding the objection and dismissing the grievance, Arbitrator Kaplan found as follows (at 294):

The parties have decided what matters they wish to have covered by the collective agreement and what matters, inferentially, they wish to exclude from coverage.

7 Section 80(1) provides as follows: 'Every collective agreement shall contain a provision obliging the employer, in administering the collective agreement, to act reasonably, fairly, in good faith, and in a manner consistent with the collective agreement as a whole.' Further, section 80(2) provides that a collective agreement which does not contain such a clause is deemed to contain similar language.

8 Article 1(b) provided that employees would not be paid for a statutory holiday if they were absent 'unless there is a justifiable excuse for the absence satisfactory to the company' (at 187).

This decision stands for the proposition that the employer is obliged to act reasonably when exercising its prerogative under the management rights clause only when express collective agreement language requires it.

In *Re Corporation of the City of Etobicoke and Canadian Union of Public Employees, Local 185* Arbitrator Springgate found somewhat differently. In this case, the arbitrator decided that although the mere existence of a collective agreement did not create an obligation for the employer to exercise its discretion reasonably, as was decided in *Stelco*, discussed above, a duty of reasonableness does exist if a decision might undermine a right under the collective agreement. In dismissing the grievance, the arbitrator found that no such conflict existed.

The arbitrator in *QBD* utterly rejected the argument that a reasonableness requirement be implied into the collective agreement. Arbitrator Newman (at 269) was of the view that where there is a management rights clause, the parties ‘have specifically turned their attention to the extent and nature of management rights [and] any appropriate limitations thereon.’ Similarly, Arbitrator Brunner, in *City of Toronto*, discussed above, rejected the notion of an implied term of reasonableness after applying the test described in *Canadian Pacific Hotels*, also discussed above.

One recent case which seems to be an exception to the general movement away from the *Council of Printing Industries* approach is, upon closer examination, not inconsistent with the trend. Arbitrator Snow examined the reasonableness of management’s approach in *Re Navistar International Corporation Canada and CAW Canada, Local 127*, despite the absence of any express provision in the collective agreement. The employer made no attempt to argue that there was no duty to decide reasonably. Instead, both the union and the employer made submissions on whether the decision made by management had been a reasonable one. Accordingly, the arbitrator found that both parties accepted that the employer had an implied duty to act reasonably and, thus, proceeded to rule on the issues submitted to him.

Conclusion

The law with respect to the duty to act fairly in the administration of collective agreements remains unsettled. Indeed, what is clear is that the existence of opposing decisions with respect to this matter is not a new problem. In the late 1950s, two boards of arbitration came down on opposite sides of the question in *Electric Auto-lite* and *Studebaker-Packard*. In the late 1970s, the Ontario Divisional Court had a similar result in *Marsh* and *Stinson*. This trend culminated in the early 1980s in *Metro Police* and *Council of Printing Industries* at the Court of Appeal.

Management Discretion

Metro Police can be viewed as a high point in the past three decades for management’s discretion (or as a low point for employees’ right to question management’s decisions). Conversely, some view *Council of Printing Industries* as the low point for management’s discretion. For much of the decade after the *Council of Printing Industries* decision in 1983, most rulings followed its reasoning. Then, in the early and mid-1990s, there was, generally, a movement toward the traditional strict construction approach.

What is sometimes missing (and was frequently missing in the decade after *Council of Printing Industries*) is a recognition by many arbitrators and the courts that interference in the operation of a firm should be done with great restraint. For adjudicators to substitute their decisions for the decisions of management when the law has not been broken and

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when the decisions have been made in good faith and within the bounds of the plain language of the collective agreement is to fetter the ability of management to make decisions and, thus, to act in a way that is detrimental to the ability of management to manage.

The Collective Agreement and the Union-Management Relationship Proponents of the broad reasonableness school often characterize the advent of a collective bargaining relationship as a complete break with the past. The result, a collective agreement, is, they argue, the negotiation of a bargain between two equal parties. To say, however, that the creation of a collective agreement creates a new relationship between a company and its employees is to overstate the importance of the event. When the management of a company agrees to bargain with a union, it does not agree to start with a blank slate. The ruling in *Metropolitan Stores Limited v. Manitoba Food and Commercial Workers' Union, Local 832 et al.* put it this way (at 12,309):

There is nothing 'equal' about a collective bargaining agreement, which is a complicated piece of drafting incorporating terms outlining the separate and distinct, but not equal, rights, privileges and duties of each signatory. The function and role of each in the workplace, and within that agreement, subject to some general overlying responsibilities of equal importance, is unique and different. So the mere signing cannot create equals.

Some proponents of the broad reasonableness approach create a straw man which they then attack. For example, in *Toronto East General*, discussed above, the union nominee, Stephen Lewis, had this to say (at 415-16) in an addendum to the award:

It seems to me that the principle of 'reasonableness' should suffuse every clause of every collective agreement. I have no patience for those interpretations—arbitral or judicial which concede to management the right to behave unreasonably, arbitrarily, unilaterally, or otherwise, simply because precise language is missing. And my opinions on that score, however heretical, apply equally to 'management's rights' provisions of the collective agreement.

Proponents of strict construction do not generally argue that management ought to be permitted to act unreasonably. This is to mistake the issue. The point is that the decisions of management should not be reviewed for reasonableness unless there is some provision in the collective agreement for such a review. Management's decisions should not be reviewed once it is established that the decision was made for legitimate business purposes, unless a provision exists to permit such a review.

The Current State of the Law

Even though the law remains unsettled, a number of principles emerge from this review of the current state of the law.⁹ The first and most obvious of these is that if a provision of the collective agreement specifically requires reasonableness, any decision made under that provision must be reasonable. There is not, however, a generally implied duty to act reasonably. The best test of whether such a term may be implied is found in the Supreme Court of Canada decision in *Canadian Pacific Hotels*, discussed above.

⁹ While these remarks are derived from the review of the cases undertaken above, the approach is patterned on that taken by Beattie (1993). These remarks are in some sense an update of the list in his article.

The decisions of management should not be reviewed for reasonableness unless there is some provision in the collective agreement for such a review.

Arbitrators are entitled to review management's decisions to ensure that they were based on bona fide business reasons and only on bona fide business reasons. Management must, therefore, act honestly and in good faith and avoid arbitrariness and caprice. Individual employees or groups of employees should not be singled out for special treatment, except when such treatment can be justified for bona fide business reasons. Further, in making decisions that affect employees, management must consider all relevant factors and disregard all irrelevant ones.

A consensus seems to be forming around the proposition that when a decision conflicts with another right under the collective agreement, the employer has a duty of reasonableness. For example, if a collective agreement requires that overtime be spread evenly among all members of the bargaining unit capable of doing the work required, management must be reasonable in judging the ability of employees to do the work. There are, however, enough cases, such as *Stelco*, which do not agree on this point to indicate that the law in this regard is not clear. If there is a duty of reasonableness, however, there is usually a range of reasonable actions, and the issue becomes whether the decision in question falls within that range.

The duty of reasonableness is clearer when disciplinary matters are involved. In such cases, or cases in which discipline may result from the breach of a rule, such as *Wardair*, arbitrators are more likely to imply a duty of reasonableness into the collective agreement. For example, as described in *Lights and Siren*, a policy grievance challenging the reasonableness of a rule may be filed without employees having to disobey the rule and be disciplined if discipline may result from such a breach.

Some balance between the rights of employees and those of employers has been struck, since a limited duty of reasonableness has been developed in the case law. If this state of balance persists, the need of employers to make business decisions without such decisions being questioned unnecessarily and the need of employees to be treated fairly and reasonably in the workplace can be recognized. Thus, the needs of everyone governed by collective agreements can be met with respect to the issue of reasonableness. Although this state of balance could become a permanent feature of the workplace through legislation, a more satisfactory outcome would be for appropriate provisions to be made through bargaining between the parties to a collective agreement.

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