

# *Nor-Man Regional Health Authority : Labour Arbitration, Questions of General Law and the Challenges of Legal Centrism*

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## I. INTRODUCTION

Grievance arbitration is an “integral and fundamental institution” in Canada’s industrial relations system.<sup>1</sup> Its purpose is to ensure the expert, expeditious and peaceful settlement of disputes arising throughout the course of the collective agreement – a period during which strikes and lockouts are prohibited by statute. Over time arbitrators have developed a body of arbitral jurisprudence – an “industrial common law”<sup>2</sup> – regarding the matters that commonly arise in the administration of collective agreements. Though arbitrators are not bound by a doctrine of *stare decisis*, they view prior awards and similar cases as persuasive. Indeed, these awards form the background of norms and understandings against which parties negotiate and draft new collective agreements and from which they proceed to resolve grievances.<sup>3</sup>

Often selected by mutual agreement of the parties, sometimes operating as tripartite boards with union and employer representation, endowed with practical, academic and accumulated expertise in resolving industrial disputes, arbitrators can be expected to “understand and respond to the values of the industrial community.”<sup>4</sup> Legislatures have granted arbitrators broad powers to

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\* Editorial note: as mentioned in the post script, the Supreme Court of Canada released their decision regarding the case that is the subject of this article prior to publication of this article. Professor Heckman predicted their verdict and reasoning successfully, and the article remains a though-provoking and informative exploration of the larger legal implications surrounding the case.

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<sup>1</sup> Donald JM Brown, QC & David M Beatty, *Canadian Labour Arbitration*, 4th ed, loose-leaf, (consulted on 19 June 2011), (Aurora, Ont: The Cartwright Group Ltd, 2009) at 1-1.

<sup>2</sup> David M Beatty, “The Role of the Arbitrator: A Liberal Vision” (1984), 34 UTLJ 136 at 151.

<sup>3</sup> Brown & Beatty, *supra* note 1 at 1-13.

<sup>4</sup> Harry W Arthurs, “Developing Industrial Citizenship: A Challenge for Canada’s Second Century” (1967), 45 Can Bar Rev 786 at 823 [Arthurs, *Industrial Citizenship*].

deal with all manner of issues arising in industrial disputes and commonly protect their decisions from judicial review in recognition of the fact that:

[t]he field of labour relations is “sensitive and volatile” and “[it] is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding”.<sup>5</sup>

It is no wonder, then, that reviewing courts came to recognize labour relations as “a discrete and special administrative regime” in which decision-makers have “special expertise.”<sup>6</sup> Acknowledging this expertise and giving effect to statutory privative causes, they have reviewed on a deferential “reasonableness” standard the decisions of arbitrators relating to the interpretation of collective agreements and their enabling statutes.<sup>7</sup> Indeed, courts reviewed such decisions on a standard of patent unreasonableness – showing arbitrators the highest degree of deference, reserved for experienced and expert administrative tribunals – before the Supreme Court did away with that standard in its *Dunsmuir* decision.<sup>8</sup> But is a deferential approach to review appropriate when, in resolving an industrial dispute, an arbitrator has regard to norms articulated by the courts in a context – the law of commercial contracts – unlike that of labour relations? More specifically, does the invocation of principles of promissory estoppel in an arbitral award remove it from the arbitrator’s area of expertise and expose it to correctness review by the courts? In terms of the framework for substantive review set out by the Supreme Court of Canada in *Dunsmuir* and, in particular, its guidelines with regard to questions that will be reviewed on a correctness standard, does an arbitrator’s reliance on the principles of promissory estoppel raise a question of general law that is both of central importance to the legal system as a whole and outside the arbitrator’s specialized area of expertise?<sup>9</sup>

This question was the focal point of the Manitoba Court of Appeal’s decision in *Manitoba Assn of Health Care Professionals v Nor-Man Regional Health Authority Inc.*<sup>10</sup> After reviewing the facts of this case, including the arbitrator’s award and the judgments on review, I critically assess the Court of Appeal’s choice of the intrusive correctness standard of review. I argue that the Court unduly extends the concept of “question of law of central importance to the legal system”, that it overlooks the important influence of labour relations policy in shaping the principles of estoppel applicable in the context of grievance arbitration, and that it

<sup>5</sup> *Toronto (City) v Canadian Union of Public Employees, Local 79*, 2003 SCC 63 at para 68, 232 DLR (4th) 385, LeBel J, quoting from *Toronto (City) Board of Education v OSSTF, District 15*, [1997] 1 SCR 487 at para 35, 144 DLR (4th) 385.

<sup>6</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 55 [*Dunsmuir*].

<sup>7</sup> *Ibid* at paras 67-69.

<sup>8</sup> See, for example, *Lakeport Beverages v Teamsters Local Union 938* (2005), 77 OR (3d) 543 at paras 20-35, 258 DLR (4th) 10 (CA).

<sup>9</sup> *Ibid* at para 60.

<sup>10</sup> 2010 MBCA 55, [2010] 7 WWR 1 [*Nor-Man CA*].

undermines the successful operation of labour arbitration as an autonomous legal regime.

## II. THE NOR-MAN CASE

### A. The Facts

The *Nor-Man* dispute arose from an employee's grievance that she had been denied vacation benefits under the collective agreement between her union, the Manitoba Association of Health Care Professionals, and her employer, the Nor-Man Regional Health Authority. Under the collective agreement, employees' vacation entitlements were based on how long they had worked for the employer. Before the arbitrator, the union argued that this period of time should include the time they had worked as casual employees, before they were permanently hired. The employer argued that the start date for calculation of vacation entitlements was the date the employees became permanently hired and began to accrue seniority under the agreement. Before this date, the union argued, the agreement dealt with casual employees' vacation entitlements by providing them vacation pay as part of their salaries. The arbitrator agreed with the union's position and found that the employer's practice of excluding casual time from the calculations of employees' vacation entitlements violated the collective agreement.

This, however, did not end the matter. The employer had openly calculated vacation pay entitlements in the same way for many years, regularly providing individual employees with reports indicating a "vacation date" that differed from their date of initial hire and coincided instead with their "seniority date" – their date of permanent hire.<sup>11</sup> Indeed, the parties had agreed that "the employer had consistently applied the relevant provisions using the interpretation which excluded credit for casual time, that this practice had never been questioned by the union, and that the relevant provisions had existed for at least five previous versions of the Agreement".<sup>12</sup> The employer argued that in view of its long-standing and consistent practice, it was entitled to assume from the union's silence that it had accepted the employer's interpretation of the collective agreement. Accordingly, it claimed that the union should be estopped from insisting on a different interpretation of the agreement. It would be unfair to allow the union to insist on its collective agreement rights as declared by the arbitrator since the employer, relying on the union's acceptance of the employer's practice, had foregone the opportunity to change the collective agreement language when the agreement was up for renegotiation or to have otherwise dealt

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<sup>11</sup> *Nor-Man Regional Health Authority v Manitoba Assn of Health Care Professionals (Plaisier Grievance)*, [2008] MGAD No 30 at para 36 [*Nor-Man award*] online: <[http://onlinedb.lancasterhouse.com/images/up-Simpson\\_NorMan.pdf](http://onlinedb.lancasterhouse.com/images/up-Simpson_NorMan.pdf)>.

<sup>12</sup> *Nor-Man CA*, *supra* note 10 at para 7.

with the issue.<sup>13</sup> The union countered that it had been unaware of the employer's practice, as the employer had supplied the vacation and seniority records to individual employees.<sup>14</sup> It denied that it did anything to induce the employer's reliance or that the employer was entitled to rely upon the union's silence or acquiescence: "no representation was or could have been made given that the union was unaware of the employer's practice."<sup>15</sup>

## B. The Arbitrator's Award

Faced with these competing positions, the arbitrator had to determine whether, on the facts established by the parties, the necessary ingredients to find an estoppel against the union were present. The parties presented conflicting lines of arbitral jurisprudence on the issue of whether estoppel could be established through a union's silence in the face of an employer's practice. The union relied on *Georgian College of Applied Arts & Technology v OPSEU*,<sup>16</sup> in which the board of arbitration held that to establish an estoppel, it would have to be shown that the union was aware both of the employer's practice and that the practice was inconsistent with the collective agreement, yet remained silent for a period of time. The employer relied on another line of awards in which arbitrators held that the union could have "constructive" or "imputed" knowledge of an employer's practice without actual knowledge of the practice.<sup>17</sup> The arbitrator adopted the reasoning set out in the awards cited by the employer and decided that on the evidence before him, estoppel was made out:

While these Awards are not binding, they are indeed persuasive and I prefer the reasoning of Arbitrators Graham and Peltz that in appropriate circumstances, a party should be determined to have imputed or constructive knowledge of the other party's practice. Such circumstances clearly exist here. Having regard to the Statement of Agreed Facts, the accompanying exhibits, and the viva voce testimony, the Employer's practice has been long standing, consistent, and open. All employees were made aware of the practice through the annual Employees Confirmation of Vacation Sheets, and all employees and the Union were made aware of the practice through the annual Seniority Reports, both provided and posted. Questions pertaining to the practice have been asked and answered. If the Union was not aware, it certainly ought to have been aware of the Employer's application of Articles 1104 and 1105. It would be unfair to permit the Union to enforce its interpretation of Articles 1104 and 1105. The Employer was entitled to assume that the Union had accepted its practice, and to rely on that acceptance in not seeking to negotiate

<sup>13</sup> *Nor-Man award*, *supra* note 11 at para 43.

<sup>14</sup> *Nor-Man award*, *ibid* at para 90.

<sup>15</sup> *Ibid.*

<sup>16</sup> (1997), 59 LAC (4<sup>th</sup>) 129 (Ont), 1997 CarswellOnt 6301 (WL Can) (Ont AB).

<sup>17</sup> *Manitoba (Family Services and Housing) v Canadian Union of Public Employees, Local 2153*, (2005), 142 LAC (4<sup>th</sup>) 173 (Man); *Re Agassiz School Division No 13*, [1997] MGAD No 61, 2005 CarswellMan 536 (WL Can).

a change or to exercise a right to effect a service break with a change in employment status. All of the elements necessary to establish the estoppel are present.<sup>18</sup>

The arbitrator ordered that the union be estopped from asserting its collective agreement rights pertaining to vacation entitlements until the termination of the current agreement.

### C. Judicial Review by the Court of Queen's Bench

The union sought judicial review of the award in the Manitoba Court of Queen's Bench. It claimed that the arbitrator had erred in interpreting and applying the principle of estoppel, a question, in its view, "of central importance to the collective bargaining community and to the legal community as a whole."<sup>19</sup> The applications judge disagreed with the union's assertion that the issue was a question of law of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise which, under the Supreme Court's *Dunsmuir* guidelines, demanded correctness review:

I see the issue as a combined question of fact and law and while it may be of importance to the collective bargaining community, I cannot conclude that it is of central importance to the legal system as a whole. Moreover, [arbitrator] Simpson is a lawyer with more than 30 years' experience and is well experienced as an arbitrator in the area of labour relations. I cannot say the issue before him was outside his specialized area of expertise.<sup>20</sup>

Beginning with the presumption that a reasonableness standard applied, and noting the existence of a privative clause in Manitoba's *Labour Relations Act* <sup>21</sup> and the arbitrator's expertise "in the special administrative regime of labour relations", the applications judge concluded that "the nature of the question of law... was not of the level that would mandate the standard of correctness...".<sup>22</sup> In applying a reasonableness standard, the applications judge outlined the diverging arguments put to the arbitrator by the parties and the arbitrator's reasons for preferring the line of arbitral jurisprudence relied upon by the employer, and decided to uphold the award:

In applying the standard of reasonableness, I must pay deference to Simpson's decision. I find it to be intelligible and justifiable and that it falls within a range of possible, acceptable outcomes which are defensible in respect to the facts and the law. It was one which he was entitled to make based on the facts as he found them and the authorities which he chose to follow. In those circumstances, I am unable to conclude that his decision was unreasonable in the circumstances.<sup>23</sup>

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<sup>18</sup> *Nor-Man award*, *supra* note 11 at para 96.

<sup>19</sup> *Manitoba Assn of Health Care Professionals v Nor-Man Regional Health Authority Inc.*, 2009 MBQB 213 at para 7, 243 Man R (2d) 281 [*Nor-Man QB*].

<sup>20</sup> *Ibid* at para 12.

<sup>21</sup> RSM 1987, c L10 [*Manitoba Labour Relations Act*].

<sup>22</sup> *Ibid* at para 13.

<sup>23</sup> *Ibid* at para 20.

## D. The Decision of the Manitoba Court of Appeal

Before the Manitoba Court of Appeal, the union once again claimed that the arbitrator's definition and application of the remedy of estoppel should have been reviewed on a correctness standard as it raised a question of law that was of central importance to the legal system as a whole and not within the arbitrator's special expertise. In its view, the existence of conflicting lines of arbitral jurisprudence supported its position:

[T]he cases relied on by the arbitrator to impose an estoppel were arbitral decisions that had not received the imprimatur of the courts and were not truly authoritative decisions. There were contrary arbitral decisions that took the view that estoppel would not lie in the absence of actual knowledge and agreement to waive rights. Thus, the issue of whether an estoppel can be imposed must be resolved by the courts, since the question is one of general law.<sup>24</sup>

The employer argued that the applications judge had correctly selected and applied the reasonableness standard to the arbitrator's award and, in particular, to his decision to follow arbitral decisions that established that a union's silence could signal its acquiescence to an employers' long-standing, open practice and to his finding of acquiescence on the facts of the case.

The Court of Appeal allowed the appeal. Justice Freedman, writing for the Court, began by defining the questions of law which were at issue in the judicial review and which were extricable from the facts of the case:

- (1) does the law of promissory estoppel require that the party (the promisor) against whom the estoppel is sought have actual knowledge of the facts on the basis of which the estoppel is sought, or is it sufficient if the promisor has imputed or constructive knowledge of those facts; and
- (2) does the law of promissory estoppel require that the promisor intend by its representation, whatever its form, to affect legal relations with the other party (the promisee)?<sup>25</sup>

These questions, the Court held, were not within the arbitrator's specialized expertise and had no "particular relevance to labour law":<sup>26</sup>

The question of whether imputed or constructive knowledge is sufficient to found an estoppel, and the related question about intent, are questions that, in my opinion, are not confined to any particular field of law. The questions and their answers transcend individual areas of law, such as property, contracts and labour law, and are of central importance to the legal system as a whole. It may be that labour arbitrators have opined on those questions, but they do not fall within their specialized area of expertise. Defining the parameters of promissory estoppel must surely be "within the normal purview of both the trial and appellate courts".<sup>27</sup>

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<sup>24</sup> *Nor-Man CA*, *supra* note 10 at para 24.

<sup>25</sup> *Ibid* at para 40.

<sup>26</sup> *Ibid* at para 46.

<sup>27</sup> *Ibid* at paras 46 – 47.

The question of law here is similar in concept to the question of law in *Toronto (City)*, as explained by LeBel J:

Second, it bears repeating that the application of correctness here is very much a product of the nature of this particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.<sup>28</sup>

The Court agreed with the union that, in determining the required ingredients of estoppel, the courts, not the arbitrators, had relative expertise:

On the critical question of expertise, it is clear that the arbitrator was not interpreting a statute, nor was he dealing with a general common law rule in a specific statutory context. He was dealing with a remedy that had originated in the courts, applying concepts rooted in equity, which was not a remedy unique to labour law. Ascertaining the parameters of the doctrine of estoppel does not raise a question on which arbitrators have any relative degree of institutional competence or expertise.<sup>29</sup>

In light of the nature of the question and the arbitrator's relative lack of expertise, the Court concluded that the appropriate standard of review was correctness:

Here, the fact that *The Labour Relations Act*... contains a privative clause, and the purpose of the tribunal, which essentially is to resolve disputes outside the courtroom, would both suggest a deferential stance by a court to an arbitrator's decision. But the other two factors, being the nature of the pure question of law which, in my view, is of central importance to the legal system as a whole, and the relative lack of expertise of the tribunal on the pure legal question, shift the balance overwhelmingly to a standard of correctness on the legal question.<sup>30</sup>

Applying the standard of correctness, the Court of Appeal embarked on its own analysis of the required ingredients of promissory estoppel. It determined, based on a review of several appellate decisions and some arbitral awards, that before an estoppel could be imposed, the arbitrator would have to make two express findings supported by the evidence:

First, there would have to be a finding that there was actual or imputed knowledge of certain facts. Second, there would have to be a finding that the representation, made with either actual or imputed knowledge of the facts, was intended to affect the legal relations between the parties.<sup>31</sup>

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<sup>28</sup> *Supra* note 5 at para 70 [emphasis in original].

<sup>29</sup> *Ibid* at para 50.

<sup>30</sup> *Ibid* at para 52.

<sup>31</sup> *Ibid* at para 67

While the arbitrator was correct in holding that he could impute knowledge of the employer's practice in relation to calculating the vacation benefits, he erred in law "by failing to consider and make a finding" on whether the union had intended its representation (of silence or acquiescence) to affect its legal relations with the employer. This omission may have been due to the arbitrator's failure to identify the essential element of intent "as a legal prerequisite to the imposition of estoppel":<sup>32</sup>

[T]he arbitrator made no finding of any kind on the issue of intent. He made no finding to the effect that the union intended by its representation, which was one of "silence/acquiescence"... to affect its legal relations with the employer. The award is silent on this issue. As explained above, before an estoppel could be imposed the union must have intended that its representation affect its legal relations with the employer, and there must be a finding to that effect. Otherwise, an essential ingredient of the estoppel mix would be missing.

Thus, I must conclude that in his imposition of an estoppel against the union the arbitrator erred in law, by failing to consider and make a finding on the question of the union's intent to affect legal relations with the employer.<sup>33</sup>

In November 2010, the Supreme Court of Canada granted the employer leave to appeal.<sup>34</sup>

### III. ANALYSIS

Like the Manitoba Court of Appeal in *Nor-Man*, other appellate courts in Canada have reviewed arbitrators' and labour boards' elaboration of the principles of estoppel on a correctness standard. In *Otis Canada Inc v International Union of Elevator Constructors, Local 50*,<sup>35</sup> Ontario's Divisional Court reviewed the decision of an Ontario Labour Relations Board Vice-Chair who, sitting as an arbitrator on a construction industry grievance, had allowed a union's grievance in respect of the employer's decision to stop paying employees travel time and expenses for maintenance work. The OLRB had determined that, in light of its long-standing practice of paying travel time and expenses, the employer was estopped from insisting on the terms of the collective agreement. The Divisional Court applied a standard of correctness to its review of the OLRB's decision:

Estoppel is an equitable doctrine initiated by the Courts of Equity. It is not something over which the OLRB has any unique or special expertise and, therefore, the application or non-application of the doctrine of estoppel is not a matter requiring the deference of the Court.

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<sup>32</sup> *Ibid* at 82. It is possible that the arbitrator's omission of a finding regarding the union's intent was "involuntary" and resulted from a deficiency in his reasons. My analysis will proceed on the basis that the omission results from the arbitrator's deliberate choice not to consider proof of the union's intent as a required ingredient for estoppel.

<sup>33</sup> *Ibid* at paras 77-78.

<sup>34</sup> [2010] SCCA No 275.

<sup>35</sup> (2000) 136 OAC 60 (Div Ct), [2000] OLRB Rep 778 [*Otis Canada*].



However, the applicability or non-applicability of the doctrine is a matter going to the jurisdiction of the OLRB and is subject to the standard of correctness.<sup>36</sup>

Other courts have adopted a deferential standard of review. In a recent judgment reviewing a decision of the Ontario Labour Relations Board on a construction industry grievance arbitration, the Ontario Divisional Court rejected the employer's submission that the Board's application of the doctrine of estoppel should be subjected to correctness review:

While the application of the doctrine of estoppel is partly a legal question, its application here raises issues of mixed law and fact. Moreover, the Board and labour arbitrators have a long history of applying this doctrine when adjudicating grievances (references omitted)... Therefore, the Board is entitled to deference in the application of this doctrine, and the standard of reasonableness applies to the estoppel issue as well as the interpretation and application of the Act and the agreements.<sup>37</sup>

In my view, the Manitoba Court of Appeal's decision in *Nor-Man* is vulnerable on appeal for several reasons. First, the Court of Appeal has taken too broad a view of the concept of the question of general law described by the Supreme Court in *Dunsmuir*, unduly expanding the reach of this concept and the scope of correctness review. Second, in concluding that the elaboration of the ingredients of promissory estoppel was a question of law outside the arbitrator's specialized expertise, the Court of Appeal did not appreciate the special and significant influence of the labour relations context on those ingredients. Finally, the conception of the courts' role in the judicial review of arbitral awards that underlies the union's position and the Court of Appeal's judgment undermines the successful operation of labour arbitration as an autonomous legal system, which requires restraint on the part of reviewing courts.

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<sup>36</sup> *Ibid* at para 30. See also *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local D331 v La Farge Canada Inc*, 66 Alta LR (3d) 396, [1999] 5 WWR 712 (QB), appeal dismissed on other grounds, 74 Alta LR (3d) 346, [2000] 2 WWR 724 (CA) where the Court found, at para 29, that a board of arbitration did not have "unique expertise" in applying and interpreting principles of promissory estoppel. See also *United Nurses of Alberta, Local 118 v Capital Care Group Inc*, 2006 ABQB 344 at paras 9-10, 58 Alta LR (4th) 384: the arbitration board's "statement of the legal requirements of waiver and estoppel" are subject to correctness review; and *Brandt Tractor Ltd v Pardee Equipment Employees Assn*, 2006 ABQB 327 at para 25.

<sup>37</sup> *Jacobs Catalytic Ltd. v International Brotherhood of Electrical Workers, Local 353* (2008), 91 OR (3d) 20 at para 39, [2008] CLC 220-056 (Div Ct), rev'd on other grounds 2009 ONCA 749. See also *Maritime Electric Co v International Brotherhood of Electrical Workers (IBEW), Local 1432* (1993), 112 Nfld & PEIR 119, [1993] PEIJ No 123, where the Prince Edward Island Supreme Court-Appeal Division reviewed a board of arbitration's decision that the circumstances of a grievance established a promissory estoppel on a standard of patent unreasonableness.

## A. Questions of General Law of Central Importance to the Legal System

In *Dunsmuir*, the Supreme Court held that courts must apply a correctness standard in reviewing administrative decisions raising questions of general law both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise. Such questions require "uniform and consistent answers", the Court observed, "[b]ecause of their impact on the administration of justice as a whole".<sup>38</sup> The Court pointed to its decision in *Toronto (City) v CUPE*,<sup>39</sup> "which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues... at the heart of the administration of justice" as an example of a case involving questions of general law. In *Toronto (City)*, the city terminated an employee following his conviction for the sexual assault of one of the children under his charge. Ruling that the grievor's conviction was admissible evidence but was not conclusive as to whether he had actually assaulted the child, a labour arbitrator allowed the union's grievance of the termination and ordered the grievor's reinstatement. The Supreme Court held that the arbitrator's award, which allowed the parties to re-litigate the grievor's criminal conviction, resulted in an abuse of process. It found that the arbitrator was required by the doctrine of abuse of process to give full effect to the criminal conviction.

Whether and when an arbitrator should have the power to allow the re-litigation of a criminal conviction is not a question that implicates only labour relations. An arbitrator's decision to allow re-litigation can lead to inconsistencies between the outcomes of criminal proceedings and labour arbitrations that "undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality".<sup>40</sup> Given the significant spillover effects of the arbitrator's decision in *Toronto (City)* on the public's confidence in the courts' administration of justice, it makes sense for the courts to govern the interaction between the findings of a judge hearing a criminal case and those of an arbitrator resolving a labour dispute.

The question in *Nor-Man*, unlike that in *Toronto (City)*, does not implicate the proper interaction between two legal regimes – criminal law and grievance arbitration under collective agreements. It relates to the arbitrator's view of what is required, in the context of grievance arbitration, to found an argument that one of the parties should be precluded from relying on the strict terms of a collective agreement. Arbitral awards are binding only on the parties to the arbitration, and there is no rigid rule of *stare decisis* in labour arbitration. There is thus no

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<sup>38</sup> *Dunsmuir*, *supra* note 6 at para 60.

<sup>39</sup> *Toronto (City)*, *supra* note 5.

<sup>40</sup> *Ibid* at para 51.

guarantee that the arbitrator's award will have a determinative or even significant impact on arbitral jurisprudence let alone the interpretation or application of estoppel in any other legal regime, such as the law of contracts in a commercial context. The question raised by the arbitrator's award in *Nor-Man* is in this sense very different from that which preoccupied the Supreme Court in *Toronto (City)*. It does not, in my view, bear the hallmarks of a "question of general law of central importance to the legal system as a whole".

## B. Estoppel in the Labour Relations Context and Arbitrators' Expertise

The Court of Appeal also justified its invocation of the correctness standard by holding that "ascertaining the parameters of the doctrine of estoppel does not raise a question on which arbitrators have any relative degree of institutional competence or expertise."<sup>41</sup> Indeed, it faulted the applications judge for regarding the legal elements in the question as "having particular relevance to labour law".<sup>42</sup> In its view, defining the ingredients of promissory estoppel, a remedy created by the courts applying concepts of equity, was a question which transcended individual areas of law, including labour law, and so fell within the normal purview of the courts.<sup>43</sup>

The claim that the scope and content of promissory estoppel as applied by labour arbitrators is entirely divorced from the grievance arbitration context and labour relations policy is contentious, to say the least. Paul Weiler, one of Canada's pre-eminent labour law scholars and practitioners, explored at length the labour relations dimensions of estoppel as Chair of the British Columbia Labour Relations Board in *Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608*.<sup>44</sup> In that case, the union and employer had signed a memorandum of agreement providing for new benefits, including a group life insurance plan. The employer, following a long-standing policy in which the union had acquiesced over the years, chose not to implement the terms of settlement until a formal agreement was signed. Unfortunately, a city employee died only several days before the group life insurance plan was set to begin. The union grieved on behalf of the employee's estate that the employee was entitled to the new benefits set out in the terms of settlement, which, they argued, was a binding agreement enforceable as of the date it was signed. The City contended that its ongoing past practice of not instituting new benefits until a formal agreement was ratified was well known to the union, and given the union's failure to object to the employer's position that, consistent with this practice, the life

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<sup>41</sup> *Nor-Man CA*, *supra* note 10 at para 50.

<sup>42</sup> *Ibid* at para 45.

<sup>43</sup> *Ibid* at paras 46 and 50.

<sup>44</sup> [1978] BCLRBD No 26, 18 LAC(2d) 307 [*Penticton*].

insurance benefit would only begin at a later date, it was estopped from asserting a different, earlier implementation date for that benefit under the collective agreement.

Citing some of the same judicial precedents as those relied on by the Manitoba Court of Appeal in *Nor-Man*, the Board of Arbitration decided to adopt a narrow view of estoppel – one which required the employer to show that the union had intended that its legal relations with the union be affected:

[T]he arbitration board held that the Union did not really put its mind to this specific question of when the additional life insurance must be in effect, until after the death of Sieg crystallized the issue. Thus, according to the arbitration award, the Union did not “consciously acquiesce” in the City’s mistaken interpretation, it did not “enter into a course of negotiations” with the City about this topic, and it did not “intend to alter the legal relations created by the contract”.<sup>45</sup>

Not only did the board of arbitration apply the same restrictive definition of estoppel as the Court of Appeal in *Nor-Man*, it did so for the same reason—to remain faithful to the judicial origins of the doctrine:

The legal issue resolves itself as to whether an estoppel arises when one party inadvertently acquiesces to a mistaken belief on the part of the other party to the contract, which itself does not share. We have been unable to find any cases directly in point. In the absence of any direct authority on this point, the question becomes whether the Board ought to adopt a wide or narrow view of the doctrine of estoppel. We believe that it is not the role of an arbitration board to redefine or widen the equitable doctrine of estoppel. This is a proper function for the Courts, the source of the doctrine. The facts of this case fall very close to being sufficient to constitute an estoppel. As an arbitration board in a labour relations dispute, however, we feel the safer course is to adopt a strict definition or interpretation of the doctrine of estoppel. We adopt the definition of estoppel set out by Mr. Justice Ritchie in the *Burrows* case.<sup>46</sup>

Applying this strict conception of estoppel, the board of arbitration dismissed the employer’s claim.

The employer appealed the award to the British Columbia Labour Relations Board under provisions of the *BC Labour Code* on the statutory ground that it was “contrary to the principles of the *Code*”. Paul Weiler observed that labour arbitrators in British Columbia were “not confined to the traditional boundaries of such legal concepts as promissory estoppel”, a premise then expressed in section 92(3) of the *Labour Code*, which read:

An arbitration board shall, in furtherance of the intent and purpose expressed in subsection (2), have regard: to the real substance of the matters in dispute and the respective merit of the positions of the parties thereto under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute.

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<sup>45</sup> *Ibid* at para 16.

<sup>46</sup> *Ibid* at para 15.

Weiler relied for this proposition on *AIM Steel Ltd v United Steelworkers of America, Local 3495*,<sup>47</sup> in which the British Columbia Court of Appeal had rejected an employer's claim that the interpretation of a collective agreement was a matter of the general law because it involved the "well-known canons of construction". The Court had held:

In the face of the direction that an Arbitration Board is not bound by a strict legal interpretation of the issue in dispute, it cannot be successfully asserted that "the basis of the decision" of this Board in interpreting the wording of this collective agreement was "a matter or issue of the general law". It could not have been intended that a decision made pursuant to this direction, should be subject to review by reference to the general law, by which the arbitrator is expressly instructed not to consider himself bound.<sup>48</sup>

In Chairperson Weiler's view, this statutory language "freed labour arbitrators from strict control by common law rules of contracts and their interpretation" and required them to fashion a "jurisprudence of the collective agreement which is responsive to the modern world of industrial relations."<sup>49</sup> Significantly, Manitoba's *Labour Relations Act* contains a similar provision, which affirms that arbitrators are not bound by a "strict legal interpretation of the matter in dispute".<sup>50</sup> Chairperson Weiler allowed the employer's appeal, finding that the board of arbitration, in assuming that it was compelled to follow the judicial conception of estoppel developed for commercial contracts, "had failed to carry out its statutory mandate... to fit the principle of estoppel into the special setting and policy objectives of the world of industrial relations."<sup>51</sup> Accordingly, the B.C. Labour Board reversed the board of arbitration's decision to consider itself bound by the same definition of estoppel adopted as correct by the Manitoba Court of

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<sup>47</sup> [1976] BCJ No 6 (CA).

<sup>48</sup> *Ibid* at para 9.

<sup>49</sup> *University of British Columbia and Canadian Union of Public Employees, Local 116*, [1976] BCLRBD No 42, s 3, [1976] 2 WLAC 563.

<sup>50</sup> *Manitoba Labour Relations Act*, *supra* note 21, s 121(1). The provision states: "An arbitrator or arbitration board shall, in respect of any matter submitted to arbitration, have regard to the real substance of the matter in dispute between the parties and to all of the provisions of the collective agreement applicable to that matter, and the arbitrator or arbitration board is not bound by a strict legal interpretation of the matter in dispute." The fact that, unlike the BC Code, the Manitoba statute does not expressly mandate the application of "principles consistent with the industrial relations policy of this Act" is, in my view, of no moment. A board of arbitration applying principles inconsistent with the policies underlying the Manitoba *Labour Relations Act* in adjudicating a grievance pursuant to its powers under the Act would likely be found to have acted unreasonably: *Macdonell v Québec (Commission d'accès à l'information)*, 2002 SCC 71 at paras 74-77, [2002] 3 SCR 661. In *Macdonell*, Justices Bastarache and LeBel, dissenting on another point, noted at para 75 that an administrative decision-maker that does not take into account the legislative purpose in its interpretation of the statute "is acting unconsciously or arbitrarily, and that is certainly not reasonable." All the more so if the decision-maker takes into account principles that are inconsistent with that purpose.

<sup>51</sup> *Penticton*, *supra* note 44, s 6.

Appeal in *Nor-Man*, on the grounds that such an approach was inconsistent with the board's duty to decide grievances consistently with industrial relations policy.

For the Labour Board, the unique characteristics of the labour relations context of grievance arbitration demanded a different approach to defining the doctrine of estoppel than the commercial context in which courts had developed the doctrine. Chairperson Weiler writes as follows:

How should such a problem be approached under the *Labour Code*? One must begin with a vivid appreciation of the distinction between collective agreements and commercial contracts. In *John Burrows*, for example, the court dealt with a single, isolated transaction between the parties: the sale of the business with a promissory note given for the balance of the purchase price, which was to be repaid in regular instalments with interest. In that situation, it was quite understandable that the judges, before holding that the terms of the contract might be departed from by one side, would require evidence that the parties had actually sat down together, each aware of their respective rights and obligations, and thus mutually agreed to alter the requirements of their contract for the time being. But a collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day to day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in *District of Burnaby*, cited above: "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour/management relations, ultimately breeding industrial unrest in the relationship - all contrary to the objectives of the *Labour Code*".<sup>52</sup>

Chairperson Weiler's analysis demonstrates that the elaboration of the ingredients of estoppel by conduct is infused with labour relations policy. An arbitrator confronted with a *Nor-Man* scenario might consider what incentives would result, in that specific workplace, from the imposition of a rigid requirement that the party raising estoppel as a defence must prove that the other party intended to affect the legal relations between them. Would the absence of

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<sup>52</sup> *Ibid.* Chairperson Weiler added important caveats to his discussion of estoppel. First, he assumed that the union was aware of the employer's practice. In *Nor-Man*, the arbitrator concluded that in light of the open and longstanding nature of the employer's practice and the fact that questions about the practice were asked and answered, the union was or should have been aware of it. Second, Chairperson Weiler observed that once the union asserted its position challenging the employer's practice, the employer would have no equitable defence to subsequent grievances filed by the union.

such a requirement encourage unions and employers – sophisticated parties engaged in the long-term contractual relationship – to more closely monitor how their collective agreement is administered, to the benefit of both parties and all employees involved? The effect of a decision on the future relationship of the parties with each other, infrequently if ever considered by courts in a commercial contracts case, is a central preoccupation of labour arbitrators.<sup>53</sup> Such considerations require labour relations sensitivity and go to the heart of labour arbitrators’ expertise. They call for deference on the part of reviewing courts and the application of reasonableness review.

### C. The Category of Questions of General Law and the Challenge of Legal Centrism

*Nor-Man* indicates that courts’ interpretation of *Dunsmuir*’s category of questions of general law of central importance to the legal system, much like their interpretation of the concept of jurisdiction, will become a locus of tension between two conceptions of administrative law: one privileging legal centrism, where the law “as a ‘whole, unified, integrated thing’ with the courts at the top ‘fully competent to administer the whole law’” pulls “towards coherence across the whole legal landscape”,<sup>54</sup> the other supporting legal pluralism – the existence of distinctive, quasi-autonomous legal regimes where administrators are free to develop within their area of statutory authority their own principles and policies, attuned to their legislative purpose and the realities of those they administer.

The union’s position in *Nor-Man* is marked by a strong current of legal centrism. Arbitral pronouncements on the scope and content of estoppel, it claims, are not “truly authoritative” unless they receive “the imprimatur of the courts.”<sup>55</sup> The existence of conflicting lines of arbitral jurisprudence on whether estoppel lay in the absence of factual knowledge and agreement to waive rights, the union argued, meant that the courts had to step in and impose the correct view.<sup>56</sup> Underlying these arguments is a vision of labour arbitrators as trial judges, writ small, whose role is to try, as best they might, to apply general legal principles to the facts before them subject to correction by appellate courts. Moreover, the union’s argument in favour of judicial intervention pre-supposes that a correctness standard is always appropriate in the presence of conflicting decisions – a claim that was refuted by the Supreme Court in *Domtar v Québec (Commission d’appel en matière de lésions professionnelles)*.<sup>57</sup> In *Domtar*, two tribunals had given a

<sup>53</sup> Arthurs, *Industrial Citizenship*, *supra* note 4 at 823.

<sup>54</sup> Michael Taggart, “Prolegomenon to an intellectual history of administrative law in the twentieth century: the case of John Willis and Canadian administrative law” (2005), 43 *Osgoode Hall LJ* 223 at 261.

<sup>55</sup> *Nor-Man* CA, *supra* note 9 at para 24.

<sup>56</sup> *Ibid.*

<sup>57</sup> [1993] 2 SCR 756, 104 DLR (4th) 385.

different meaning to a legislative provision whose interpretation fell within their expertise and was subject to a patent unreasonableness standard of review. Justice L'Heureux-Dubé, for the Court, declined to accept inconsistency as a freestanding ground for correctness review, expressing concern that review for inconsistency would transform Superior Courts into “genuine appellate jurisdictions”:

In my opinion, questions as to the advisability of resolving a jurisprudential conflict avoid the main issue, namely, who is in the best position to rule on the impugned decision. Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise.<sup>58</sup>

The Diceyan assumption that the authority of arbitral awards depends on their receiving the blessing of the superior courts ignores the more subtle role of principle and precedent in labour arbitration. Harry Arthurs, another pre-eminent Canadian labour law academic and arbitrator, urged arbitrators to resist the pressure to adopt broad principles on the basis of which all individual cases would be resolved:

[This approach] may preclude the pragmatic and realistic solutions to particular problems which would be of most assistance to labour and management in a given bargaining relationship. By such an approach, there is a risk that the lessons of experience, the ever-changing industrial environment, the nuances of the particular situation, might disappear from view. This is not to say that a gradual and economical adumbration of principle ought not to occur. As principle emerges from particular situations, it assists the parties in resolving subsequent disputes without recourse to arbitration. As similar cases are decided over a period of years by a large number of arbitrators, the parties may be able to realistically evaluate the odds upon particular language being construed in a particular way. And as opposing statements of principle confront each other, there being no ultimate appellate tribunal, pressures are generated for compromise between the two positions.<sup>59</sup>

In other words, the labour relations community, labour arbitrators and the parties to collective agreements, can work out these issues for themselves.

The award of arbitrator M.A. Pineau in *Re Sterling Place and United Food and Commercial Workers International Union, Locals 175/633* illustrates this point well.<sup>60</sup> In that case, the issue was whether an employer could be estopped from discontinuing a long-standing practice of paying meal benefits even when meal benefits were not a term of the collective agreement. Arbitrator Pineau noted the existence of three approaches in the arbitral jurisprudence regarding the scope of estoppel. Some arbitrators, following a restrictive approach, refused to allow parties to invoke estoppel as a sword to “create” rights not found in the collective agreement. Some arbitrators, following a permissive approach, rejected the sword-shield distinction as unsuitable to an industrial relations context, where parties

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<sup>58</sup> *Ibid* at para 87 [emphasis added].

<sup>59</sup> *Re United Steelworkers of America and Russelsteel Ltd.* (1966), 17 LAC 253 at para 5, [1966] OLAA No 4 (available on QL).

<sup>60</sup> (1997) 62 LAC (4th) 289, 1997 CarswellOnt 6186 (WL Can) [*Sterling Place*].



enjoy long-term contractual relationships, and allowed such claims. Other awards followed an “intermediate” approach. There was judicial support for both the restrictive and permissive approaches.<sup>61</sup> Arbitrator Pineau decided that the permissive approach was appropriate based on the nature of the benefits at issue in the grievance. Meal benefits were a form of compensation, and compensation was not normally subject to unilateral alteration during the course of a collective agreement. In such a context, given the long-standing nature of the practice and the fact that it had continued into the first 11 months of a new collective agreement, it was reasonable for the union to assume that the benefits would continue and it would be unjust to allow the employer to insist on its strict legal right to discontinue them.<sup>62</sup> Far from being fazed by the existence of multiple lines of arbitral authority on the question confronting her, arbitrator Pineau selected the approach which, for principled reasons, best fit the specific circumstances of the grievance before her. I see no reason why courts should preclude such an approach by imposing, through correctness review, a one-size-fits-all approach to estoppel, less sensitive to the labour relations context.

Promissory estoppel, as noted by the Court of Appeal in *Nor-Man*, is a remedy that originated in the courts, applies concepts rooted in equity, and is not unique to labour law; however, this does not inexorably mean that the courts must forever be responsible for the doctrine’s development in every statutory context, and, in particular, the special environment of labour relations. Indeed, looking at it from a labour relations standpoint, the question of estoppel by conduct is simply whether the collective agreement, or part thereof, “should be applied, having regard to the conduct of the parties.”<sup>63</sup> Who better to determine this question than an arbitrator who is familiar with the parties, the history of their bargaining relationship and the realities of their workplace?<sup>64</sup> As noted by the Ontario Divisional Court in an early, seminal decision on the authority of arbitrators to apply estoppel, “questions of the application of collective agreements are squarely within the jurisdiction of arbitrators in labour disputes.”<sup>65</sup> Had arbitrators elaborated their own doctrine to answer the question of estoppel by conduct in the context of collective agreement arbitration, courts would have been hard-pressed to demonstrate that arbitrators’ definition of this doctrine was a question of general law of central importance to the legal system. Why should the fact that arbitrators have instead chosen to borrow the doctrine of promissory estoppel from the common law of commercial contracts and adapt it to labour

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<sup>61</sup> For an analysis of this question, see: MA Hickling, “Labouring with Promissory Estoppel: A Well-worked Doctrine Working Well?” (1983), 17 UBC Law Rev 183.

<sup>62</sup> *Ibid* at 305.

<sup>63</sup> *Canadian National Railway Co v Beatty* (1981), 34 OR (2d) 385 at para 29, 128 DLR (3d) 236.

<sup>64</sup> I thank the anonymous reviewer for emphasizing this point.

<sup>65</sup> *Ibid*.

relations realities remove the question of estoppel from their sphere of jurisdiction and expertise?

In *Toronto (City)*, in a judgment concurring with the majority's assessment that the question of whether an arbitrator should re-litigate a grievor's criminal conviction, which involved common law doctrines of *res judicata* and abuse of process, should be subject to correctness review, Justice LeBel presciently observed that a correctness standard would not apply to all questions involving general common law questions:

In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop a body of jurisprudence that is tailored to the specialized context in which they operate.<sup>66</sup>

This passage, cited by the applications judge in *Nor-Man*, could aptly describe labour arbitrators' use of estoppel principles in the context of grievance arbitration. But if correctness review is not appropriate, on what basis should courts intervene in such cases? When it comes to applying principles of estoppel in labour arbitration, would reasonableness review mean that anything goes? I would suggest that an arbitrator's elaboration of the requirements of estoppel would be reasonable if these requirements seek to achieve the core purpose of estoppels – “to prevent a party from acting in a manner inconsistent with an express or implied promise when to do so would be unconscionable”<sup>67</sup> – and do so in a manner consistent with sound industrial relations policy as applied to the specific circumstances of the parties to the grievance.<sup>68</sup>

In my view, the Court of Appeal's expansive interpretation of the concept of the “question of general law of central importance” undermines the successful operation of labour arbitration as an autonomous legal system. Professor Arthurs notes that when parties who are governed by the legal norms of an administrative regime (such as the system of labour arbitration) decline to submit to its norms and assert their rights under the general law through an application for judicial review, there must be a reconciliation of the special legal system with the formal legal system. The courts must determine “whether and to what extent the norms of the special regime should be vindicated”:

If those who are involved in it can simply exit as they please, the reliance interests of others, the survival of the group, or the effectiveness of the regulatory regime will be jeopardized. If they cannot exit, they may be denied rights available to other citizens. If “ordinary” courts

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<sup>66</sup> *Toronto (City)*, *supra* note 5 at para 73 [emphasis added].

<sup>67</sup> See Hickling, *supra* note 61 at 213.

<sup>68</sup> I would argue that Arbitrator Pineau's award in *Sterling Place*, *supra* note 60, is a good example of a decision that meets such a standard.

try to enforce the norms of the special regime, they may misconstrue them; if they do not, they may subvert them. If administrative action is reviewed, the economy and integrity of the regime may be compromised; if not, it may overreach itself.<sup>69</sup>

The concept of jurisdiction, in Professor Arthurs' view, is mediated between the ordinary law and "special laws of the administration."<sup>70</sup> In the labour relations context, for example, the norms developed by labour arbitrators could be vindicated by courts so long as they fell within the arbitrators' jurisdiction. Unfortunately, the malleability of the concept of jurisdiction and its interpretation by courts to facilitate judicial interference in the administration undermined its usefulness as a mediating principle. As a result, the Supreme Court has more recently sought to circumscribe the category of jurisdictional questions attracting correctness review.<sup>71</sup> *Nor-Man* signals that the concept of "questions of general law of importance to the legal system as a whole" may be emerging as another mediating principle.<sup>72</sup>

How then should this concept be defined? This question is not new. In an article published in 1974, which might usefully provide guidance today, Professor Peter Hogg attempted to describe the circumstances in which courts should intervene in agency decision-making. He observed that:

The very qualities which make the Agency well-suited to determine questions within its area of specialization may lead it to overlook or underestimate general values which are fundamental to the legal order as a whole. The generalist Court is ideally suited to check the specialist Agency at the point where these general values are threatened.<sup>73</sup>

Professor Hogg narrowly defined the catalogue of general values fundamental to the legal order as a whole that courts must enforce in their role as "guarantors of the integrity of the legal system".<sup>74</sup> "First and foremost among these general values", he noted, were those "associated with the Canadian commitment to democracy based on the English parliamentary system."<sup>75</sup> The principle of validity – that official actions must be authorized by laws made by a freely elected legislature – was one such value. It required the courts to enforce a narrow concept of jurisdiction by striking down agency decisions over matters not assigned to them for decision – i.e. decisions "completely unauthorized by

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<sup>69</sup> Harry W Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press: Toronto, 1985).

<sup>70</sup> Taggart, *supra* note 54 at 261; Arthurs, *supra* note 69 at 208.

<sup>71</sup> Dunsmuir, *supra* note 6 at para 59: "these questions will be narrow."

<sup>72</sup> It is noteworthy that the definition by arbitrators of the requirements of estoppel has also been described by some courts as a question going to the arbitrators' jurisdiction: see *Otis Canada*, *supra* note 35 at para 30.

<sup>73</sup> Peter W. Hogg, "Judicial Review in Canada: How Much Do We Need It?" (1974) 26 Admin L Rev 337 at 344 [emphasis added].

<sup>74</sup> *Ibid* at 345.

<sup>75</sup> *Ibid* at 344.

statute”.<sup>76</sup> By contrast, an administrative decision that bore “some relationship to statutory power should be permitted to prevail so long as it [was] a reasonable interpretation of the power”, taking into account the decision-maker’s reasons for decision and their consistency with the civil libertarian or proprietary values asserted by individuals affected by the decision.<sup>77</sup> Professor Hogg also placed civil libertarian values basic to Canada’s legal order, such as freedom of association and procedural fairness<sup>78</sup> in the catalogue of “general values”.

Against this framework, an arbitrator’s view of the circumstances in which it would be unfair to a union or employer to enforce the strict terms of a collective agreement does not engage the “integrity of the legal system”, to use Professor Hogg’s words. In comparison, an arbitrator’s refusal to give effect to a court’s final and authoritative finding regarding a grievor’s criminal responsibility does engage the integrity of the legal system by undermining public confidence in the administration of justice.

Professor Arthurs once remarked that the development of “responsible industrial self-government” by labour, management, and other actors within the world of industry would require restraint on the part of judges and lawmakers.<sup>79</sup> The survival and successful operation of autonomous legal regimes, including labour arbitration, will depend on the adoption by reviewing courts of a narrow interpretation of the concepts of jurisdictional question and “question of general law”, perhaps not unlike that proposed by Professor Hogg. *Nor-Man* represents a golden opportunity for the Supreme Court to provide guidance on this important question.

#### IV. POSTSCRIPT

On December 2, 2011, the Supreme Court allowed the employer’s appeal from the Manitoba Court of Appeal’s judgment in *Nor-Man*.<sup>80</sup> In a key part of its

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<sup>76</sup> *Ibid* at 355.

<sup>77</sup> *Ibid*.

<sup>78</sup> Harry Arthurs observed that in applying general legal standards, such as natural justice, in their sphere of activity, tribunals “should be presumed to be responding to the exigencies of the context, unless there is persuasive evidence to the contrary”: Harry W Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 Osgoode Hall LJ 1 at 39. In other words, reviewing courts should show deference to a tribunal’s judgment on matters such as the nature of notice to be provided to persons affected by a decision, as they require familiarity with the practical realities within which the tribunal operates. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 840, the Supreme Court incorporated a measure of deference in determining what procedures are required by procedural fairness by requiring courts to take into account agencies’ choice of procedure as one of several factors in the analysis.

<sup>79</sup> Arthurs, *Industrial Citizenship*, *supra* note 4 at 830.

<sup>80</sup> *Nor-Man Health Authority Inc. v Manitoba Association of Health Care Professionals*, 2011 SCC 59 [*Nor-Man SCC*].

judgment, the Supreme Court disagreed with the Court of Appeal's finding that the arbitrator's imposition of an estoppel fell outside of his expertise and was reviewable on a correctness standard:

Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.

On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates – and well equipped by their expertise – to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.<sup>81</sup>

According to the Court, arbitrators' broad mandate flowed from two main sources. First, section 121 of the *Manitoba Labour Relations Act* instructed arbitrators to consider the "real substance of the matter in dispute between the parties" and provided that they were "not bound by a strict legal interpretation" of this matter. Second, arbitrators could fulfill their "distinctive role in fostering peace in industrial relations" only if they were afforded "the flexibility to craft appropriate remedial doctrines" that could "respond to the exigencies of the employer-employee relationship."<sup>82</sup> While urging reviewing courts to "remain alive to these distinctive features of the collective bargaining relationship, and reserve to arbitrators the right to craft labour specific remedial doctrines", the Supreme Court warned that "the domain reserved to arbitral discretion is by no means boundless":

An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.<sup>83</sup>

In the end, the Supreme Court held that the arbitrator's decision was reasonable. In transparent, intelligible and coherent reasons, the arbitrator had "adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the [*Labour Relations Act*], the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of [the] grievance."<sup>84</sup>

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<sup>81</sup> *Ibid* at paras 44-45.

<sup>82</sup> *Ibid* at paras 47-48.

<sup>83</sup> *Ibid* at paras 51-52.

<sup>84</sup> *Ibid* at para 60.