***IN THE MATTER OF AN ARBITRATION***

***B E T W E E N:***

***NAV CANADA***

***(The Employer)***

***- and -***

***CANADIAN AIR TRAFFIC CONTROL ASSOCIATION***

***(The Union)***

***AND IN THE MATTER OF THE GRIEVANCE OF BARRY GREEN***

**PRELIMINARY AWARD**

ARBITRATOR:
Kenneth P. Swan

APPEARANCES:

For the Employer:
Charles E. Hurdon, Counsel
Janice Schick, Counsel
Sheila Taylor, Director, Labour Negotiating

For the Union:
Peter Barnacle, Counsel
Benoit Girard, Ontario Regional Director
Barry Green, Grievor

***PRELIMINARY AWARD***

A hearing in this matter was held in Ottawa, Ontario on May 10, 1999. At the outset of the hearing, the parties were agreed that the arbitrator had been properly appointed pursuant to the collective agreement, and that I had at least sufficient jurisdiction to deal with the preliminary issue which had arisen between them. That preliminary issue was, however, an objection by the Employer to the jurisdiction of any arbitrator appointed pursuant to the current collective agreement to deal with the substance of the present grievance.

This matter has a considerable history, which the parties were able to reduce to an Agreed Statement of Facts. Those facts are as follows:

1. The Grievor, Barry Green, was first employed as an air traffic controller with Transport Canada on May 3, 1971. Mr. Green had worked as an air traffic controller at the Sudbury Control Tower since June, 1982.

2. Mr. Green's employment was terminated for cause an May 29, 1995. At that time, Mr. Green was an operational air traffic controller at the Sudbury Control Tower (AI-02 classification level).

3. Mr. Green filed a grievance, which was denied by the employer (Appendix "A"). Subsequently, Rosemary Simpson, member of the Public Service Staff Relations Board, heard the matter. The PSSRB had jurisdiction to adjudicate all grievances in the Federal Public Service.

4. In a decision dated June 14, 1996, Ms. Simpson dismissed the grievance (Appendix "B"). The union filed for judicial review on July 18, 1996 to the Federal Court Trial Division.

5. Mr. Justice Cullen, in a decision dated July 8, 1997, allowed the application for judicial review and directed the matter back to the PSSRB to be heard before a new adjudicator on the sole issue of appropriate penalty (Appendix "C"). Treasury Board, the employer party in the application, filed an appeal to the Federal Court of Appeal.

6. In the interim, the civil air navigation system, including air traffic services, was transferred from the Public Service to NAV CANADA, a not-for-profit corporation

under the Canada Corporations Act, Part II, as of November 1st, 1996. (Civil Air Navigation Services Commercialization Act, S.C. 1996, c-20, Appendix "D").

7. Following this transfer, the employer took the position it was not responsible for any grievances arising from terminations, disciplinary or non-disciplinary, by Transport Canada that were outstanding at the date of transfer, as these employees were not included on the list prepared by Transport Canada of designated employees for transfer to NAV CANADA. A total of twelve cases were affected, including Mr. Green's. The union presented a motion in the first of these cases to reach the PSSRB after transfer to add the employer as a party. A settlement was subsequently reached for that case and all others, including that of the Grievor (Appendix "E").

8. Following the Agreement in Appendix "E", the case was then heard for the second time by PSSRB Vice-Chairperson, Phillip Chodos, sitting as an adjudicator under the Public Service Staff Relations Act. In a decision dated April 6, 1998, he reinstated Mr. Green with a substituted penalty of three months suspension, plus a further three months without pay (Appendix "F"). Treasury Board applied for judicial review of the Chodos decision.

9. Neither the Federal Court of Appeal (appeal of the Cullen decision to remit the case back to the PSSRB) or the Federal Court Trial Division (judicial review application with respect to the Chodos decision to reinstate) have been heard to this date. Requisitions for dates have been filed for both matters. As of this date, CATCA is advised that the appeal of the Cullen decision will likely be heard some time in the late Fall or early 2000, and the judicial review will likely be heard some time this Fall.

10. In the interim, Treasury Board has reinstated the Grievor to the Public Service and CATCA and Treasury Board have resolved the compensation issues arising from the reinstatement. Mr. Green remains an employee today in the Public Service but with no actual job, given that all operational controllers and facilities were transferred to the employer on November 1st, 1996, including the Sudbury Control Tower.

11. Following the Chodos decision, the parties held discussions with respect to the implementation of the Agreement in Appendix "E". Following which, a formal demand was presented by the union to return Mr. Green to the Sudbury Tower as an employee of NAV CANADA. The employer refused (see correspondence, Appendix "G").

12. The union filed a grievance on behalf of Mr. Green on November 23, 1998 (Appendix "H") and, in due course, the present arbitration proceeding was scheduled. The employer has objected on the jurisdiction of the arbitrator to hear the matter. (See Appendix "I")

13. The parties agree that the preliminary issue of jurisdiction should first be determined,

following which the parties may assess their position as required.

The Agreed Statement of Facts refers to a number of appendices. Indeed, the complete documentation of the Agreed Statement of Facts amounts to a substantial book. It will only be necessary for the purposes of this preliminary award to refer to some of the documentation, but two documents require to be set out at length.

The first is the Memorandum of Understanding referred to in paragraph 7 of the Agreed Statement of Facts as Appendix "E", a document dated November 6, 1997 by which the present parties compromised the Union's attempt to add the Employer as a party to the adjudication proceedings before the Public Service Staff Relations Board. That document is as follows:

> WHEREAS Barry Green grieved the termination of employment by Transport Canada;
>
> WHEREAS CATCA sought to add NAV CANADA as a party to this grievance;
>
> WHEREAS Barry Green, through his bargaining agent CATCA, CATCA and NAV CANADA wish to come to a full and final resolution of the issue in dispute;
>
> NOW THEREFORE THE PARTIES agree as follows on a without publicity basis:
>
> 1. In the event that Barry Green is reinstated to the Public Service by an adjudicator of the Public Service Staff Relations Board as a result of the hearing of his grievance, he shall be offered employment as a new hire by NAV CANADA under the following terms and conditions:
>
>  (a) he shall be returned to the position that he held at the time of his termination; and
>
>  (b) his pay, service and seniority shall be determined and applied as if he had never left Air Traffic Services, but had transferred over to NAV CANADA as a continued employee.
>
> 1. NAV CANADA shall not be liable for and Barry Green shall not seek from Nav Canada any compensation, benefits, pension, leave or other cost arising from any order of reinstatement of Barry Green by the Public Service Staff Relations Board. No leave bank, including sick leave credits, shall be rolled over to NAV CANADA on rehire.

2. In consideration of the offer of employment by Nav Canada to Barry Green pursuant to the terms of para. 1 and 2 and on execution of this Agreement, CATCA, on behalf of Barry Green, will withdraw the motion to add NAV CANADA as a party to the grievance. Further, Barry Green and CATCA agree not to seek to add NAV CANADA as a party in the future, subject to completion of the terms of this Agreement.

3. This Agreement is between Nav Canada, CATCA and Barry Green and in no way is intended to effect the rights and entitlements of Barry Green or the Public Service (Transport Canada) in their relations with one another.

The second document that must be set out is the grievance itself, in the form of a letter dated November 23, 1998 in the following terms:

> This is a grievance submitted on behalf of Mr. Green.
>
> Mr. Green was an operational controller at Sudbury Tower (A1-02) when his employment was terminated by way of disciplinary discharge by Transport Canada on May 29th, 1995. An adjudicator of the PSSRB, Rosemary Simpson (the Simpson Decision, June 14th, 1996), dismissed the resulting grievance.
>
> An application to the Federal Court Trial Division for judicial review was subsequently allowed (the "Cullen Decision", July 8th, 1997) and the matter returned to a new adjudicator to assess penalty.
>
> By a decision dated April 6th, 1998, PSSRB Vice-Chairperson, Phillip Chodos, order that Mr. Green be reinstated to his position in the Public Service with a substituted penalty (the "Chodos Decision").
>
> In the interval from discharge to reinstatement, the ATC system was transferred from Transport Canada to NAV CANADA. In early 1997, NAV CANADA took the position that it had no responsibility for any grievance with respect to individuals terminated by Transport prior to the transfer date (November 1st, 1996), on the basis that such persons were not "designated employees" pursuant to the *Civil Air Navigation Services Commercialization Act* (CANSCA). There were some twelve cases affected by that position, one of which was the grievance of Mr. Green.
>
> NAV CANADA and CATCA later reached a settlement with respect to our motion to add NAV CANADA as a party in the first of the affected cases to reach adjudication. As a result, an agreement was entered into requiring NAV CANADA to rehire Mr. Green under specified terms, in the event he was reinstated to the Public Service by an adjudicator. For reference, a copy of that agreement is enclosed.

By letter dated April 9th, 1998, we advised Pat Brethour, Legal Counsel, Labour Relations for NAV CANADA, of the Chodos Decision and requested that the Agreement to rehire be accordingly implemented. We did not receive a written reply to that letter (copy enclosed), although some discussions later took place between Ms. Brethour and CATCA Legal Counsel, Peter Barnacle. A further letter was sent May 14th, 1998 to which no reply was received.

Subsequent to our letters, however, we were advised by Treasury Board Legal Counsel that Transport would resist reinstatement, pending the determination of its appeal of the Cullen Decision to the Federal Court of Appeal and its application for judicial review of the Chodos Decision to the Federal Court Trial Division. That issue then became the focus as its resolution would impact on the application of the Memorandum of Agreement.

Treasury Board only abandoned that position over the summer and finally, by letter dated September 23rd, 1998, reinstated Mr. Green to the Public Service. We so advised Ms. Brethour on September 29th, 1998 and formally requested rehire pursuant to the Memorandum of Agreement (copies of Transport letter of September 23rd and our letter to Ms. Brethour of September 29th, enclosed).

Mr. Barnacle followed up with Ms. Brethour several times in October and November in order to receive NAV CANADA's response to our rehire demand. By letter dated November 16th, 1998, Ms. Brethour has now responded that NAV CANADA refuses to reinstate Mr. Green pending the judicial proceedings initiated by Transport and referred to above (copy enclosed).

It is our position that NAV CANADA has no legal basis to refuse to execute the Memorandum of Agreement. The Memorandum speaks only to an adjudication decision and that decision from Mr. Chodos to reinstate Mr. Green triggers NAV CANADA's obligation to rehire regardless of any court proceedings. Further, such court proceedings do not act as a stay of the reinstatement order, as Treasury Board has now in effect conceded, and certainly cannot act as a stay on execution of the Memorandum of Agreement without the presence of an express provision to that effect in that Agreement.

Accordingly, and consistent with the Supreme Court of Canada's direction in *Weber* requiring such matters to be pursued in the grievance and arbitration process, Mr. Green grieves the refusal to rehire him as a termination without cause contrary to the Collective Agreement.

As a discharge grievance this matter is immediately referred to the Final Level of the Grievance Procedure. Given the nature of the case, and the previous communications between CATCA and NAV CANADA on the matter, we request that NAV CANADA waive the thirty day period for response and agree to refer this file immediately to arbitration, should NAV CANADA not be now prepared to comply with the terms of the Memorandum of Agreement and rehire Mr. Green at this time. We are prepared to discuss immediate dates

for arbitration.

As a final background matter, some discussion of collective bargaining history between the present parties is in order. Prior to the transfer of the Civil Air Navigation System from the Public Service to NAV CANADA, there existed a collective agreement between Treasury Board for a bargaining unit of public servants performing air traffic control duties. In preparation for the transfer, a tripartite agreement was entered into between NAV CANADA, Transport Canada and a coalition of 9 bargaining agents representing employees in the public service who were anticipated to become employees of NAV CANADA. That agreement was dated September 8, 1995, and essentially dealt with transitional and successorship issues. On the same date, a bilateral agreement was entered into between NAV CANADA and the same coalition of bargaining agents dealing with structural issues relating to collective bargaining. Among other things, that agreement included a covenant to commence negotiations on an interim grievance and arbitration procedure.

Finally, as a part of a Memorandum of Understanding to apply during Transition Period ("the Transition Agreement"), the parties agreed on the transitional provisions, including the grievance procedure, to apply until the negotiation of new collective agreements. The grievance and arbitration procedure thus established is Appendix "B" to the Transition Agreement, and the following provisions are of relevance:

GRIEVANCE AND ARBITRATION PROCEDURE

OBJECTIVE:

> The parties wish the grievance and arbitration procedure to address the real issue of each party's complaints in an expeditious, efficient, economical and fair manner.

> <u>GRIEVANCE PROCEDURE</u>

**1. Disclosure of Information**

In the interest of resolving disputes in an expeditious and efficient manner, the representatives of each party should share all information that either party acquires knowledge of. This principle of full disclosure shall apply during the complaint, grievance and arbitration procedure. This provision does not limit the right of the parties to introduce further evidence at arbitration.

**2. Just Cause**

No employee shall be disciplined or discharged except for just cause. However, the discharge of a probationary employee for non-disciplinary reasons may be carried out at the discretion of the Employer at any time during the probationary period. The Employer's discretion must be exercised in good faith, without discrimination and in a non-arbitrary fashion.

**3. Definition of Grievance**

A grievance shall be defined as any dispute between the Employer and the Bargaining Agent (on behalf of an employee, group of employees or on its own behalf) concerning the interpretation, application or administration of the Collective Agreement, and shall include individual employee grievances, group grievances, Union grievances and Employer grievances.

. . .

**4. Dispute Resolution**

An earnest effort shall be made to settle all disputes fairly and promptly in the following manner:

. . .

Referral to Arbitration

Failing settlement being reached at Step 2 or where the NCJC has reached an impasse on an issue which was referred to it, either party may refer their grievance to arbitration within thirty (30) days of the receipt of the Step 2 response or the expiration of Step 2 time limits, by advising the Employer's Vice-President of Human Resources or authorized designate or the authorized Bargaining Agent representative, in writing by registered mail of its intention to refer the dispute to Arbitration. If a party does not choose to refer its grievance to Arbitration, the Authorized Bargaining Agent representative or the Employer's Vice-President of Human Resources or authorized designate shall so advise the other party.

. . .

ARBITRATION PROCEDURE

**1. Powers of an Arbitrator**

> A grievance referred to arbitration shall be determined by a mutually acceptable arbitrator/board of arbitration who/which shall have all the powers described in Part I of the *Canada Labour Code.*

. . .

**2. Board Procedure**

> The arbitrator/board of arbitration may determine its own procedure, but shall give full opportunity to all parties to present evidence and make representation. It shall hear and determine the real issue or the difference of allegation in dispute.

. . .

**3. Arbitrability**

> It is understood that no matter may be submitted to arbitration which has not been properly carried through Steps 1 and/or 2 of the grievance procedure. The arbitrator/board of arbitration shall have jurisdiction to determine whether a grievance is arbitrable and to relieve against time limits where the circumstances compel such action.

. . .

Against this background, I turn to the issue between the parties. At this stage, the issue is whether an arbitrator appointed under the collective agreement, as continued and supplemented by the Transition Agreement, has any jurisdiction to resolve the present grievance. The parties are generally in agreement that the rights of Mr. Green, which are sought to be vindicated by the grievance, do not arise under the Civil Air Navigation Services Commercialization Act, nor under any of the Memoranda of Understanding, nor expressly under the collective agreement itself. What is claimed on behalf of the grievor is that he is entitled to be covered by the collective agreement and to enjoy its protections, rights which the Union asserts arise under the

Memorandum of Agreement dated November 6, 1997. In the Union's submission, those rights exist by operation of law, since the condition specified in the Memorandum of Agreement has been met by the reinstatement of the grievor by Adjudicator Chodos. To refuse to recognize those rights, the Union claims, amounts to a termination without just cause.

The Employer argues that, precisely because the rights of Mr. Green arise only under the Memorandum of Agreement, he has no rights under the collective agreement at all. He therefore has no right to invoke the grievance procedure, no right to process a grievance, and no right to have a grievance referred to arbitration on his behalf. As a result, therefore, the Employer argues that there is no jurisdiction by an arbitrator appointed pursuant to the collective agreement, as supplemented by the Transition Agreement, to entertain this grievance.

To resolve this matter, it is necessary first to take a step backward and consider what is the substance of the main dispute between the parties. The Union argues, through the grievance, that Mr. Green is entitled to be rehired forthwith, pursuant to the Memorandum of Agreement. The response of the Employer has always been that it is premature to do so, given the outstanding appellate and judicial review proceedings in the Federal Court. Therefore, this requires an interpretation of the Memorandum of Agreement of November 6 and, if appropriate, its enforcement. The question is whether the resolution of such a dispute on its merits is within the jurisdiction of an arbitrator appointed pursuant to the collective agreement, which apart from whatever effect the Memorandum of Agreement may have, does not cover Mr. Green. The parties apparently agree that the Memorandum of Agreement does not constitute a collective agreement by itself, nor does it constitute a part of the collective agreement. It is, the Employer asserts, a simple contract, and therefore one which cannot be enforced at arbitration.

Certainly, the traditional view of the jurisdiction of an arbitrator is that it arises only

from a collective agreement, and its source must be found within the four corners of that document: see *Re Cape Breton Development Corp. and Rail Canada Traffic Controllers and United Transportation Union, Local 984-E* (1987), 28 L.A.C. (3d) 16 (Outhouse). The question here is whether the decision of the Supreme Court of Canada in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 925, the decision which is adverted to in the grievance, has broadened the understanding of arbitrability beyond this traditional narrow interpretation.

In that decision, McLachlin J., writing for a unanimous court on this point, rejected the models proposed in various cases in the lower courts of concurrent jurisdiction and overlapping jurisdiction of the courts and arbitrators, and adopted instead the exclusive jurisdiction model, pursuant to which all differences between the parties which arise from the collective agreement must proceed by arbitration. Her description of this model, and its implications, is as follows:

> The final alternative is to accept that if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to and entertain an action in respect of that dispute. There is no overlapping jurisdiction. On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement. In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd. (1983), 148 D.L.R. (3d) 398 (N.B.C.A.). The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement: Energy & Chemical Workers Union, supra, per La Forest J.A. Sometimes the time when the claim originated may be important, as in Wainwright v. Vancouver Shipyards Co. (1987), 38 D.L.R. (4th) 760 (B.C.C.A.), where it was held that the court had jurisdiction over contracts pre-dating the collective agreement. See also Johnston v. Dresser Industries Canada Ltd. (1990), 75 O.R. (2d) 609 (C.A.). In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.

Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator. However, a review of decisions over the past few years reveals the following claims among those over which the courts have been found to lack jurisdiction: wrongful dismissal; bad faith on the part of the union; conspiracy and constructive dismissal; and damage to reputation (Bartello v. Canada Post Corp. (1987), 46 D.L.R. (4th) 129 (Ont. H.C.); Bourne v. Otis Elevator Co. (1984), 45 O.R. (2d) 321 (H.C.); Butt v. United Steelworkers of America (1993), 106 Nfld. & P.E.I.R. 181 (Nfld. T.D.); Forster v. Canadian Airlines International Ltd. (1993), 3 C.C.E.L. (2d) 272 (B.C.S.C.); Bell Canada v. Foisy (1989), 26 C.C.E.L. 234 (Que. C.A.); Ne-Nsoko Ndungidi v. Centre Hospitalier Douglas, [1993] R.J.Q. 536).

This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts: Elliott v. De Havilland Aircraft Co. of Canada Ltd. (1989), 32 O.A.C. 250 (Div. Ct.), at p. 258, per Osler J.; Butt v. United Steelworkers of America, supra; Bourne v. Otis Elevator Co., supra, at p. 326. Additionally, the courts possess residual jurisdiction based on their special powers, as discussed by Estey J. in St. Anne Nackawic, supra.

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

The appellant Weber also argues that arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and duty of arbitrators to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes: St. Anne Nackawic; McLeod v. Egan, [1975] 1 S.C.R. 517. As Denning L.J. put it, "[t]here is not one law for arbitrators and another for the court, but one law for all": David Taylor & Son, Ltd. v. Barnett, [1953] 1 All E.R. 843 (C.A.), at p. 847. This also applies to the Charter: Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570, at p. 597.

It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in St. Anne Nackawic confirmed that the New Brunswick Act did

> not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in Moore v. British Columbia (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to the language of Estey J. in St. Anne Nackawic (at p. 723), is a "real deprivation of ultimate remedy".
>
> To summarize, the exclusive jurisdiction model gives full credit to the language of s. 45(1) of the Labour Relations Act. It accords with this Court's approach in St. Anne Nackawic. It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts: see Ontario (Attorney-General) v. Bowie (1993), 110 D.L.R. (4th) 444 (Ont. Div. Ct.), per O'Brien J.

Some arbitrators have been reluctant to act on a broad interpretation of *Weber*: see *Re Gananoque Light and Power Ltd. and International Brotherhood of Electrical Workers, Local 636* (1996), 54 L.A.C. (4th) 203 (Thorne) and *Re Abbott Laboratories Limited and Retail, Wholesale Canada Local 440*, unreported, July 27, 1998 (R.M. Brown). Others, and some courts, have readily adopted the broadest interpretation: see *Re CVC Services and I.W.A. - Canada, Local 1-71* (1997), 65 L.A.C. (4th) 54 (Lanyon), *Re Fording Coal Ltd. and United Steelworkers of America, Local 7884* (1997), 69 L.A.C. (4th) 430 (McDonald), *Honeywell Ltd. v. Jolie* [1997] O.J. No. 372 (Ont. Ct. Gen. Div.), and *Quinn v. Morrison* [1997] O.J. No. 2898 (Ont. Ct. Gen. Div.). In my view, each case requires a careful assessment of the circumstances against the language used by the Supreme Court, and a thoughtful application of the law to the circumstances.

What faces me here is a dispute over whether a particular individual has any rights under the collective agreement from which my jurisdiction arises, because of his reinstatement under a predecessor agreement between the same Union and a predecessor employer, and a Memorandum legislation binding the individual, the same Union, and the present Employer. The question, in the

words of McLaughlin J., is whether the dispute, "in its essential character arises from the interpretation, application, administration or a violation of the collective agreement".

Obviously, at the most basic level, this is an issue of the interpretation and enforcement of a Memorandum of Agreement. But that Memorandum of Agreement was entered into in the course of proceedings under the legislation which previously covered disciplinary matters, and its interpretation will determine the individual's rights under the successor collective agreement.

Moreover, the grievance was filed by the Union, as it must be pursuant to the grievance procedure included in the Transition Agreement, and there is really no issue of whether the individual affected has any personal rights under the collective agreement. Since only an authorized representative of the Union can file a grievance, even those relating to individual employees, no procedural barriers arise to the processing and arbitration of a grievance filed in this way.

What the Union is seeking is an order that Mr. Green be employed pursuant to the collective agreement. While the creation of an employment relationship, or its voluntary termination, are not normally the subject of collective bargaining, arbitrators nevertheless do, from time to time, determine as a question of fact whether such a relationship has been created or terminated. All that is different in the present case is that the alleged creation is in the form of a simple contract which may require interpretation. While the administration of contract is normally a matter for the Courts, where the dispute in its essential character is one of the application of the collective agreement to an individual, it is simply a matter of the consideration of the common law in relation to the dispute which is required, something that is beyond neither the competence of an arbitrator, nor the scope of arbitral jurisdiction as explained in *Weber v. Ontario Hydro*.

As I understand the decision of the Supreme Court in *Weber*, where an arbitrator has jurisdiction, that jurisdiction is exclusive except in circumstances where a remedy is required which the arbitrator is not empowered to grant. Obviously, an arbitrator appointed under this collective agreement may give a full and complete remedy, either by declaring that Mr. Green is covered by the collective agreement and entitled to benefit from its provisions, or by finding that he is not. If any order is to be conditional, that remedy is also well within the powers of an arbitrator as set out in the *Canada Labour Code* and the Transition Agreement.

In my view, therefore, this is a question of the application of the collective agreement, and the fact that it will also require consideration of ancillary documents and the common law of contract are insufficient to remove it from the statutory jurisdiction of an arbitrator as established by the *Canada Labour Code.* In the result, the grievance is arbitrable, and may proceed on the merits on a date agreeable to the parties.

DATED AT TORONTO this 27th day of May, 1999.

Kenneth P. Swan, Arbitrator