

**LEGAL, ECONOMIC, AND INDUSTRIAL
RELATIONS CONSIDERATIONS**

IN

**WORKFORCE INTEGRATION FOLLOWING
CORPORATE MERGERS**

by

Fraser Douglas Hodge

B.A.Sc. University of British Columbia, 1969

LL.B. University of British Columbia, 1991

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

The Faculty of Graduate Studies

(Law)

The University of British Columbia

(Vancouver)

October 2008

© Fraser Douglas Hodge, 2008

Abstract

Over the past several decades the business world has witnessed countless corporate mergers of unlimited size and description. The ramifications of these events are profound and the impacts are felt in every walk of life. Canada is not exempt.

Consolidation of workforces following corporate mergers has become a complex undertaking which defines the extent and scope of impact on every employee. Employees enjoy varying degrees of control or influence over protection of their working conditions and benefits accrued over their employment service. The extent of an employee's influence over the impact of his corporate merger is governed by his placement in the hierarchy of the corporation. Management employees have the least influence while highly unionized employees have the greatest influence.

This thesis will explore the evolution of legal, economic, and industrial relations principles identifiable as governing an employee's ability to carry forward his earned benefits of employment primarily in the Canadian context with some view to the international context.

CONTENTS

Abstract	ii
Table of Contents	iii
List of Acronyms and Abbreviations	iv
Chapter I Introduction.....	1
Chapter II Substance	20
Chapter III Process	49
Chapter IV Conclusion	83
Bibliography	96

List of Acronyms and Abbreviations

AC Air Canada

ACPA Air Canada Pilots Association, the union representing the pilots of Air Canada following their decertification from CALPA in 1995, and to which the Canadian Air lines pilots were added after the CIRB bargaining unit consolidation in 2001..

ALPA Air Line Pilots Association, the U.S. union of airline pilots into which the remainder of CALPA merged following the departure of the Air Canada pilots in 1995.

BCCCA British Columbia Crown Counsel Association, the professional association formed to act on behalf of and bargain collectively for Crown Counsel in the Province of B.C.

BCMA British Columbia Medical Association the professional association formed to act on behalf of and bargain collectively for the Doctors in the Province of B.C.

CAIL Canadian Airlines International Ltd., a domestic and international airline formed by the amalgamation of Canadian Pacific Air Lines and 4 regionals in 1987.

CALPA Canadian Air Line Pilots Association, the union that represented virtually all airline pilots in Canada from the 1930s to the decertification of the Air Canada pilots in 1995.

CIRB Canadian Industrial Relations Board

CPAL Canadian Pacific Air Lines, an arm of the Canadian Pacific transportation conglomerate that provided domestic and international airline service until it was sold to PWA in 1987 and became the major component of CAIL.

EPA Eastern Provincial Airlines, a regional airline operating in Atlantic Canada until acquired by CPAL prior to the formation of CAIL.

LEC Local Executive Council: the elected executive of each local council.

Local Council The pilots at a given base in a given airline within either CALPA or ACPA.

MEC Master Executive Council, the governing body of the union within each airline consisting of a chair and the chair and vice chair of each LEC.

ND Nordair Inc., a regional airline operating in central Canada until acquired by CPAL prior to the formation of CAIL.

OAC Air Canada pilots in the employ of Air Canada prior to the Canadian Airlines acquisition in 2000.

OCP Air Canada pilots in the employ of Canadian Airlines International prior to the Canadian Airlines acquisition by Air Canada in 2000.

PWA Pacific Western Airlines, an Alberta company and regional airline operating in western Canada until the formation of CAIL.

Chapter I Introduction

Tens of thousands of Canadians and others around the western world every year experience a life altering impact on their chosen profession or career due directly to a corporate decision so far beyond their influence that they often first hear of it through the media when it is a fait-accompli. It is a twentieth and twenty-first century phenomenon known as corporate merger. TELUS and B.C. Tel.; Toronto Dominion Bank and Canada Trust; Royal Bank and Royal Trust; Air Canada and all its component airlines; Daimler-Chrysler; Boeing and MacDonal Douglas; US Airways and America West Airlines; Northwest Airlines and Delta Air Lines; Great-West and Canada Life; and Brookfield and Royal LePage are just very few of the many examples of recent mergers and acquisitions. Each of those is a major corporation and therefore the total employees and families thereof amount to a very large number of directly-affected people.

The disruptive effects of corporate mergers upon employees in terms of reduced productivity and also in terms of life-style and family upset is well known and well documented. Accordingly the need to bring a measure of perceived fairness, predictability, and therefore stability to the lives of merger participants is clear.

Merging working groups within a jurisdiction is sufficiently problematic on its own. Crossing jurisdictional lines such as provincially governed labour fields in Canada adds further complications and crossing internationally bounded jurisdictional lines exponentially increases difficulties and complications. Among international corporations, airlines, by virtue of their

natural mobility of assets and staff, are arguably the most likely candidates for international mergers that go beyond token exchanges of advisers within management ranks. Thus far, no major corporate merger has crossed international boundaries with respect to integrating work forces, by way of a substantive merger, that is other than minor or token integration within management teams. New ground may be broken in the near future as a result of the 2004 agreement to merge between KLM Royal Dutch Airlines and Air France under a Paris-based parent company, KLM-Air France. The fact that both countries are members of the European Union has provided unprecedented opportunity to overcome barriers yet substantial jurisdictional issues remain unresolved on the labour front as well as international airline jurisdictional issues. However a 5 year moratorium was placed over the merger in 2004, due to expire in 2009, at which time the merger is expected to move ahead. Regardless of trans-border complications, fundamental principles necessary to perform a successful merger must be present in all cases.

Following a broad overview of corporate mergers in Chapter I, Chapter II will analyze selected mergers over the past twenty years to extract the fundamental elements of seniority as revealed in a selection of mergers, that is, the substance of seniority integration.

Chapter III will focus on the process side of seniority integration. A critical element of successful seniority integration is finality which can only be achieved by adherence to a specified end point, following which the parties move on in life. As will be seen through several key case studies reaching beyond the subject of mergers into other critical aspects of labour relations, absent finality there may be ongoing chaos which exists at great expense both financially and emotionally to the participants and the host corporation of a merger, or enterprise or even government.

Chapter IV will present the conclusions that there is a functional definition of fairness that can be readily applied to the circumstances of seniority integration. Further, elements of seniority can be identified and quantified and combined in a manner that provides a compelling case for fairness in weighing the factors that are embodied in seniority. The trail of arbitral jurisprudence in Canada has culminated in sound and viable results under the prevailing Canadian statute.

Finally, fairness and certainty and finality in the process are achievable objectives but are dependent on proper understanding of their need by involved parties and unequivocally backed up by the courts.

Starting Point

Within every corporation and therefore within any merged corporation employees readily separate into two distinct groups: management and labour. There are sub-groups within each, of course, executive, senior, middle, junior management on one hand and in labour organized or unorganized, used interchangeably with unionized vs. non-unionized, on the other. However, for most significant purposes including analyzing mergers, the most important distinction is management vs. labour. Labour, in most instances, will involve organized or unionized labour.

The two groups react, respond, and are handled entirely differently from the other. Following a corporate take-over, members of management may be relocated or re-employed at the simple behest of the management of the surviving entity. Conversely, unionized employees are subject to labour law provisions in the jurisdiction within which they reside and work as well as whatever collective agreement provisions are in force between the union and the pre-merger companies. Therefore, consideration of merger effects on management employees is limited to the general provisions that affect all in the process while merger effects on unionized employees are complex and extensive.

The DaimlerBenz AG merger with Chrysler Corporation, touted as one of the world's biggest mergers but ultimately amounted to very little, is illustrative of how cultural, social, and jurisdictional considerations thwarted a major merger attempt. A brief review of the component companies and the more important merger events reveals the unbridgeable chasm of differences that lay between the two corporations:

The Chrysler Corporation was founded in 1924 by Walter P. Chrysler, former president of McLaughlin-Buick who incorporated his vision of producing a high-end competitor to Packard, Cadillac, and Lincoln. In the ensuing three decades Chrysler grew and its product line grew with

the acquisition of such other manufacturers as Plymouth and Dodge, Simca (French), and American Motors which itself included Hudson, Studebaker, Packard, and Willy's Jeep. By the mid-1980s it was the third largest U.S. car manufacturer behind General Motors and Ford.

Chrysler's financial history was one of large fluctuations, that is, major crises followed by spectacular recoveries. One of the most notable was the 1978-80 crisis where Chrysler was forced to sell off its foreign holdings such as Simca in France, Mitsubishi in Japan, and its aviation defence interests such as Gulfstream Aviation in the U.S., and beg the U.S. government for a US\$1.5B bailout package. This recovery was engineered by Lee Iacocca who repaid the U.S Government bailout package by 1983, a full seven years ahead of schedule. This was a most remarkable turnaround and provided compelling evidence to the automotive world that Chrysler was modern, nimble, lean, and well focussed in its market approach. However, it remained unable to significantly enlarge its impact beyond North America, undoubtedly a factor in the minds of Chrysler executives when Daimler revealed its merger intentions to Chrysler at an historic 17 minute meeting at the Detroit Auto Show in January 1998.

DaimlerBenz AG is itself the product of a 1926 merger of Daimler AG and Benz AG¹ both of which dated back to the late 1800s. It was always prominent in the upscale or luxury car portion of the German and European car market. During the 1980s it was slowly forced to share that market with BMW and subsequently by the Japanese manufacturers: Toyota with Lexus, Nissan with Infinity, and Honda with Acura.

DaimlerBenz underwent a strange and largely unsuccessful period of diversification in the 1980s which involved four distinct entities: transportation, aerospace, microelectronics, and "white goods" or household appliances. The bulk of this diversification was achieved rapidly through a series of grossly unprofitable conglomerate acquisitions at a price of approximately US\$6.2B. The result was massive losses. For example, \$3.3B in 1993, that were revealed when DaimlerBenz listed on the NYSE and had to disclose under the U.S. GAAPs². The following

¹ In German Law, the suffix "Ltd." or "Corp." or "Inc." is designated by "AG" which stands for *Aktiengesellschaft*.

² Generally Accepted Accounting Principles

year, Mercedes alone returned to profitability, but in 1995, DaimlerBenz overall reported the biggest peacetime loss ever by a European company, a staggering US\$4B.

In the mid 1990s DaimlerBenz was appointed a new CEO, Jürgen Schrempp who quickly began cleaning house in a massive and ruthless way. Schrempp reduced the number of businesses under Daimler Benz from 35 to 23 by disposing of companies such as Fokker, the Dutch aircraft manufacturer. Further, against the opposition of the powerful German trade unions, he reduced the workforce by 10% across the board. Results were positive as early as 1996 and further improvement in 1997, but DaimlerBenz had retrenched into itself, relying on its reputation for traditional high quality and excellence in automotive engineering somewhat the opposite of Chrysler, which gave the appearance of an industry leader in terms of commonality in products³, innovation, and quick market reaction.

By 1997 Chrysler's success made it cash rich (and therefore an attractive take-over target) and with a management frustrated by unsuccessful attempts to increase its global presence. DaimlerBenz, on the other hand, had just emerged from a severe slimming and trimming period and looked with great envy not only at Chrysler's profitability but its fast moving innovation. Both companies were ripe for each other but neither understood how to account for the vast differences that would ultimately prove the merger unattainable.

On May 7, 1998, a cross-border, trans-oceanic transaction, with an equity value of \$36 billion, combined revenues of \$132 billion, annual sales of four million vehicles, and involving over four hundred thousand employees was jointly announced by DaimlerBenz AG (Stuttgart, Germany) and Chrysler Corporation (Auburn Hills, MI) to be: "not only the best strategic merger or the best prepared merger, but also the best executed merger", in short: "a merger of equals made in

³ in the early 1990s other manufacturers, such as Toyota, Chrysler, and Volkswagen, embraced the concept of a universal platform (chassis) upon which several different models were built. Mercedes declined to follow this obvious manufacturing efficiency citing instead its commitment to unique and specific engineering for each of its models. Like Ford and GM, DaimlerBenz still produced a high percentage of components in-house rather than vigorously seeking efficiencies gained from outsourcing, possibly at the expense of quality control. Similarly labour inputs remained high: it took 60 - 80 man hours to produce a Mercedes but only 20 to produce a Lexus. If Mercedes was engineering and quality-control driven; Chrysler was market-innovation driven.

heaven"⁴. The result would be the fifth largest automotive manufacturer maker in the world in sales and the third largest in revenues. Robert Eaton of Chrysler and Jürgen E. Schrempp of DaimlerBenz would co-chair the new entity to be called DaimlerChrysler AG.

The new entity would be a German company, supposedly for tax reasons, and would be called DaimlerChrysler AG. A complex and cumbersome multi-level board structure (even including some 10 board seats for labour leaders) soon went out of balance favouring the Daimler side of the "merger of equals". The public announcements were long on hype and short on specifics. Claims were made for extensive cost savings through sharing facilities, technologies and distribution systems, but no mention of integrated production or even shared technology. Early, the question of relative quality of products, Mercedes vs. Chrysler, arose both internally and publically. Schrempp's response was to state categorically that there would be no intermingling of products or product identities. This was an instant bar to true integration in addition to spawning anxieties arising out of the quality disparities.

Analysts and industry observers watched carefully for and probed for the strategic rationale behind the merger and any indications of how it would be integrated but were denied. The hurdles and potential difficulties were staggering, with as corporate backgrounds and cultures as diametrically opposite as any could imagine. In addition, the social differences between corporate life in the U.S. and in Germany plus the different regulatory schemes were mind-boggling to understand let alone consider bridging or merging.

It did not take long before executives began to depart from both companies. As no prior cultural analysis had been done, there was no appreciation for the breadth of the cultural divide that existed in either the corporate or the nationalistic sense. Further, there was no pan to bridge or narrow the cultural divide. In less than a decade the merger attempt terminated with both DaimlerBenz and Chrysler having lost many from their executive ranks with little if anything to show for the adventure.

⁴ Jürgen E. Schrempp, merger announcement, 1998.

While the DaimlerChrysler merger stalled then failed at its early stages it does embody all the characteristics of the early stages of every merger. Early merger statements by corporate executives inevitably garner much attention outside the prospective merger partner companies. There was a whirlwind of publicity that quickly surrounded the announced DaimlerChrysler merger. However, perhaps more importantly, the internal effect of early pronouncements has a major lasting effect on the ultimate success or failure of a merger. Credibility of corporate executives and leadership teams is quickly won or lost on the precision, factuality, and consistency of early merger announcements. Credibility directly affects acceptance of the ultimate merger outcome, known alternatively as finality of the process which will be addressed in Chapter III of this thesis.

The DaimlerChrysler saga is interesting as an example of a big, well publicised merger, but in the end it was a merger that never properly started and certainly never ran to conclusion. Others, of course, with more adept planning and fewer natural obstacles, proceeded to varying stages of successful integration. In that quest it inevitably became necessary to devise some means of weighing or measuring responsibilities and benefits that would accrue to each employee in the new corporation. That is the focus of this writing.

The world wide airline industry has arguably undergone more transformation and consolidation over the last twenty years than any other. The airline industry is highly organized or unionized, the number of employees is large, employees are generally well paid, and therefore the resulting quantum of resources available to union leadership is extensive. Within organized airline employees, the pilot group is the highest paid per capita, underwrites powerful unions, and is where the concept of seniority has emerged and evolved into a complex measure of relative job or employee value as the currency of integrating workforces. Necessary legal steps in this area may be compounded by the existence of more than one established union seeking to represent the new, merged bargaining unit. Pilots live in a world of seniority and seniority is defined and measured in numerous different ways in different circumstances. Accordingly, it is the complexities of seniority integration under the trusteeship of organized labour which govern the lives of unionized employees through the transition from old company to new company. And, the

pilot group provides the most fertile ground from which to examine the principles of work force integration within a unionized environment.

It is readily apparent that an analysis of seniority integration issues involves understanding both the substance and the process of seniority integration: substance being the factors that are weighed and balanced in some means to produce a result and process being the means employed to evaluate the substance known also as natural law or due process. Successes and failures in mergers have involved varying degrees of success in each of these two distinct aspects. Success in both is necessary for overall success. Success in both will inevitably involve a perception of fairness in both.

Fairness as an Essential Component

A great many scholars in a great many fields have attempted to formulate a succinct definition of fairness. The field of economics endeavours to objectively and arithmetically analyze and quantify fairness and therefore presents a useful approach to developing an understanding and application of fairness, as it may be applied to the need for fairness in the integration of work forces. The term fairness is frequently used interchangeably or in tandem with the term equity. For the purposes of integrating workforces a working definition of fairness is essential to success.

Several economic authors and tools will be examined first with respect to defining an appropriate and applicable working definition of fairness and second with respect to quantifying elements of value in a merged workforce which is to be distributed among the members of the new work

unit. Authors include: James A. Brandner⁵, John Rawls⁶, Steven E. Rhoads⁷, Thomas C. Schelling⁸, and Anthony E. Boardman, et al⁹.

Three Approaches to Fairness

All traditional approaches to principles of fairness have flaws in spite of the great energy invested in analyzing fairness over several centuries by prominent philosophers. Most influential views incorporate a distribution of benefits principle in some form or other but the distribution of benefits approach itself is not fully immune to all criticism. The following three major systematic approaches to fairness, all suggest an absolute or universal set of standards or criteria by which we may judge fairness, thus rejecting the notion of cultural relativism.

1. Utilitarianism: A theory that was developed by David Hume, Jeremy Bentham, and John Stuart Mill (most influential) in the late 18th and early 19th century and is thought by many to be a refinement of the benefits approach. It focuses on benefits and costs (which are merely negative benefits). The essence of utilitarianism is summing up all (some costs are born by others than those who reap the benefits) the benefits. If the sum is positive then one should proceed, if negative then the proposed action is not warranted.

Utilitarianism produces a very liberal social position. It attempts to treat all participants as equals. Also, if an act increases the utility of the person performing the act without harming

⁵ Brander, James A., University of British Columbia, Vancouver, Canada, (2006), *Government Policy and Business in Canada* (4th Edition) Wiley & Sons.

⁶ Rawls, John, Harvard University, Cambridge, Massachusetts, U.S.A., (1971), *A Theory of Justice*, Cambridge MA Harvard University Press.

⁷ Rhoads, Steven E., University of Virginia, Charlottesville, Virginia, U.S.A., (1985) *The Economists View of World Government, Markets and Public Policy*, Cambridge, Cambridge University Press.

⁸ Schelling, Thomas C., University of Maryland, College Park, Maryland, U.S.A., (1981), *Economic Reasoning and the Ethics of Policy*, Public Interest 63 (Spring).

⁹ Boardman, Anthony E., (University of British Columbia); Greenberg, David H., (University of Maryland); Vining, Aidan R., (Simon Fraser University); Weimer, David L., (University of Wisconsin); *Cost-Benefit Analysis: Concepts and Practices*, 2nd edition, (2001), Prentice Hall, Upper Saddle River, New Jersey, U.S.A.

anyone else, then the act is justified. Utilitarianism sees good in things rather than focussing on such things as religious and moral doctrines that are based on sacrifice. Utilitarianism produces a strong rationale for re-distributing money from rich to poor. One extra dollar of income is more valuable to a poor person than to a rich person, overall utility is increased with that transfer. A morsel of food for a starving person has increases overall utility with its transfer from a well fed person. Generally proponents of Utilitarianism say that all reasonable moral positions eventually boil down to adding up benefits.

Utilitarianism has criticisms and flaws. It assumes that utility or happiness is comparable across individuals. If not then utilitarianism cannot be applied. Even if it can be applied and can answer the question "do benefits enjoyed by some count more than benefits enjoyed by others?" is it right to do it? It offers very weak protection for people's rights and can lead away from due process by simply increasing overall benefits to a group. Therefore we place conditions on which benefits are acceptable, which is necessarily a subjective evaluation.

2. Social Covenants and Contracts

A 'fair' system is one we would all voluntarily agree to join; that is, one in which we would all agree to accept. First developed by Locke, Rousseau, and Kant, it was most influentially propagated by John Rawls.¹⁰ Rawls envisions what he calls an original position, in which every relevant individual is present in the original position but nobody knows who he or she is (a concept developed by Rawls and called "the veil of ignorance"). Some social structure will emerge from the original position as each of us assumes our identities at the same time. The universal lack of identity and therefore absence of bias in the original position will ensure that whatever ensues will ultimately be fair. Two claims arise concerning the veil of ignorance: one, agreements reached from behind the veil should be taken as fair; that is, rational discussion in the original position should be taken as fair, and two, rational people in the original position would adopt a "maxi-mini" principle, that is, society should be ordered so as to maximize the well-being of the worst off person. However, any subjective evaluation of risk detracts from the ideal of the veil and the innocence of the original position.

¹⁰ Rawls, *supra* note 6 at 11.

Maxi-mini is essentially another example of the benefits principle, but quite different from utilitarianism. Utilitarianism seeks to maximize the benefits of all while the maxi-mini seeks to maximize the benefits of only the worst off person. Also, the maxi-mini principle puts excessive weight on the very worst off (hard to define in reality) while ignoring the rest.

Rawls' work is exceedingly theoretical and abstract yet it introduces valuable concepts which can be translated into and used in practical situations. The social contract idea is interesting in that it suggests that a group with all their biases and special interests stripped away will necessarily produce fair rules. That is to say that fairness will be derived from a fair procedure.

Rawls' concept can be seen as akin to the legal concept of the "reasonable man" who has lived for centuries in the abstract and theoretical analyses of the Law. The reasonable man knows no bias, has good knowledge of everything, and can unwaveringly arrive at a most reasonable conclusion to resolve any conflict. In short he has a good heart and an empty head. His employment has continued unabated since the early days of the Law, and he is frequently called upon to underpin a conclusion that may be based more on intuition than a preponderance of fact or rational logic.

3. Procedural Fairness or Rights Approach

The appeal of the social contract approach is not based on an evaluation of benefits, but on the idea that fairness is whatever derives from fair procedures. It therefore focuses on procedural fairness which is different from distributive fairness, which focuses on the ends or results of some process (utilitarianism and maxi-mini).

Which is more fundamental, procedural or distributive fairness? The primacy of procedural fairness means the ends do not justify the means. Primacy of distributive fairness is: if the ends don't justify the means, what does?

Nozick (1974) and Hayek (1960) are strong proponents of the primacy of procedural fairness or rights. Procedures should be non-coercive, choices should be voluntary and avoid paternalism. Nozick's statement is the foundation of the libertarian position which argues for minimal government. Rights that create claims on others are coercive.

It is difficult to agree on what basic rights and procedures should be adopted. There is no simple approach to fairness that will serve as a universal foundation for analysing public policy but which uses the features of each to help analyse policy.

Also, individual- and group-based fairness do not necessarily align. Group fairness has gained more importance in recent times: for example, fair treatment of racial or ethnic groups in public institutions such as universities has become an issue. However, group fairness can quickly conflict with individual fairness or equality of opportunity particularly in matters as broad as affirmative action and as confined as intra-union decision making.

Fairness, at its best, is the foundation of public policy. It also is a determinative factor in private lives and in day to day decisions that are made. Bigger decisions or events command more attention to fairness. Workforce integration may become the biggest event in a person's working life and therefore fairness is of monumental importance.

Unfortunately the concept of fairness, while individually based on notions of values and ethics, has wide variations throughout our society. It lacks a precise definition and therefore has attracted the attention of scholars and philosophers who generously attempt to fill that void but typically enhance the complexity and uncertainty of the concept itself. A look at underlying principles used to gauge fairness may assist in evaluating fairness. Brander¹¹ suggests there are three widely held conceptual understandings worthy of consideration:

1. Sanctity: The invocation of some ultimate or over-arching value regardless of benefits which predetermines distribution of benefits. It suggests that failure occurs if sanctity is not observed.

¹¹ Brander, *supra* note 5 at 11

It is an appeal to suspend normal techniques of policy analysis frequently employed in situations where human life is at stake. Unfortunately or fortunately there is no single thing in this world that is truly greater than all others. Accordingly this principle is best described as illusory and unattainable and can lead to dogmatic behaviour. It is powerfully attached to the concept of human life and it is frequently raised in the absence of rational logic. For example, promoters of health facilities will often claim any cost is worth the expenditure if it saves a human life. Our history as a society simply shows that that is not true - human life is valued in every construction project. Freeways and highways are built to a certain safety standard which is a finite standard, not an infinite standard of safety. In other words, a value judgment is made that the expenditure of one additional unit of economic effort is not justified by saving one more life. Therein lay the value of the marginal life. Another tragically obvious example of this concept is the flooding of New Orleans by Hurricane Katrina in August, 2005. The New Orleans dikes were constructed to Category 4 Hurricane strength, not Category 5, for conscious economic reasons. Ex post facto analyses may dispute the wisdom of that decision, either for engineering or for political reasons, and result in the construction of stronger dikes for the future *but not dikes that will outmatch any hurricane for all time.*

In the airline seniority integration context many will argue that seniority should be construed to be solely the length of time a person has been in a job because that is how it has been traditionally viewed and that is the one common element everybody understands to underpin seniority. In fact, that is a sanctity argument. It seeks to pre-empt further thinking or analysis by elevating a simplistic and singular analysis above all else. It can jive with any reasonable analysis of fairness by coincidence alone. In short, the sanctity argument makes no rational sense, is based in a vacuum of consideration of viable alternatives, and invites frustration and dissatisfaction.

2. Discrimination and Non-Discrimination: Discrimination is an extremely politically loaded term, the emotional impact of which frequently overwhelms any underlying logic of making some decisions based on comparative differences. That is, some forms of discrimination are not unfair based on circumstances which can prevent the realization of benefits. For example, admission to graduate school based in part on previous marks is a form of discrimination against

less successful undergraduate students. However, in another way it is beneficial to all to screen out those who would not succeed in advanced studies in order to devote the resources to those who will succeed. Taken in the context of seniority integration, an element of age discrimination, for example, can be helpful in the distribution of benefits if the older participants are made senior then in due course retire and make way for the younger participants to also enjoy the benefits. The reverse becomes a block to the distribution of benefits. Accordingly, group profiles or demographic analyses become valuable tools in the final analysis of a merger.

3. Distribution of Benefits: An entity may be deemed to be fair if benefits, which may be both positive and negative, are distributed fairly to affected parties. Therefore, a policy of benefits distribution must underlie fairness. A theoretically appealing route to success depends critically on accurate knowledge of facts and weighing of benefits in order to estimate fairness in the distribution. Applied to the airline merger context, benefits are obvious, such as pay and employment benefits. Greater pay is a greater benefit. There are also many other less tangible benefits which will be identified later in this chapter.

Determination of fairness depends, of course, on underlying value judgments in assessing benefits. One way to deal with competing value judgments is through the doctrine of moral relativism, which states: there is no way to determine that some values are superior to others and accordingly, asserting that one's values are superior to another's is mere arrogance. Although Brander's work¹² is primarily concerned with the interrelationship of government policy and business, he lays out as a foundation a concise description of four fundamental concepts: opportunity cost, marginalism, economic incentives, and economic efficiency. The description of the fifth concept, cost benefit analysis, is drawn from Boardman et al¹³. It is suggested that these concepts are valuable tools for assessing worth or value in the aspects of jobs that come into a merger, the most essential step in determining seniority integration. In the seniority context, statistical analysis of prior behaviour is exhibited in similar-choice fact patterns according to some of the following tested economic tools for evaluation:

¹² *Brander, supra* note 5 at 11.

¹³ *Boardman, supra* note 6 at 11.

1. Opportunity Cost:

As a concept it is perhaps the most useful of all economic concepts. It defines: “the cost of any activity is the value of the best foregone alternative”. Further, the application of opportunity cost to policy decisions means that a project or policy should only be undertaken if its value exceeds its opportunity cost. In other words comparisons based on just cost or just value are not relevant in deciding the real validity or worth of a proposed project.

Public opinion polls are often touted as evidence of support for policy proposals or project proposals. However, they often display a misunderstanding of opportunity cost or a failure to conceptualize social priorities in terms of opportunity costs. Public opinion polls will often show an approval for example, for police security or education or health care. However, what they need to show is public preference, say, to hire “X” more police officers at the expense of the school renovation when the finite number of available tax dollars requires a choice. One then becomes the opportunity cost for the other.

Far too often policy makers frame public questions in absolutes, such as the safest system for air transport rather than the safest system reasonably possible. The cost of a perfectly safe system may include forfeiting all other government expenditure on transportation, an absurdity in itself. Somewhere in the scale of expenditures there is an appropriate or sensible correct opportunity cost for a given project beyond which the opportunity cost is too great to justify proceeding. In the context of opportunity cost one cannot have one’s cake and eat it too. Conversely, opportunity cost measurement is often effective in revealing wasteful or inefficient policy proposals. In order for opportunity cost to be an effective analytical tool it must be exercised on the basis of a realistic choice between viable alternatives.

2. Marginalism

Marginalism is the economic tool which considers, as determinative, only the last increment of (opportunity) cost versus the last increment of benefit rather than the whole of the cost versus the

whole of the benefit in weighing the merit of proceeding with a policy or project. It explains the paradox of why ordinary water, which is so vital to life itself, is so cheap compared to diamonds which are non-essential to life itself. An additional cup of water each day has very low extra or marginal value because there is so much water available, whereas an additional diamond may be worth a great deal to us. In other words, price is determined, not by total value, but by marginal value.

A paradox of value consists of making a statement about total value to influence policy on marginal spending. For example, saying that education is more important than twinning the Port Mann Bridge so the provincial government should divert the Gateway funds to the education budget is problematic. Everybody agrees that education (or substitute health care, personal security, etc. in this argument) is important but this is an absurd statement. The better analysis compares the marginal value gained for the last, say, \$1 billion spent on highways versus the last \$1 billion spent on schools.

The marginalist principle states that any policy or activity should be carried out as long as the marginal benefit exceeds the marginal opportunity cost. The optimum outcome arises when every activity is carried out just to the point where marginal benefit becomes equal to marginal cost. That is an economist's perfect world. Marginalist analysis is easily and appropriately applicable to business: increase production as long as marginal revenue exceeds marginal cost.

3. Economic Incentives

Economic incentives have a direct effect on the outcome of opportunity cost analysis and marginalist analysis by lowering incremental cost. This is typically achieved by way of application of some government or corporate policy. Economic incentives are a first step in tampering with an otherwise free-market of choices and pure opportunity cost analysis. They generate an artificially low marginal cost. Often, economic incentives are created for government (or a governing body in the private sector) to positively address some social issue. While they usually address a pressing social need they often have unanticipated side effects that may surpass or defeat the desired benefit. For example, it is usually held that unemployment

benefits are paid in order to stabilize an unemployed person's life, thus facilitating his or her return to the work force. If that is so, then increases in unemployment benefits should accelerate returns to work. However, an argument can be made that the opposite is the case: unemployment numbers will rise with increased benefits. The reason is that the economic incentive altered the behaviour pattern of the unemployed person because it became more attractive to remain unemployed, the opposite of the intended effect. A similar example may be found in work force reduction programs that offer early retirement incentives such as with airline pilots. An early retirement incentive will capture motivated leaders who can go to something better elsewhere, such as a graduate degree while leaving behind the less-motivated who quietly know they can't do even as well anywhere else, thus effectively reverse-culling the herd and lowering the Darwinian median.

As long as society maintains a social conscience there will be economic incentive programs; government and leaders trying to steer the economy in a perceived "better" direction by way of short term fixes for deep, complex problems. This is applicable not just to social welfare programs but more pro-active programs such as global warming initiatives as well. Economists postulate, usually correctly, that people will follow their economic interests while non-economists often expect people to leave their behaviour unchanged in spite of changing economic incentives. Therefore, it is vitally important properly to anticipate reactions and potential changes in recipients' behaviour before implementing economic incentive programs.

4. Economic Efficiency

It is likely that no discussion of economics could occur without the extensive use of the word "efficiency" and the phrase "economic efficiency". Accordingly, a brief look at efficiency is warranted. There are two concepts of economic efficiency frequently used in economic analysis:

1. management or production efficiency – each economic activity is managed so efficiently that cost is minimized for the output levels chosen. Management inefficiency means that resources are being wasted.

2. Pareto or allocational efficiency – a broader concept of efficiency where resources are allocated in such a way that it is impossible to make anyone better off without making someone else worse off.

A potential Pareto improvement has occurred if the gainers have gained enough to be able to fully compensate the losers and still be better off. That is, gainers gain more than the losers lose. Pareto efficiency is a central benchmark used by economists in evaluating policy.

5. Cost Benefit Analyses (CBA)

CBA is perhaps the most frequently used tool in the analytical economist's kit. It is as simple as Benjamin Franklin famously exercising a decision making process of listing pros and cons in two columns on a piece of paper, assigning weighted values, crossing off equal and opposing values, then summing up the remainder to reach a decision.

The purpose and uses of CBA include assisting with decision making either in the broad social sense or even individually. In the broad social sense, where markets work well, individual self-interest leads to an efficient allocation of resources.

There are two primary types of CBA,

1. ex ante - conducted while a project is under consideration,
2. ex post – conducted following the end of a project,

and two secondary types,

3. in medias res – during the course of the life of a project, and
4. comparative – combination of any of above, most useful to policy makers in learning about efficacy (capacity for producing a desired result, effectiveness) of a project. The

paucity of this type is not surprising because the constituencies of the other types may be different and/or may have become defensive.

One profound limitation of ex ante CBA is that in early stages of a project, little is known about actual impacts and true social benefits. Therefore later CBAs will be more revealing and more accurate. However, accurately evaluating inputs to CBA has limitations as well. For example, measuring the value of a benefit is frequently taken as the value an individual is willing to pay for it. Determining this value is perfect in theory but difficult in practice as it depends on an honest reporting of willingness to pay and other factors such as wealth which may profoundly alter an individual's willingness to pay. Nevertheless, willingness to pay and opportunity costs are conceptually valuable indicators of CBA input.

Evaluations of efficiencies are analogous to evaluations of preferences in a seniority system. With an application of statistical analysis, they can be employed to quantify the value in different aspects of seniority. For example, preferences in geographic base location exist within a multi-base airline. Those preferences, therefore, become an aspect of that airline's pilots' seniority in the event of a merger which can be quantified and properly valued in constructing a merged seniority list.

Chapter II Substance

The first half of fairness dwells in the substance of matters considered. In order for a result to be seen as fair, all the arguments must be heard and all the issues must be thoroughly canvassed. Tracing the evolution of the concept of seniority will reveal the factors that comprise the value of an employee's seniority.

Seniority is a concept of fundamental importance within organized labour. It is the vehicle with which organized labour attempts to resolve issues of workplace competition among employees by use of an objective pre-set criteria for distribution of workplace benefits. If employee "A" is as qualified as employee "B" then pay and benefits should be equal, and promotion, perks, and benefits will be awarded on the basis of seniority. If a new benefit becomes available in the workplace but there is only sufficient quantity of benefit for either employee "A" or employee "B", not both, then there needs to be some means to decide which employee will receive the benefit. That has historically been accomplished by way of seniority. Assignment and accrual of seniority therefore become matters of paramount importance in the work environment. It follows closely that any potential change in seniority will be immediately threatening.

Seniority has evolved from being merely a statistical fact of life on the record of an employee into a multifaceted concept driving and affecting almost every aspect of an employee's working

life. The original view of seniority was that it was simply an interchangeable term with length of employment. While this construct is still somewhat valid within limited static circumstances, it implodes in the dynamic context of a significant change in the definition of or boundaries of a particular bargaining unit. For example, in the case where two or more bargaining units are combined into one, such as the result of a corporate merger, service-time considerations may have differing correlations in the different groups to job-quality and scope (of work covered in either collective agreement) considerations. It is these very job quality and scope considerations that the doctrine of seniority rights evolved to protect. Accordingly, a more comprehensive definition must evolve concurrently with the evolution of seniority's realm of applicability, in most cases, expanding bargaining units.

Traditional View of Seniority:

Seniority has a long history of being featured in labour disputes and labour arbitrations. It is frequently said that seniority is the single most valuable concept achieved by organized labour since the inception of collective bargaining and collective agreements. It is often referred to as a coin of exchange among workers whereby they distribute benefits such as access to promotions and higher pay, choice of shifts and days off, protection from lay-offs, and almost every other feature of employment. In December, 1977 Chairman Paul C. Weiler, British Columbia Labour Relations Board, wrote a landmark decision¹⁴ regarding seniority rights of a group of unionized workers who were in a dispute with their employer and their union over seniority. In his decision, Chairman Weiler quoted the following with reference to the importance of seniority to the affected workers:

“...Seniority enables an employee to acquire valuable interests by his work, to capitalize his labor (sic) and obtain something more than a day's wages for his continued production. When seniority determines promotion rights, it gives the employee a claim to better jobs when they become available; when seniority determines the order of layoff, it provides the employee a measure of insurance against unemployment. Seniority does not guarantee that vacancies in higher rated jobs will be filled or that any jobs will be available; but by giving the senior employee priority when a choice is made as to who will be promoted or who will remain employed, seniority gives an employee an interest of substantial practical value. As Professor Aaron has pointed out, 'more

¹⁴ *Seagram's Employees v. Distillery, Brewery, Winery, Soft Drink & Allied Wkrs. Union, Loc 604*, [1978] 1 Can. L.R.B.R. 375 (B.C.L.R.B.).

than any other provision of the collective agreement ... seniority affects the economic security of the individual covered by its terms,' and it has understandably come to be viewed as one of the most highly prized possessions of any employee. Seniority may be the most valuable capital asset of an employee of long service.”¹⁵

This commentary of over thirty years ago reveals two important features of seniority as it was then viewed: First, that it was understood by all to be vitally important to workers, and second, that it was defined entirely within a collective agreement or bargaining unit. Little was said about the determination of seniority rights following a substantial change in the nature of the bargaining unit.

Widely recognized as the "Bible" of labour arbitration in Canada, Brown & Beattie's Canadian Labour Arbitration”¹⁶ offers the following traditional description of seniority from the second edition, which was published in 1984:

“Seniority systems are an integral part of virtually every collective agreement. They serve the twofold purpose of defining who is eligible for certain monetary and fringe benefits provided for in the collective agreement and of determining an employee’s entitlement to a particular job in such contexts as promotions, transfers, and layoffs. For both purposes, seniority provisions are designed to grant certain preferences to employees based, in whole or in part, on their accumulated length of service. The theory underlying such systems is to provide those employees possessing the longest record of service in the context of a layoff with the greatest job security, and in the context of a promotion with the greatest potential for advancement. The extent to which a particular seniority provision secures such benefits will depend in large measure on the scope or definition of an employee’s seniority, the manner in which the agreement provides for its application, and the extent to which it is qualified by such other considerations as skill and ability. Although any of these matters may vary in each collective agreement most arbitrators would subscribe to the view that:

“Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee’s seniority under the terms of a collective agreement gives rise to such important rights as relief from layoff, right to recall to employment, vacations and vacation pay, and pension rights to name only a few. It follows, therefore, that an employee’s seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators

¹⁵ Summers and Love, "Work Sharing as an Alternative to Layoffs by Seniority", (1976), 124 U. of Pa. L.R. 893, at p. 902.

¹⁶ Canada Law Book website <http://www.canadalawbook.ca/catalogue.cfm?DSP=Detail&ProductID=329> description of Brown & Beatty, Canadian Labour Arbitration, 2d , 1984, Canada Law Book Ltd., Aurora, Ontario Later Edition 2006,

should construe the collective agreement with the utmost strictness whenever it is contended that an employee's seniority has been forfeited, truncated, or abridged under the relevant sections of the collective agreement.¹⁷

"It is usually assumed that in the absence of a specific provision in the agreement to the contrary, an employee's seniority will commence on the date of hire or the date of entry into a particular seniority unit, whichever is made relevant by the particular collective agreement."¹⁸

"...However, arbitral opinion seems divided as to the operative date of an employee whose employer has been purchased by, merged, or amalgamated with, some other enterprise."¹⁹

Consideration was given in that era of the early 1980s to whether provisions such as §13 of the Employment Standards Act²⁰, which sought to mandate that an employee's rights could carry over to a new employer could protect or vest those seniority rights as well²¹.

In this traditional view, seniority was considered a function only of length of service which was an acceptable and workable definition because bargaining unit boundaries were stable and seldom altered. However, as the 1980s unfolded with deregulation of many industries and the rapid industry consolidation that followed, bargaining units were recreated, reshaped, and redefined in a rapid newfound frequency either by expansion or consolidation. The traditional tie of seniority to length of service meant little or nothing on its own because its traditional context had evaporated. Accordingly, there emerged a need to redefine seniority in a context greater than the traditional single bargaining unit or collective agreement. That is, to determine a means of equating the relative value of seniority in one bargaining unit vs. the other, or one component of a new bargaining unit vs. another. Trying to equating different seniorities introduced the need to examine the service at each entity and extract the underlying factors or valuable components of each.

¹⁷ *Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 (Reville), at p. 162, cited with approval in *Edwards of Canada, Unit of General Signal of Canada Ltd.* (1974), 6 L.A.C. (2d) 137 (Adams). See also *R. Huber & Co. (Canada) Ltd.* (1976), 11 L.A.C. (2d) 309 (Shime).

¹⁸ *Hartz Mountain Pet Supplies Ltd.* (1975), 7 L.A.C. (2d) 342 (Shime)

¹⁹ *Bermay Corp. Ltd.* (1981), 30 L.A.C. (2d) 402 (Ellis); *McCallum Transport Division of Dominion Freightways Co. Ltd.* (1970), 21 L.A.C. 94 (O'Shea); *Toronto Electric Com'rs* (1967), 19 L.A.C. 75 (Arthurs)

²⁰ R.S.O. 1980 c. 137

²¹ *Canadian Labour Arbitration*, note 7 at 264

An early hint of that deficiency in the traditional definition of seniority is evidenced in *Canadian Labour Arbitration*²² referring to a particular case, *Federal Wire & Cable Co. Ltd.*²³:

“The right of an employee to accumulate seniority credits during periods of employment outside the bargaining unit and the right to exercise the seniority rights so accumulated both to return to and following resumption of work within the bargaining unit are contentious and frequently arbitrated issues. On one hand, it has been argued that as a matter of principle, seniority is a collective bargaining concept which is founded upon and restricted to the operation of the collective agreement, and that accordingly, both the accumulation and application of an employee’s seniority rights have meaning only in the context of the collective agreement.”

The contentiousness and frequency of litigation regarding seniority accrued outside vs. inside the bargaining unit signalled the necessity to expand the traditional definition of seniority from a measure of employment length to a concept covering a variety of employee rights accrued under the heading of seniority. More specifically, in a situation where enterprise “A” is absorbed into enterprise “B”, effectively the former employees of enterprise “A” had zero length of service in enterprise “B”, their new “home”, yet there was a well recognized need for them to preserve at least some measure of their accrued seniority rights from enterprise "A". To dispose entirely of their rights gained as one employee group while transitioning into a new bargaining unit would produce an exceedingly unfair result.

In an early U.S. airline pilot seniority arbitration²⁴ Arbitrator Lawrence Seibel said: “Seniority is better viewed as the currency of exchange within the market place of competing employee rights to benefits of their employment. It may be seen as a medium of trade for pay, benefits, work schedules, and all other employment conditions pertaining to a position in the workplace. Seniority is a coin of exchange as among pilots; it has value only on a basis relative to the seniority possessed by other fellow pilots.”

²² Brown & Beattie, *supra* note 17 at 24

²³ *Federal Wire & Cable Co. Ltd.* (1960) 3 Steelworkers Arbitration Cases 276 (Laskin)”

²⁴ *In the Matter of Arbitration: Flying Tiger Line Master Executive Council, Air Line Pilots Association, International, AND Seaboard World Airways Master Executive Council, Airline Pilots Association, International, AND International Brotherhood of teamsters, Airline Division of Local Union No. 851*, Lawrence E. Seibel, Independent Arbitrator, March, 1981, Chevy Chase, Maryland, USA, at P 143, Part II.

Traditional Methods of Seniority Integration

Out of necessity early arbitrators evolved several crude methods of integrating seniority across bargaining unit boundaries. The first and simplest was simply to append one seniority list to another or, in other words, “end-tail” one to the other usually on the basis of which company acquired the other or which was the “surviving” group. While this was simple, and undoubtedly pleasing to the “survivor” group, it defied widely held concepts of fairness and natural justice. This was the method used in case of the pilots of BC Airlines merging with the pilots of Pacific Western Airlines.²⁵

Some unions or union locals went as far as to negotiate terms in their collective agreements that would require or prevent end-tailing (depending on whether their company was the seller or buyer) as a precondition in the event of a sale of the business. For example: an early 1980s (pre-Canadian Airlines) collective agreement between Pacific Western Airlines Ltd. and the Canadian Air Line Pilots Association representing the pilots at Pacific Western Airlines Ltd. had a provision requiring pilots from any acquired airline be placed at the bottom of the PWA Pilots' seniority list. In this instance the PWA pilots' attempt at protectionism was rendered futile on a basic privity-of-contract analysis.²⁶

The second and third basic methods are two means of combining seniority lists with reference to employment longevity or date based seniority. The more basic is according to "date-of-hire" (DoH) and its variation, "length-of-service" (LoS) which is simply lay-off time and leave of absence time subtracted from overall time since the employee's date of hire.

²⁵ In 1969 Pacific Western Airlines, a regional airline then based in Vancouver purchased B.C. Airlines Ltd., also based in Vancouver but an entirely different operation by its nature, serving coastal communities with float and amphibious airplanes. Without any labour protective provisions in law the BCA pilots were simply offered positions at the bottom of the PWA seniority list.

²⁶ *Great Northern Railway Co. v. Cole Agencies Ltd.* (1964), 49 W.W.R. 153 at 159 (Sask.Q.B.)

The fourth means has acquired the name “dovetailing” presumably from the carpentry joint of that name.²⁷ The inference is a simple feathering together of seniority lists. Because seniority was traditionally viewed as “date-based”, dovetailing became somewhat synonymous with date-of-hire and the two terms are often used interchangeably in early merger arbitration awards.

Black’s Law Dictionary defined “dovetail seniority” as “Combining two or more seniority lists (usually of different companies being merged) into a master seniority list, with each employee keeping the seniority he had previously acquired even though he may thereafter be employed by a new employer.”²⁸ Twenty-five years later Black’s Law Dictionary says: “The combination of seniority lists from merging companies into one list that allows employees to keep their pre-merger seniority.”²⁹ Although the difference is subtle, it is significant. It shows a broadening of definition from seniority being defined by longevity on the job to a more general term, that is, “pre-merger seniority” which may be defined as: “longevity” or “relative ranking” or in variety of other similar means.

The image of a cabinet maker’s dovetail joint with uniform interlocking wedges of wood gives a better definition to the concept of ratio integration. Ratio integration also has variations, the simplest being a straight ratio of the sizes of the two groups. In other words, if there are 100 in one bargaining unit and 200 in the other then a straight ration combines one from the first with two from the second then one more from the first with two more from the second, and so on, through to the end. A common variation seen in some early pilot mergers was dubbed a “rank ratio” wherein each pre-merger seniority list was broken down into rank: captains, first officers, second officers, and each of those groups was combined by ratio with the equivalent group from the other airline to become the integrated list. A problem of this method was defining where in each pre-merger list the logical breaks should occur between groups due to differences such as at different bases or some cases of unusual personal preference driving a bid rather than the normal

²⁷ Oxford Paperback Dictionary, Thesaurus, and Wordpower Guide, Oxford University Press Inc., New York, 9th edition, 2001, p. 266: dovetail: “n. a wedge shaped joint formed by interlocking two pieces of wood” and, “v. fit together easily or conveniently”

²⁸ Black’s Law Dictionary, Henry Campbell Black, 5th edition, West Publishing Co., Saint Paul Minn., 1979

²⁹ *Ibid*, Blacks, 8th edition, 2004

job progression. In other words the determination of the proper comparator groups presented difficulties but not insurmountable difficulties. Therefore, as the sophistication of seniority integration developed, more subtle definitions evolved to define appropriate groups for combining by ratio.

The fifth method evolved out of the necessity to weigh acquired seniority in the context of the working conditions it represented in each of the pre-merger groups because large discrepancies in working conditions translated into gross injustices by any of the above mentioned, traditional methods. It involved moving the merger focus from old data, hiring dates, to current data, actual positions, and forward looking data constructed to estimate reasonable career expectations. It was pioneered by creative arbitrators such as Professor David Feller³⁰ in the Air New Zealand merger and the Canadian Pacific - Eastern Provincial mergers that are described in some detail below.

Substantive Elements of Seniority Integration

An integrated seniority list constructed solely on length of service is a single value concept that relies on ancient data and therefore is essentially frozen in time. Conversely a seniority integration that accommodates more recent and more relevant factors will, by any reasonable measure, more properly reflect the accumulation of seniority benefits earned by each individual over time. That is, seniority can no longer be viewed as a single strand entity but should be viewed conceptually as similar to a bundle of rights earned over time and transportable over bargaining unit boundaries with the proper form and proper value of each individual strand. It is always a summation of the values of each strand.

³⁰ Professor David E. Feller, Professor, University of California, Berkeley, Boalt Hall, a well known and respected labour figure having practised for many years as General Counsel to the United Steel Workers and argued several prominent labour cases at the U.S. Supreme Court.

Over the past four decades, airline mergers in the U.S. have developed and broadened the scope of factors broadly considered by arbitrators to be relevant to evaluating seniority for integration purposes. A thorough but not necessarily exhaustive list includes³¹:

1. The financial strength of one carrier to the other;
2. The length of service of each employee;
3. The date of hire of each employee;
4. The degree that the integrated list preserves the pre-merger positions and status of the pilots;
5. The new benefits that each group has derived from being part of the new carrier;
6. The types of service that each group brought to the merger;
7. The types and amounts of equipment that each group brought to the merger;
8. The equipment on order at the time of the merger;
9. The routes and route authority that each carrier brought to the merger;
10. The number and treatment of employees on furlough or leave of absence;
11. The pay and benefits that each pilot enjoyed prior to the merger;
12. The domiciles which are part of each carrier's operations;
13. The relative size of the two pilot groups;
14. The positions that each group anticipated absent the merger;
15. The prospects of the merged carrier;
16. The anticipated attrition as a result of retirement and the like;
17. The historic development and performance of the carriers;
18. The types of restrictions, temporary and/or permanent, that are necessary to make the integrated list fair and equitable throughout.

While all these factors will not be prominent factors in any given merger they are all quantifiable and each represents a viable factor in seniority integration akin to the concept of bundles of rights. A seniority integration that ignores any or all these factors may yield a result that is an

³¹ *Siebel, supra*, note 24 at 26.

absurdity. The degree of absurdity may be quantified in terms of windfall gains of employment benefits transferred by operation of the merged seniority list from one group to another.

Seniority has evolved into a complex concept that still functions as a medium of exchange among employees within a bargaining unit as was perceived by early airline merger arbitrators. However, it has become known that seniority has become much more complex as working demands upon employees have become much more complex. Seniority can no longer be defined in terms of one ancient event, that is, the day a given employee commenced his or her employment. To do so, ignores the vast value in employment of collective employee effort expended in a huge variety of ways to further the interests of the corporation and therefore the well-being of the employees. It is simply too simplistic and precipitates a huge disservice to the employees. Within the plethora of mergers examined in the course of this writing there is a common thread that proponents of simple date based seniority are coincidentally or otherwise the recipients of vast wind-fall gains if their simple theory is imposed as a final solution. This alone should raise sufficient suspicion of motives to dismiss those arguments as unworthy in this day of much more sophisticated analyses.

Seniority represents a long list of component factors relating to the terms and conditions of employment. Each of the factors present is capable of unique and stand-alone examination and evaluation. If seniority is taken to be the sum of these factors than it can be fairly and readily quantified for purposes of integrating into another seniority environment. Failure to take relevant factors into account will inevitably result in an inferior result which can wreak havoc on the careers of employees, and place in jeopardy the very survival or the corporate enterprise.

Evolution of Seniority Through the Consolidation of Canada's Airlines

The mid 1980s brought deregulation in Canada's airline industry which opened the flood gates to a series of mergers as the industry underwent an extensive and rapid consolidation. Quickly this phenomenon highlighted the need to re-define seniority. The following is a chronological summary of the evolution of seniority in Canadian airline pilot mergers.

PWA – BC Airlines

In 1969 Pacific Western Airlines, a regional airline then based in Vancouver purchased B.C. Airlines Ltd., a smaller, primarily VFR (visual flight rules) airline flying float and amphibious airplanes on British Columbia's coast. The pilots at B.C. Airlines were simply offered conditional positions and placement at the bottom of the PWA seniority list, a procedure called "end-tailing". There was no dovetailing or integration of seniority lists and therefore no reference to any definition of seniority.

PWA – Transair

In 1969 the Canadian Regional Air Policy provided for 5 regional carriers and licenced them to operate in defined geographical areas. From west to east in terms of their designated geographical area they were: Pacific Western Airlines, Transair, Nordair, Quebecair, and Eastern Provincial. Even in a fully regulated environment which essentially amounted to a licence to charge on a cost-plus basis, some of the designated areas were too small to support sophisticated jet service. Consequently, by 1977 Transair, based in Winnipeg, was struggling financially and became a take-over target for its healthier neighbour to the west, Pacific Western Airlines, a Calgary based regional. Both airlines had similar fleets (Boeing 737s) and similar flying made up entirely of short haul, domestic operations. Both pilot groups had similar pay rates and working conditions. The merger appeared to be an easy fit. The two pilot groups each made up a different local of the same union, the Canadian Air Line Pilots' Association, CALPA. At that point in time CALPA's policy guidelines provided little direct guidance for determining seniority in a merger but it did provide for an arbitration process and retained Arbitrator R. Gallagher, to integrate the seniority lists once it was clear the company intended to integrate the operations of the two carriers.

Arbitrator Gallagher concluded that out of deference to the presence of other important factors he must employ a different approach to assigning relative seniority positions in a merged seniority

list than strict adherence to simply date of hire or length of service. In his view, no longer did it square with logic to look only to past individual employment history in order to assess the weight of traditional seniority of the two groups. Arbitrator Gallagher elected to bring to bear the financial development of each airline over the employment period of its pilots as a modifying factor for the assignment of seniority in the new company. This was a pivotal point in the evolution of seniority from a monolithic count of consecutive days of employment into a multi-faceted concept, opening the door to consideration of an entire range of conditions that determined career progress as generally expressed through seniority.

Arbitrator Gallagher relied on evidence of the dire financial condition of Transair and integrated the seniority lists based on a ratio which favoured the PWA pilots and used the length of service concept only as a protective floor for the PWA pilots over the Transair pilots. The final effect was that by introducing financial viability to modify traditional seniority, Arbitrator Gallagher delivered a distinct seniority advantage to one group at the direct expense of the other.

Regrettably, Arbitrator Gallagher passed away before his work was completed and implemented and understood. Not having the benefit of full reasons, a sense of winners and losers emerged which unfortunately pervaded future mergers thus skewing perceptions and ability to accept finality of the process which will be discussed in more detail in Chapter 3.

Regardless, of how any discontent arose, a most important observation of the PWA - Transair process is that at the end of the process, there was acceptance by the parties of the result. The traditional labour-arbitration model of the parties selecting a wise adjudicator who heard the evidence and rendered a decision which in his view accounted for and accommodated the evidence in the best possible manner succeeded and was accepted by the parties. Finality was anticipated at the outset and the binding intent of the parties also at the outset was honoured and respected through to the implementation phase.

CPAL – EPA.

In 1984, the Canadian airline industry witnessed the first step in deregulation and industry consolidation. Canadian Pacific Air Lines, (CPAL), a national and international, full service

airline purchased Eastern Provincial Airways, (EPA), small regional airline operating in Atlantic Canada. Unlike the PWA - Transair merger just a few years prior, this merger was motivated by deregulation and consolidation, not just the financial ill-health and corresponding vulnerability of one player, which provides an opportunity to reduce competition.

There were vast differences in almost every aspect of the two companies. In CPAL the smallest planes were Boeing 737s which was the biggest type and only type of jets in the EPA fleet. Flight Crew (pilot and flight attendant) pay rates are determined in large part by the size of airplane they fly. Accordingly there were overall vast differences in pay scales as well as vast differences in job status and job desirability. The latter were termed intangible differences such as the opportunity in a world airline to fly the biggest and best airplanes all over to the world in contrast to small airplanes in small markets. Destinations in the South Pacific, Europe, and Asia held greater appeal as a feature of employment to most than the smaller cities of Canada's northeast. However, even in similar areas such as B737 operations there were significant differences in contractual provisions, most notably, rates of pay, in which the EPA pilots lagged. Both the EPA pilots and the CPAL pilots were members of CALPA which was struggling to ward off its own breaching within the rapidly evolving Canadian airline industry.

CALPA had, just following the PWA - Transair merger a few years earlier, adopted a section in its constitution in anticipation of having to confront another merger of one or more of its constituent groups. The constitutional provision was simplistic and gave strong guidance by stating that length-of-service (time since date of hire minus any lay-off time) would be the governing principal for merging seniority lists. The reference to consideration of other factors was vague which could be interpreted to infer secondary importance.

Following an aborted attempt to merge the seniority lists by negotiation and in accordance with a singular length of service principle, Arbitrator David Feller³² was retained by CALPA (with the agreement of the parties) as mediator/arbitrator. Arbitrator Feller had confronted a similar set of issues previously in the merger of Air New Zealand, an international plus domestic airline with a

³² *Supra*, note 31 at 29.

domestic-only New Zealand regional, New Zealand National Airways. Arbitrator Feller recognized the greater seniority value vested in the Air New Zealand positions as compared to the regional positions in the local airline, New Zealand National Airways. That is, the Air New Zealand pilots all either had, or had the potential of achieving, captain status on big, long haul, and higher-paying overseas airplanes. Arbitrator Feller integrated the seniority lists according to the traditional length of service method. However, he delayed implementation of the combined list for a period of ten years by which time all projections showed even the most junior Air New Zealand pilot would achieve Captain's status on overseas airplanes. Once in the position other contract provisions prevented them being "bumped" out. The ten year projection proved just sufficient time to achieve this goal. Arbitrator Feller was able to forge a union of two seemingly opposite schools of thought: the traditional which argued for "date-based" seniority without regard for the outcome or effects, and those who sought a balance of benefits in recognition that one group's seniority had greater value than the other. However, his ten year implementation period was a guess into the future.

Arbitrator Feller faced an analogous problem in the CPAL-EPA merger. The EPA fleet was five short haul, B737s and 3 very short haul turbo-props. The majority of the CPAL fleet was long haul DC8s, DC10s and B747s as well as some B737s, and, as mentioned, the CPAL pilots had substantially higher rates of pay even with respect to equivalent positions for example on the B737s. It was not a balanced situation going into the merger.

Arbitrator Feller recognized at the outset that strict adherence to the Length of Service principle would produce huge windfall gains for the EPA group at the direct expense of the CPAL group. Concurrently, the CPAL pilots' proposal of an end-tailing solution with a set of protective provisions for the EPA pilots to preserve their kind and number of pre-merger jobs. Arbitrator Feller, was able to dismiss both positions as extreme and inequitable and turn to the "other factors may be considered" clause in the CALPA constitution to fashion a more equitable compromise.

Arbitrator Feller turned to the demographics of the two groups to find a means to integrate the seniority lists by preserving to the greatest extent possible the elements each group valued the

most. This constituted a breakthrough in approach by identifying and quantifying the elements of precisely what seniority was able to procure for each member of each group, then looking for a means to reconcile those elements.

Initially Arbitrator Feller framed the question in terms of future expectations which was radically different from measuring past service: “The problem with which the Board wrestled is the devising of a method of merging the seniority lists of the two airlines so as to preserve to the maximum extent possible the reasonable expectation of each group without impairing the expectations of the other.”³³ .

Arbitrator Feller’s analysis was constrained by the practicality of having to produce a solution that was simple enough to survive in the practical world of operating the airline. Others had failed by virtue of their cumbersome complexity. For example, British Overseas Airways Corporation and British European Airways merged in 1974 with a basic integrated seniority list and a series of complex seniority solutions that proved so complex as to eventually be deemed unworkable. When stripped away out of necessity to achieve even a minimum amount of workability, the much coveted BOAC positions suddenly became available to the former BEA pilots to the great loss of the former BOAC pilots.

Arbitrator Feller chose to balance the benefits of the merger to the two groups by incorporating a feature of each airline’s hiring patterns that resulted in non-linear hiring over time. That is, both airlines tended to hire in groups that reflected cyclical industry economic conditions. By placing the CPAL pilots a step ahead in hiring groups he granted sufficient greater seniority to the CPAL pilots to ensure the bulk of their pre-merger expectations to rise within their careers to the premium pilot positions on overseas airplanes, while not entirely excluding the EPA pilots from substantial improvements as a result of the merger. That is, Arbitrator Feller granted the CPAL pilots greater seniority on the merged list than their length of service would have obtained for them and provided some protective conditions to preserve the reasonable expectations of the EPA pilots from abuse by the higher seniority granted to the CPAL pilots. In this way he gave

³³ *In the Matter of the Merger of the Pilot Seniority Lists of Canadian Pacific Air Lines and Eastern Provincial Airways*, Professor David E. Feller, Berkeley, California, November 17, 1986, at 10.

modified effect to the principle of length of service but primarily based the new seniority on the variety of differences in each pilot group's pre-merger circumstances, in what each pilot group valued highest in their pre-merger environment.

The Feller Award was radical because it was forward looking, not simply rooted in ancient past data. It attempted to recognize and balance the components of bargaining unit life that were governed by traditional seniority. However, it was not widely understood this way and when it was issued it landed in a highly charged environment of prior union problems. Accordingly it never gained wide acceptance, generated considerable controversy, and, because it was overtaken by rapid consolidation in the industry, it was never implemented.

During the process that produced the Feller Award another regional airline, Nordair was acquired by CPAL. Shortly thereafter the remaining regional, Pacific Western, purchased the much larger CPAL. These events are what overtook the implementation of the Feller Award.

The principle that emerged from the Feller arbitration was that traditional seniority concepts can be equitably modified with factors that take a view toward the future not just factors rooted in history to produce a just result. In other words, while Arbitrator Gallagher chose as a modifying factor the financial health - a view to the immediate past - of the airline, Arbitrator Feller chose a forward-looking view of pre-merger expected pilot careers as an appropriate factor to modify traditional seniority.

CPAL, PWA, and Nordair in the formation of Canadian Airlines International, CAIL ³⁴

By as early as the mid 1980s it had become readily apparent in airline mergers around the world that in a merger between a regional and an overseas airline the regional pilots stood to reap substantial overnight gains in their careers. Moreover, date-based seniority integration significantly enhanced those gains. Accordingly, the representatives of small regional carriers being merged with bigger, international carriers typically advanced date-based solutions often as

³⁴ *In the Matter of a Seniority Arbitration of the Pilots of Canadian Pacific Air Lines, Pacific Western Air Lines, Nordair Inc., and Eastern Provincial Airlines*, M. Teplitsky, 1987.

a sanctity kind of argument³⁵. During the a980s and 1990s a great many regional airlines were absorbed by major airlines. Their collective voices strengthened by their numbers in lieu of strength in their logic, as they vociferously advocated the simplistic position that seniority is based on the start of employment; that was the way it had always been done; and that was what was universally understood by all pilots. This argument, frequently advanced in the guise of a statement of it being a high and irreproachable principle (sanctity), was solely self-serving and failed to account for any but one of the myriad of factors comprising the concept of seniority.

Conversely, pilots from bigger, multifaceted airlines resisted length of service and advanced the approach of balancing the distribution of benefits of the merger to prevent the dilution of, and preserve to the greatest extent possible, that which they had exclusive domain over prior to the merger, namely the greater opportunities for greater careers, flying bigger and newer airplanes to more exciting destinations for more pay. This was the mindset that preceded the merger of CPAL, an international full service airline with PWA, Nordair, and EPA, all regional airlines and all members of CALPA.

By the late 1980s CALPA was confronted with the dilemma of merger events surpassing its processes and therefore yielded to the collective weight of the regional or small-airline representatives. That is, CALPA abandoned the chronological sequence of events, and ordered a three way seniority merger, CPAL, Nordair, and PWA. Also, because CALPA had never negotiated a new collective agreement covering the pilots of CPAL and EPA as integrated by Arbitrator Feller, there remained an uncertain partial standing for the EPA group. Arbitrator Martin Teplitsky, was retained by CALPA to produce an integrated seniority list for the four airlines.

Arbitrator Teplitsky adopted the plain language interpretation of the CALPA Merger Policy reference to length of service as the governing principle and declined to follow other arbitrators by considering or applying any other modifying factors. Then, on his own motion he dealt with the EPA group by quashing the Feller Award and inserting the EPA pilots into the newly

³⁵ see p 13 for "sanctity"

combined CPAL-PWA-ND list at length-of-service seniority levels discounted by an arbitrary amount of twenty percent.

The Teplitsky arbitration reverted to a single factor solution based on length of service with the EPA pilots inserted ex post facto on a similar but modified basis. In contrast to prior mergers, Arbitrator Teplitsky specifically rejected any current or forward looking factors in contrast to prior mergers.

Canadian – Wardair.

The further consolidation of the Canadian airline industry came shortly after the formation of CAIL with the financial demise of Wardair, a unique former niche player that had transformed itself into an international airline but built upon an historical foundation of charters, not scheduled destinations. This factor limited Wardair to a weakened start into the world of full service scheduled carriers because it had no network of destinations built up over time. All the former regionals in Canada, that is Pacific Western, Transair, Nordair, EPA, and Quebecair had unsuccessfully tried charters through the 1970s and 1980s. In the 1980s Wardair succeeded in charters where others had failed. However deregulation allowed scheduled operators to compete more directly with charter operators such as Wardair. Wardair was therefore forced to transition into a scheduled airline in spite of lacking an established base of scheduled destinations and customers. The result was extensive financial hemorrhaging. In its weakened state Wardair was purchased by Canadian in 1989 and subsequently integrated into Canadian. Although this is an over-simplified account of the demise of Wardair, it sets sufficient background for our purposes in this discussion.

The Wardair pilots were not members of CALPA and therefore CALPA could not provide an umbrella or governing vehicle for governing the merger. The Wardair pilots had an in-house union called the Air Crew Association of Canada (ACAC) which included a number of flight engineers who fulfilled a dual role as second officers in flight and engineer on the ground. The component airlines of CAIL had abandoned that model for several reasons in the late 1960s which meant there would be no home for the Wardair flight engineers within CAIL. Instead

each was given an opportunity to qualify as a pilot within CAIL and a junior placement on the seniority list according to a formula that partially accounted for years of service.

Without a common union to facilitate the seniority integration a unique process was negotiated and termed a set of “consensual terms of reference”, later called the “Protocol”. The protocol contemplated arbitration and bound the parties to the result. Arbitrator Donald Munroe was retained to integrate the pilot seniority lists.

In one important factual aspect Arbitrator Munroe’s Wardair integration was opposite to the Teplitsky integration. In the Teplitsky Award, smaller regional carriers with smaller airplanes were joining a large carrier with a mixture of large and small airplanes which guaranteed an improvement in job scope for the regionals regardless of their new seniority positions. Conversely, Wardair, although a relatively smaller airline, had only large airplanes, which provided the premium jobs. Accordingly, the arguments typically advanced on behalf of the pilots from the smaller airline would actually work against the Wardair group, thus producing a curious reversal of customary positions. To the Wardair pilots the substantive argument was recognition of the industry status they had attained albeit in a very short time in their airline. To the CAIL pilots the governing principle was the longevity of their careers in gaining their status.

Arbitrator Munroe took both into account by recognizing that the considerably shorter term that Wardair had existed as an international airline detracted significantly from the strength of its pilots' argument of legitimacy in long term career investment. It was a matter of fact that Wardair’s unduplicated, international routes were few, their market share was small, and their time invested as an international airline was relatively short. In sum, the facts simply did not support the contention that the addition of Wardair to CAIL would result in any substantial increase in combined flying for the integrated pilot group to enjoy. In the words of Arbitrator Munroe: “... a dispassionate appraisal of the relative values brought to the table leaves this argument by ACAC (the Wardair pilots’ union) without any real force.”³⁶

³⁶ *In the Matter of a Seniority Integration of the Former Pilots of Wardair Inc. Represented by the Air Crew Association of Canada with the Pilots of Canadian Airlines International represented by the Canadian Air Line Pilots Association*, Donald R. Munroe, 1991, at 27.

Arbitrator Munroe recognized that a date-based integrated seniority list had the appearance of a fair distribution of the benefits of the merger. His view of the merits of one principle versus another was that because there is some inherent value in defining seniority in terms of length of service, all mergers should start from the premise that length of service should govern as a rebuttable presumption with the onus on the party seeking to substitute another formula to provide persuasive and compelling evidence to do so. Arbitrator Munroe did not advance the proposition that seniority should be singularly based upon length of service but suggested that was a logical starting point in the form of a rebuttable presumption with the onus on the party seeking to another solution to make a sufficiently compelling case to displace the presumption.

Air Canada, Canadian and Their Respective Feeder Networks:

The next step in the industry consolidation was internal consolidations within the two big players in the Canadian industry, Canadian Airlines International and Air Canada. Both airlines had structured themselves with a main or core airline, frequently referred to as the "mainline", surrounded and supported by regional short-haul feeders flying mainly lower cost prop airplanes, frequently referred to as "partners" or "connectors". The connectors had grown up in the place of the earlier regionals which tended to remain in geographic areas although not constrained to do so as the regionals were under the regulated environment. Initially connected by commercial agreements the feeders ultimately became partially or wholly owned subsidiaries of the main airlines at which time their pilots sought access to positions on the seniority lists of the main airlines.

In Canadian Airlines, an agreement was made between the company and the two separate pilot groups which permitted for an orderly flow of pilots from the feeders to the main airline in response hiring requirements of the main airline. Simultaneously agreement was reached between management on one hand and the pilot group or groups on the other on the difficult issue of which flying would be preserved for which group.

However, within Air Canada the same cooperative spirit did not exist either between the company and its two pilot groups or between the pilot groups. At first perception of this problem, the Air Canada pilots opted for a process developed in the U.S industry known as “scoping” which involved negotiating restrictive provisions into their collective agreement which limited the scope (type and quantity) of flying that management could divert to their lower cost partners or connectors. Scoping amounted to inserting an impenetrable barrier between the separate pilot groups along with negotiated control over the allocation of flying. Scoping was squarely in the path of the relentless pressure of deregulation and corporate consolidation. In other words, corporate manoeuvring became more adept than organized labour manoeuvring around collective agreements.

Subsequently the Air Canada pilots agreed, through CALPA, to merge the seniority lists. CALPA retained Arbitrator Michele G. Picher for this purpose. The Air Canada pilots simply proposed that the Connector pilots be end-tailed at the bottom of the Air Canada list - a solution not seen since the BC Airlines - PWA merger many years prior. Arbitrator Picher, determined that the traditional date-based solution was inappropriate because of the extreme result it generated, but found sufficient overlap in the nature of the junior Air Canada flying to adopt a modified date-of-hire solution, the impact of which would be confined to the bottom 15% of the Air Canada pilots seniority list. Thus the Picher Award was retained an element of traditional, date-base consideration albeit extensively modified. The selection of method adopted in the Award was justified in terms of apportioning the benefits and affects of the merged seniority list; fairness is the distribution of benefits.

However, the Air Canada pilots reacted by rejecting the Picher Award outright as entirely unacceptable that any Air Canada pilot could be junior to any Connector pilot. In order to avoid the effect of an implemented Picher Award the Air Canada pilots withdrew from CALPA and formed their own, in-house union, the Air Canada Pilots Association, ACPA, leaving the Picher Award to die. As will be explored at greater length in Chapter 3, this was the break of the long-standing tradition in labour relations where parties abided by their commitment to finality once the contemplated process was exhausted.

Air Canada – Canadian:

In December, 1999, Air Canada succeeded in its long pursuit to eliminate its competition in Canadian Airlines International either by forcing bankruptcy or merging thus triggering the biggest and arguably the least successful seniority integration seen to that point in the Canadian airline industry. The parties were well financed and positions were hardened by previous experiences.

Unlike previous experiences being able to abandon a result by abandoning membership in a union, the Air Canada pilots now had to engage in a no-escape process under the Canadian Industrial Relations Board. Also, both groups were large enough to garner the necessary resources to properly conduct a thorough and extensive arbitration. Both airlines featured a full spectrum of flying, narrow body, short haul to wide body long haul international flying in similar proportions. Both groups had experience in the process of seniority integrations. That is, they were similarly situated; the only difference being size. The Air Canada group outnumbered the Canadian group by approximately 2000 to 1200 pilots.

The single most significant difference between this merger and previous mergers as mentioned above was that as the two pilot groups were in different unions, Air Canada Pilots Association, ACPA, for the Air Canada pilots and the Air Line Pilots Association, ALPA, (successor to CALPA), for the Canadian pilots, the process would not be conducted under the auspices of either union but under the auspices of the Canadian Industrial Relations Board, (CIRB or the "Board"), in accordance with the principles laid down in the *Canada Labour Code*³⁷ (the *Code*). The result would be made into a Board Order having the force and effect of law. Therefore there would be no escape route available by simply opting out of the union and into a new union. The employer, Air Canada, was in a sensitive position but a legitimate position giving it limited standing as *amicus curiae* in the process as the future recipient of the result. In that the result

³⁷ *Canada Labour Code*, R.S.C. 1985.

would become an order of the Board, Air Canada would be compelled to abide by the result not merely obligated to enter into a negotiation in due course for implementation.

The following brief summary underscores the intensity of the parties in the process:

On August 3, 2000, the CIRB declared Air Canada and Canadian Airlines International to be a single employer and on October 17, 2000, ordered a consolidation of the bargaining units which triggered a membership preference vote. With no surprise the vote favoured ACPA, given the relative numbers in each group, approximately 2,000 to 1,200. A transfer of ALPA's representation rights to ACPA occurred in May 2001. However, the CIRB ordered that ALPA would continue to represent the Canadian pilots on seniority matters. Appropriate arrangements were made for dues check-off to fund ALPA's litigation by the former Canadian pilots. However, even this step generated a very tenuous situation with repeated accusations that the surviving union, ACPA, frequently misused its resources and influence to the detriment of the Canadian pilots who were contributors of dues essentially used against them.

From this point onward, in the eye of the public all the pilots were indistinguishable Air Canada pilots. Airplanes were repainted, uniforms changed. The Canadian identity was rapidly erased. However, although flying was essentially pooled, crews could not be intermingled without an integrated seniority list with which positions, flights, vacations, etc., could be allocated. It was an uncomfortable and tense period with each side wary that their flying might be siphoned off to the other side. There were numerous allegations of corporate mischief in this regard particularly around difficult scheduling times such as Christmas and difficult scheduling to popular destinations such as Asia and Hawaii. The willingness of the parties to quickly and vociferously complain about unfair treatment at the hands of the Company was a stark lesson in the need to fairly and conclusively resolve the seniority integration question. However, even nine years after the process began finality still eludes Air Canada. Internal tensions are high within the Pilots' union and significant matters such as negotiation strategy are still determined along old lines of division in the group. The protracted nature of the process has generated mistrust and distrust between the pre-merger groups which, in the long run, has detracted from acceptance of the final result and employee harmony to the detriment of the new airline as will be shown in Chapter III.

The parties agreed, under the auspices of the CIRB, to a protocol known as the “Mitchnick Protocol”, which contemplated arbitration under a sole arbitrator, Morton Mitchnick. The Protocol provided, among other things, that the Mitchnick Award when rendered would be incorporated into a CIRB order and be final and binding on all the parties, including Air Canada, except for a specific CIRB reconsideration process and/or judicial review which, of course, could not be contracted away. This was the logical application of the historic labour relations arbitration model with the escape route of opting out of the union foreclosed by the jurisdiction of the CIRB in place of the jurisdiction of a single union.

The parties took predictable positions on the substance of the merger. The Canadian pilots advanced the position that since the two fleets were approximately the same make-up in terms of size of airplanes and scope of flying that a date-based integration method was appropriate in logic. The Air Canada pilots argued that the imminent financial demise of Canadian severely undermined the Canadian position as had been the case in the Wardair merger. Therefore, the bulk of the flying opportunities should be preserved for the Air Canada pilots. The Canadian pilots counter argued that a date-based solution was historically preferable (sanctity argument) and that any measurable advantage gained by the Canadian pilots through demographic differences could be offset by short term fences that would prevent a flood of pilots from one side into the premium jobs historically held by the other.

Arbitrator Mitchnick issued his award on March 31, 2001 rejecting the Canadian pilots' proposal for length of service. By his selection of groups to be combined by ratio he applied a substantial discount to the Canadian pilots' seniority. He based this on his view of the poor financial health Canadian Airlines at the time of purchase by Air Canada. Arbitrator Mitchnick's rationale was similar to that of Arbitrator Gallagher in *Transair* in the 1970s and Arbitrator Munroe in *Wardair* in the 1990s. In effect, Arbitrator Mitchnick's discount was a reverse application of the same methodology applied by Arbitrator Feller in *EPA* more than a decade earlier. Arbitrator Mitchnick also went further and provided extensive fence conditions and restrictions.

The Canadian pilots were displeased by the methodology Mitchnick employed (substance) and had grave concerns about the process as well. Accordingly they sought CIRB reconsideration on both grounds as had been provided within the protocol. By agreement the procedural review was postponed in favour of dealing first with the substantive review. Ultimately the procedural review was unnecessary.

Also as provided in the Protocol, the CIRB incorporated the Mitchnick Award into an Order which had the effect of directly implementing it with Air Canada. Thus, as mentioned above, there was no opportunity or requirement for collective bargaining and therefore no escape route. Accordingly, crews became intermingled, positions were bid on and won or lost, and flying was scheduled according to the Mitchnick seniority list.

The review provided by the Protocol was undertaken by the CIRB Chair, Paul Lordon. On 10 July 2002, over a year after its implementation, the CIRB, through Chairman Lordon, ruled on the substantive review that the Mitchnick Award “was not consistent with the Mitchnick Protocol and failed to give effect to the remedial approach to seniority integration as directed by the *Code*.”³⁸ Essentially it said that Arbitrator Mitchnick had erred, not in the type of solution he chose but in the choice of comparables or groups for ratio integration in which he relied too extensively on the financial condition of CAIL thereby displacing consideration of the preservation of seniority and collective agreement rights as required by §18.1 and 35 of the *Code*:

"After hearing the parties at this stage, it appeared to the Board that economic issues might, under the provisions of the Code, be less relevant than they had been considered to be by the arbitrator and that the key issue in the circumstances appeared to be the Code's intention that there be a continuation of the collective agreement rights of the two parties in a process resulting from a merger pursuant to section 35."³⁹

"First of all, as noted above, all relevant considerations should be assessed, but under the provisions of section 18.1 of the Code, the preservation of pre-existing seniority and

³⁸ *Air Canada* CIRB Decision 183, 10 July 2002, Lordon

³⁹ *Ibid*, at ¶61

related collective agreement rights must be a priority. The Board must undertake this task in the context of the Code in a manner that supports the objectives of the Code including free collective bargaining, sound labour-management relations and in a manner that ensures a just share of the fruits of progress to all..."⁴⁰

This CIRB decision clearly endorsed a distribution of benefits basis approach for achieving substantive fairness as discussed in Chapter I.

While Chairman Lordon's decision did set aside Arbitrator Mitchnick's Award it did not have that immediate effect because there was nothing to put in its place. The two pilot groups were already intermingled; the Company was conducting its business based on the Mitchnick seniority list. A retreat to pre-merger circumstances was simply not possible, thus Air Canada had no choice but to continue with the Mitchnick list until an alternative was developed. This introduced a huge incentive to delay on the part of the Air Canada pilots who felt any change from Mitchnick would be detrimental to them.

The CIRB strongly encouraged the parties to find a solution through negotiation. However, that proved unattainable but the parties, with the assistance of Arbitrator Brian Keller, were able to agree on another protocol, the Keller Protocol, with a three person panel chaired by Arbitrator Keller to resolve outstanding matters now narrowed in scope by Lordon's CIRB Decision 183. Arbitrator Keller made a signed commitment to "final and binding" by the parties a pre-condition to his accepting the chairmanship of the panel.

The Keller Protocol was accepted and approved by the CIRB, also in an order. It's primary differences from the Mitchnick Protocol were threefold: that the scope of its issues was narrowed by the CIRB in Decision 183, it specifically excluded further review by the CIRB, and contained the aforementioned "final and binding" commitment by the parties, save, of course, for judicial review.

⁴⁰ *Ibid* at ¶139

Lordon's decision narrowed the scope of Arbitrator Keller's jurisdiction by pre-determining that the final result would not be a date-based solution but would be in integration of a series of ratios between appropriate groups within each pilot group according to whatever factors the Keller Panel felt appropriate. Thus the Keller Award would be removed entirely from the realm of date-based solutions and consist of groups combined by ratio according to group similarities. It fell to the Keller Panel to determine the appropriate make-up of groups to be combined by ratio.

The Keller process itself was lengthy with extensive submissions from both parties and hearings over the first 6 months of 2003. On the last scheduled day of hearings/meetings with the parties the OAC delegation, without voicing any prior concern, withdrew, abandoning the process, and so advising the Board through their nominee, “because of the direction the award was heading and the process that was used to get there.”⁴¹ They subsequently attacked the panel for working in a vacuum after they left. As was anticipated at the outset, there was no agreement within the Keller Board so the opinion of Arbitrator Keller issued as the Award on June 16, 2003, with two conflicting dissents. It was immediately implemented by Board Order and has remained in effect since. The Keller solution was based on ratios of groups within each list in accordance with Lordon's finding in review. It also contained a particularly contentious provision intended to counter the effect of Arbitrator Mitchnick's solution being implemented and employed for seniority matters for over two years in spite of its inappropriateness and detrimental effect on the OCP pilots as determined by Chairman Lordon's review. It was subsequently attacked both substantively and procedurally as will be outlined in Chapter III.

Other unions at Air Canada

Typically the world's airlines have five unions within their structure. In addition to the pilots, flight attendants, mechanics, ticket agents, and office staff are typically unionized. For the most part the other unions at Air Canada found common ground to integrate their personnel without the bitter acrimony that consumed the pilots. Most were integrated along the lines of a date based solution which worked satisfactorily with some small allowances given, such as in the case

⁴¹ Final ACPA statement read to the Keller Board.

of the flight attendants for differences in quality and scope of jobs. It appears that the greater mobility of those persons in and out of the industry rather than mobility within the industry (for example mechanics can switch in a matter of days from aviation to resource extraction in northern Alberta unlike pilots and flight attendants) significantly dulled any detrimental impacts resulting from a more traditional seniority integration.

Air France - KLM

As noted previously, it appeared that the merger of Air France and KLM⁴² may become a historical merger by being the first cross border integration of actual work groups specifically the pilots, within the airline industry. However, in spite of the diligent work done by the two pilot groups and others in preparation for that event, the process has stalled mainly due to inter-governmental requirements within the world airline industry. For example, international flights operate by way of bilateral agreements between the country of origin and destination of any given flight. Netherlands maintains a slate of bilateral agreements with all the countries KLM flies to just as France does for Air France. Any change in any of those agreements or route authorities requires the agreement of the other participating country. That is, at the time of this writing there is no mechanism for interchanging or substituting a KLM route authority with/for an Air France route authority, or visa versa, thus the new airline, Air France-KLM cannot mingle the operations of the two previous airlines. Bilateral agreements are in the hands of governments, not airline companies. Any attempt to renegotiate bilateral agreements is typically met with a plethora of demands for changes in service levels and access to prime destination slots.

Despite these obstacles, it appears that the general momentum of the European Union in bringing itself together into a significant world economic and political force will overcome these hurdles. In 2004 a five year moratorium was placed on the Air France - KLM merger. At the expiration of the moratorium it is anticipated the merger will precede and it will become clear on what basis the pilot seniority integration will be accomplished. A protocol agreement has been negotiated

⁴² Koninklijke Luchtvaart Maatschappij, Royal Dutch Airlines

and agreed upon between the two pilot groups under the auspices of the International Federation of Airline Pilots' Associations but the substantive means of integration is yet to be revealed.

Chapter III PROCESS:

This chapter turns to the other side, process. Fairness in process is every bit as important as fairness in substance. Those who believe a process is fair are much more receptive of any result than those who believe their case was never properly heard. Perhaps as importantly to the overall quality of a process is the provision of finality to conclude the process so the parties are able to move on in life.

Through a few selected case studies this chapter will explore the essential elements of process including fairness and finality not just within the context of merging companies but also reaching out into other important areas which will illustrate where denied or disrupted process also denies fairness. This chapter will start with a look at two cases in the realm of public law then return to the private law realm of the Air Canada pilots to re-examine their merger struggles from the point of view of their process and where it broke down.

Final + Binding = Certainty

What is the meaning of “final and binding”? The Oxford Dictionary definition of “final” is: adj. 1. coming at the end; last, 2. allowing no further doubt or dispute: *the decision of the judges is final*. And of “binding” the Oxford says: “adj. (of an agreement) putting someone under a legal obligation.”

Black's Dictionary says of "final": "Last; conclusive; decisive; definitive; terminated; completed", and "final award" is: "One which conclusively determines the matter submitted and leaves nothing to be done except to execute and carry out terms of the award".

"Certainty" is defined as "a fact that is true or an event that is definitely going to take place". Certainty is a necessary underpinning for most aspects of our legal and economic systems. Certainty in the realm of post merger work group integrations defined as the product of joining final and binding is arguably the single most important ingredient for success.

Certainty may be best explored inversely, that is by examining what occurs in the absence of certainty. This part looks at difficulties arising from the elusiveness of final and binding in three separate, high profile Canadian cases, two in the realm of collective bargaining in the public sector and the third, the Air Canada pilots from the perspective of process.

The first case is the British Columbia Crown Counsel and their labour difficulties experienced with their employer, the Government of British Columbia. This is a public sector, employer-employee labour dispute, its history and evolution over the last fifteen years. It is a small group of individuals, approximately four hundred, without a singular major economic impact on the Province overall, but undoubtedly with the financial and legal resources to engage in an unencumbered pursuit of its rights and goals as well as crucial positioning to force its issues by use of traditional labour tools, namely a withdrawal of services. The primary feature of this case is the attack on the doctrine of final and binding by the Provincial Government's imposition of the concept of legislative supremacy.

The second case involves the BC Doctors through the British Columbia Medical Association. The BC Doctors' relation with the Government of BC is a fee for service relationship, not truly an employer-employee relationship. BC Doctors are also a sophisticated group in experience and legal resources, and political clout, and by virtue of their numbers have a substantial impact on the economics and political well-being of the Province. Again, a primary feature of this case is an attack by the Provincial Government on the doctrine of final and binding through legislative

supremacy but in a bigger and more public way yet where the government must have felt it could succeed politically.

The third case is in the area of private law in the federal arena and examines from this different perspective the attempts through its intra-union relationship of the pilots of Air Canada to evade the customary final and binding features of traditional labour arbitration. This part examines not the substantive issues arising out of industry consolidation as reviewed in the previous chapter, but the processes in which the Air Canada pilots have tried to avoid unwanted results arising from interest arbitration in which they first voluntarily, then were circumstantially forced to participate.

In these cases the concept of “final and binding” is elusive but for different reasons. The difficulties in reaching the certainty of “final”, and the unwanted dilemmas from the need to continue to operate in an uncertain world with ongoing litigation extracts a high price both in financial and human terms.

B.C. Crown Counsel

The B.C. Crown Counsel Association, (the BCCCA), was incorporated as a B.C. Society in 1991 to represent crown counsel in B.C. in matters involving terms and conditions of their employment with the government of B.C. Through the ensuing 15 years they have maintained a turbulent relationship of escalating strife with their employer, the Government of British Columbia, seeking bargaining recognition, wage and benefit improvements, an acceptable structure for the crown counsel hierarchy, an acceptable structure for dispute resolution, and parity with similarly situated groups elsewhere in Canada, through a lengthy series of mediations arbitrations, job-action threats, and legislated “collective agreements”. BCCCA attained the designation or full status of a union in 2005. The following is a historical, background sketch:

The driving force for creation of the BCCCA in 1991 was several years’ stagnation in salaries. 1992 brought a solidly backed move for job action of dubious legitimacy because of the BCCCA’s grey-area, quasi-union status. However it was, at a minimum, a successful tactic

which precipitated an eleventh-hour commitment to mediation (Mediator V. Ready) from the provincial government. Most importantly, both sides bound themselves to the mediation result and a first contract was signed in late 1992 running to March, 1995.

Late 1994 brought the first of a series of contract extensions or roll-over contracts which featured virtually no changes from previous contracts. The 1992-1995 contract was rolled over in order to continue from March 1995 to March 1996. In March 1997, another roll-over was implemented to cover the period 1996 – 1998. Through 1998 and 1999 negotiations went nowhere until another eleventh hour job action crisis brought Mediator Stephen Owen, but no commitment on the Government's part to be bound by the mediator's findings. It may have been the case that the BCCCA presumed a prior commitment on the part of the Government in a manner similar to the Ready Mediation in 1992. That was typical of mediation processes of that era, grounded in the long standing tradition of referring labour disputes to respected third parties, (neutrals), whose solutions were politically unimpeachable and therefore accepted and implemented by the parties. That is, no party would dare go against them because of the overwhelming political fallout. This precipitated a more angry response by the BCCCA when the absence of such a commitment on the part of the Government became apparent. It was the first signal of a major shift from prior processes.

Mediator Owen reported comprehensively on salaries and internal structure of the Crown Counsel office to the parties in a period of nine months. The Government refused to act on any of Mediator Owen's recommendations. It may be noteworthy, (but not necessarily a justification), that this chapter of this dispute was played out in the midst of a political change-over, the final months of the NDP provincial government of the nineties, which by 2000 and 2001 featured a rapid succession of premiers and senior ministers.

In March, 2000, the BCCCA again went to the brink of a political crisis by setting down a date for a two day withdrawal of services. The Government escalated its response by way of an application for an injunction. Again, an eleventh hour settlement, a formal agreement called a Memorandum of Settlement, to engage Mediator Donald Munroe averted the "strike" and the necessity for an injunction which was abandoned before it was heard by the court. The

Memorandum of Settlement provided typically common yet, agreed upon points to “contribute to the orderly, constructive, and expeditious settlement of terms and conditions of employment”. However, it further provided that the BCCCA would be bound by the recommendations of the mediator, but the Government, citing the supremacy of the legislature in a democratic society, would not be bound by the mediator's findings but would only have to report to the legislature in a "reasoned response" if it chose to reject the mediator's findings. In sum, the terms of the Memorandum of Settlement bound the BCCCA, but not the Government, to the mediator's findings. Final and binding on one side but not on the other.

Mediator Munroe's recommendations broadly addressed many of the contentious issues such as the matter of the internal structure, that is, the various levels of responsibility and corresponding remuneration within the hierarchy of the crown counsel group, which had long plagued the parties. His recommendations form the basis of the structure as it remains today. Munroe also thoroughly canvassed the contentious issue of appropriate comparator groups within Canada and abroad for determination of appropriate salary levels. Further, he squarely confronted the frequently-advanced Government argument that mediators and arbitrators fail to account for the Government's financial position by awarding generous settlements as though the Government had endless amounts of money. Mediator Munroe's recommendations were substantively comprehensive nevertheless, yet on the process side, the Government required, for itself only, an escape clause from prior commitment. The BCCCA again displayed a sense of betrayal with the process due to the non-reciprocal commitment to finality.

The Munroe Memorandum of Settlement agreed upon was implemented within a week of the withdrawal of the strike and injunction. Ten weeks later, Mediator Munroe published his full recommendations which formed the basis for a five year agreement running to March 2003. One provision in the agreement was for the *Crown Counsel Act* to be amended to give the BCCCA statutory recognition which was done in July 2000. Another provision required that an expert report, ultimately the Connaghan Report, be prepared prior to the next round of bargaining, concerning, among other things, salary comparisons with similarly situated crown counsel in other jurisdictions. The Connaghan Report was completed in February, 2003, and viewed as conclusive by the BCCCA in order to properly inform the parties of the issues prior to bargaining

for the next Agreement. However, the Government took the view that it was for information only and had no binding effect. Once again the BCCCA was caught in another surreal revelation that final and binding was on their side alone. And once again, the difference in commitment toward binding triggered a strong feeling of betrayal on the part of the BCCCA.

A further provision of Mediator Munroe's report established a Dispute Resolution Panel which would be established to assist the parties in dealing with their long outstanding issues of remuneration and selection of appropriate comparator groups for determination of remuneration.

In October, 2003, the Dispute Resolution Panel, chaired by Mr. Colin Taylor, QC, began hearings, under the asymmetrical mandate, that their recommendations would bind the BCCCA but not the Government. Although the Government retained the its escape clause, (referral to the Legislature), this time Government rejection could lead to withdrawal of services, that is a strike, at the time of the following contract, which would be April, 2005. This represented a small but significant change in the process providing the BCCCA with a viable and strong avenue of response to the absence of final commitment on the part of the Government. Thus the BCCCA had, in fact and in potential action, attained the true stature of a union.

The Taylor panel dwelt extensively on defining its own role as a dispute resolution panel in the historical context of seeking to replicate what solution the parties might have reached if an impasse had not occurred, not that of weighing the stronger and weaker position points in order to fashion a compromise within those bounds. Secondly, it advanced a thorough analysis of determination of the appropriate comparator groups with respect to remuneration equity. The Government proposed for the appropriate comparators to lie within the B.C. Civil Service, thus subject to the Government-imposed constraints. The BCCCA proposed that Crown Counsel in Ontario, Alberta and federal Crown Counsel located in Vancouver, comprised the appropriate comparator groups. it was convenient for the BCCCA that's its proposed comparator groups had all recently received generous large settlements. The Taylor panel, with a minority exception, agreed with the BCCCA. The third major feature of the panel's report was a restructuring of the internal hierarchy of the Crown Counsel group. The Attorney General, on behalf of the Government, rejected the Panel's findings, and tabled its position in the legislature, thus

superficially meeting its requirements under the Agreement Renewal provisions that formed the basis of the Taylor Panel.

The rejection of the Taylor Panel's recommendations left the parties in an uncomfortable and awkward position. The BCCCA was bound to a finding that the Government had terminated, or at a minimum had expressed its intention to not follow. Where to go from here, other than a legal escalation of the dispute in place of a solution-oriented step?

The BCCCA filed a strongly worded grievance with respect to the Attorney General's response under a provision of the Renewal Agreement calling the Government's position a sham that fell far short of a valid "reasoned response". The BCCCA argued there was ample precedent in terms of what a response would have to be in order to be acceptable as a "reasoned response" and that the response tabled in the Legislature fell far short of that minimum. The grievance gave birth to another panel, the Jones Panel, (Mr. D.P. Jones, Q.C., Chair), which sat through the fall and winter of 2004 – 2005.

The Jones Panel and report delved deeply into the model of dispute resolution that was adopted by the parties in all their previous negotiations. The employer's position was that it was not bound by a panel's (such as the Taylor panel) recommendations as long as it tabled some or any rationale for rejection in the Legislature. The BCCCA position advanced the requirement of a minimum standard of a "reasoned response" according to jurisprudence in four recent cases, the P.E.I. Reference⁴³, the B.C. Provincial Court Judges⁴⁴, the Alberta Provincial Court Judges⁴⁵, and the Ontario Justices of the Peace⁴⁶. These cases established that a thorough and rational explanation of why the government could not accept the report findings was required, not just a simple statement that the government had declined to accept the findings.

At the end, the parties were left with the simple and unsatisfied need for finality on the part of the BCCCA, who was at cross purposes with the Government's desire to avoid being bound by

⁴³ P.E.I. Reference, (1997), 150 D.L.R. (4th) 577 (S.C.C.).

⁴⁴ Re Provincial Court Judges' Association of British Columbia (1998), B.C.J. No. 1230 B.C.C.A.

⁴⁵ Alberta Provincial Judges' Association v. Alberta, (1999) 177 D.L.R. 418 (Alta C.A.).

⁴⁶ Re Ontario Federation of Justices of the Peace Associations et al, (1999) 43 O.R. (3d) 541 (Ont. Gen. Div.).

any third party mediator or arbitrator, regardless of their skill and wisdom. What remained unanswered is why the government felt it could not agree to the findings and at a minimum reinforce the traditional process of neutral arbitration to bring a suitable and widely acceptable result.

Arbitrator Jones found that the meaning of “reasoned response” as defined in the relevant jurisprudence⁴⁷, and bound the Government to provide a substantive response for its rejection of the Taylor Panel recommendations. That is, he allowed the grievance of the BCCCA, set aside the Attorney General’s rejection of the Taylor Panel’s findings, and implemented the Taylor Panel’s recommendations to form a collective agreement running to March, 2006.

In response in March 2005, the Government introduced the *Crown Counsel Agreement Continuation Act*, the purpose of which was to continue the 2001 collective agreement until March 2005. The effect of this legislation was to wipe out the Jones Award, the Taylor Award, and the provisions of the Renewal Agreement of 2000, and substitute terms and conditions of employment by legislation replacing all those bargained for, and agreed upon, by the parties.

In this move, the government again set aside the result from the traditional process and substituted its own legislated solution, by authority of the supremacy of the legislature to override a traditional process. In the vacuum of logic to support the government's action it falls to political analysis for explanation. The BCCCA is a relatively small group of individuals who, although they perform a vital and important function within the criminal justice system, are not prominent in the view of the electorate, a fact which the government may have felt provided an opportunity to make them an example in order to establish itself as "in control" of the province's labour relations with its civil service. The province's labour relations have oscillated back and forth with the changes of government over the decades. In the 1990s the closer connection between the NDP government and organized labour left the other side of the political spectrum, the opposition Liberals, feeling that a return to governmental control of civil service labour

⁴⁷ See for example: Reference Re Public Sector Pay Reduction Act (P.E.I.), (1997) 150 D.L.R. (4th)577 (S.C.C.), and Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General), [1998] 1230 (C.A.), and Re Ontario Federation of Justices of the Peace Associations et al. v. The Queen in Right of Ontario et al., (1999) 43 O.R. (3d) 541 (Ont. Gen. Div).

relations would be a high and early priority when they took government back from the NDP which occurred in 2001. The new Liberal government's early skirmish with some unionized health workers and contract roll-backs generated a substantial public backlash. The government may have felt the less visible Crown Counsel were an easier target or it may just have been coincidence that the BCCCA ran into an ideologically driven new government determined to have its way even if it took the heavy hand of legislated labour contracts to achieve that.

Nevertheless, in response, in June 2005 the BCCCA initiated a lawsuit against the government and two cabinet ministers, claiming that the legislation:

1. Bill 21 violates the Independence of the Crown.
2. Bill 21 infringes the Rule of Law.
3. Bill 21 offends the constitutional principle of the Honour of the Crown.
4. Bill 21 unjustifiably infringes the constitutional principle of Freedom of Association guaranteed by section 2(d) of the Charter of Rights and Freedoms.
5. Bill 21 violates the contract between the BCCCA and the Government.
6. The Honourable Graham Bruce committed the tort of Misfeasance in Public Office.
7. The Honourable Geoff Plant committed the tort of Misfeasance in Public Office.
8. The Government has been unjustly enriched.
9. The conduct of the Defendants was wrong, in bad faith and an abuse of power and as a result constitutes a constitutional tort.⁴⁸

The BCCCA claimed the following: violation of fundamental tenets of the Crown, the Rule of Law, constitutionally protected freedoms and rights, breaches of contract, public torts, unjust enrichment, bad faith, and abuse of power. The suit set the stage to litigate compliance with the traditional model of labour relations within public law.

Meanwhile, another *Crown Counsel Agreement Continuation Act*, further extended the Crown Counsel Agreement to March 2007. One salient but possibly unanticipated feature of this Act was to preclude Crown Counsel from participating in the unprecedented 2006 BC Government sponsored labour peace incentive programme, which featured \$3,000 to \$4,000 signing bonuses that added up to nearly a billion dollars cost to the taxpayer. It was a stunningly successful means to buy provincial public sector labour peace during the period leading up to 2010

⁴⁸ BCCCA press release, May 12, 2005.

Olympics in Vancouver-Whistler. In 2007 the BCCCA qualified for the bonus programme by concluding a new agreement that carried it past the Olympics time frame. However, a feature of the 2007 Agreement was the termination of all outstanding litigation between the BCCCA and the BC Government which meant the issues of compliance with the traditional model of labour contract resolution would not be litigated arising from these events. Arguably these events provided an excellent fact pattern upon which the courts could re-examine and reinforce the role of specialty labour panels in dispute resolution. However, that opportunity dissolved in the 2007 Agreement.

In a retrospective examination of the BCCCA experience the question arises: Why did it develop as it did? At each step, one or other of the parties escalated the dispute. Taken as a whole, the dispute was able to continue because the traditional finality at certain steps was undermined by the Government invoking legislative supremacy which invariably trumped the traditional model of contractual dispute resolution. The escalating dispute grew until an extraneous factor - substantial signing bonuses, not connected to the substance of the dispute - was artificially injected into the dispute. In an economic analysis it must be concluded that the quantum of the bonuses exceeded the value of the arguments of principle that had been driving the dispute.

The BCCCA case may well have been an excellent fact pattern upon which the courts, all the way up to the Supreme Court of Canada, could pronounce on these issues. However, circumstances changed with the Government's political need for labour peace leading up to the Olympics. Those important issues remain untested.

BC Doctors

Doctors in British Columbia have, in a fashion similar to the BC Crown Counsel, evolved from a professional association into a collective bargaining vehicle. The British Columbia Medical Association (“BCMA”), founded in 1900, represents all the approximately 8,000 British Columbia physicians, in collective bargaining to determine terms, and rates of remuneration, albeit fee for service not salary, for medical services with the Government of British Columbia.

Doctors' bargaining has been a major feature of the BC political landscape for many years. Traditionally governments were loath to publicly challenge the doctors because of the political fall-out tied to the popular support the doctors enjoyed in the mind of the public. By the early years of this decade that perception may have sufficiently changed for the government to feel it was on politically safe ground taking on the highly paid doctors.

Labour relations with the doctors were not entirely smooth through the eighties and nineties such that in 2000 the Korbin Commission⁴⁹ was stuck in place to investigate the relationship between the BCMA and the Government and make recommendations for improvement. One key recommendation was: "That independent binding arbitration is required as the ultimate mechanism for the settlement of bargaining disputes."⁵⁰

The subsequent round of bargaining began with a "Framework Memorandum" in February, 2000, to replace their Master Agreement, due to expire in March, 2001. The parties agreed that the renewal provisions in the Framework Memorandum would carry forward for all future agreement renewals and entered into a new Master Agreement which contemplated resolving all issues by this mechanism, and ran for the term March 2001 to March 2006. At the outset there was optimism for a new era of cordial, peaceful, and successful negotiations which may have been influenced by the widely anticipated (in 2000) wholesale change of government in 2001 from the NDP with their traditionally sceptical view of wealthy doctors to a "friendlier" more right-of-centre Liberal government.

The Framework Memorandum had provided for the usual move to mediation followed by arbitration, if the parties were unsuccessful themselves in concluding an agreement with a typical three-member panel: one appointee from each party and a neutral chair, chosen by agreement of the parties or appointed by the Chief Justice of the Supreme Court of B.C. The parties agreed upon Mr. Justice Allan McEachern, recently retired Chief Justice of British Columbia. The terms of reference for the McEachern Panel included "the objective of being consistent with the

⁴⁹British Columbia, *Final Report of the Commission on the Contractual Relationships Between Government and Doctors in the Province of British Columbia*, Korbin, Judith, Victoria, B.C., 2000.

⁵⁰ *ibid* at 73

law and the terms of the Master Agreement, reflecting the financial circumstances of government, the need to provide reasonable compensation to the physicians for the services rendered, and the operational and medical resource needs of the Health Authorities.”⁵¹ . It is noteworthy this included the term, “reflecting the financial circumstances of government”, undoubtedly to deflect the oft-advanced government argument that arbitrators viewed governments as limitless sources of money without regard for very real government constraints.

The McEachern Panel, consisting also of two respected doctors as party-nominees, met extensively with the parties, thoroughly explored and canvassed the issues, and issued its findings in the form of a two hundred and twenty-four page report, (including addenda) in February, 2002 with a myriad of recommendations on issues including very technical issues within the specific context of the BCMA–Government relationship.

However, the Government, in a move strikingly similar to its handling of the Crown Counsel dispute, abandoned the process and introduced legislation, referred to as Bill 9, to impose terms and conditions on the Doctors and even went so far as to include a section in the Bill to foreclose any attempt by any person to seek damages because of that legislation.

The entire work of the McEachern panel was set aside and the Government’s choice of resolution to the Doctors issues was legislated into place, a one-sided solution under which the Doctors carried on their work for four years.

Surprisingly, peace returned to the Doctors’ labour arena and in March, 2006, the BCMA agreed to and approved a comprehensive fee agreement covering the period April, 1, 2006 to March 31, 2012. This was a centre-piece achievement in the Government initiative to buy labour peace in BC through the era of the 2010 Olympics.

⁵¹ McEachern Award p. 8

The Doctors' case encountered the same unexpected escalation at the hands of the Legislature as did the Crown Counsel case. However, they differ in that they appear to have resumed where they left off with another agreement in place and unknown trust in its certainty.

That the Doctors may be reluctant to trust Government again is grounded in long experience. When Bill 9 set aside the McEachern Award many Doctor's recalled the "new" NDP Government of 1991, introducing legislation that extinguished an agreement reached the previous year between the BCMA and the Government regarding pensions. The shifting certainties of politically charged dealings with the provincial government are well known to the Doctors.

The Pilots of Air Canada and its Predecessor Airlines

Trans Canada Airlines, (TCA), was founded by an Act of Parliament in April, 1937, had its name changed to Air Canada, (AC), in 1965, and was privatized in 1986. Eight months after TCA was formed, the TCA pilots founded the Canadian Air Line Pilots Association, (CALPA), on December 1, 1937, "to consolidate airline pilots' views regarding aviation concerns, with the authority to voice them when necessary"⁵², which quickly expanded to include bargaining collectively for wages and working conditions of their employment in a manner typical of most trade unions in Canada. They were joined shortly after World War II by the pilots of Canadian Pacific Air Lines, (CPAL), the other major, international airline in Canada, and over the following thirty-five years by regional airlines of Canada including Eastern Provincial, (EPA), Maritime Central, Quebecair, Great Lakes Airways, Nordair, Air BC, Time Air, Transair, and Pacific Western, (PWA). Through that thirty-five year period the aviation industry in Canada was fully regulated. Each regional had its own territory, and the two majors shared the aviation world according to federal government, division of the world policy. Labour relations were predictable and certain. CALPA was a club of dignified pilot-union executives. Controversy and confrontation were notably absent from its agenda.

⁵² statement of objectives from CALPA founding convention, 1937

Deregulation in the 1980s changed all that, not only by way of the highly visible consolidation of airlines into each other but it also had a profound internal effect in the industry's established unions, particularly the pilots union. Deregulation opened the door for competition that necessarily found its way, philosophically and practically, into the internal relations of CALPA. Past practice of “what is best for the industry” gave way to “what is best for me by way of what’s best for my airline”. This change manifested itself most blatantly in the issues that arose out of the consolidation of the industry—mergers and acquisitions—starting in the early 1980s.

The Air Canada pilot group was always by far the largest group within CALPA. Through the quiet and dignified years prior to deregulation, CALPA was, in practice, Air Canada’s club and they allowed a governing structure to evolve without any forethought as to what the future might bring. Each airline group, regardless of size, had its own Master Executive Council, (MEC), and the CALPA governing Board was made up of a small executive plus all MEC chairmen each with equal voting power regardless of the size of their constituency. Thus, a small feeder airline such as Great Lakes Airlines with 50-60 pilots had the same voting power as Canadian Pacific with 600-700 pilots or Air Canada with 1200-1300 pilots as it was in the mid 1980s just prior to the impacts of deregulation.

Almost overnight, deregulation radically altered the nature of the relationships within the industry. The newly introduced pressures and stresses of deregulation brought about a rapid realignment of allegiances within CALPA into two distinct camps: the regionals, versus the two international carriers, with the bulk of internal CALPA voting power in the hands of the regionals who collectively comprised only a small minority of the total CALPA membership.

CALPA also struggled with the internal tension of trying to be both a trade union and a professional association, a proper definition of its identity. This was typical of many quasi-professional bodies that particularly enjoyed the benefits of collective bargaining for wages and working conditions, yet disliked the “trade union” stigma and "rule book mentality", feeling they were above that as professionals. The two distinct camps struggled back and forth on this issue like a pendulum, each trying to define CALPA’s nature. In 1985 the trade union faction

prevailed and led EPA, a regional of less than 100 pilots operating routes confined by regulation to Atlantic Canada, into a pilot strike hoping to achieve, among other things, union maturity by having staged a strike. The strike itself was far from successful as the pilots ultimately settled for a lower offer than was on the table prior to the strike. Further, the strike caused extensive damage to the airline's financial health which ripened it for acquisition in the newly deregulated industry. Canadian Pacific, CPAL, purchased EPA as it recoiled from its strike in 1985.

The CALPA executive of the day tried to formulate a quick solution⁵³ to slot the EPA pilots into the CPAL seniority list by an internal CALPA process that singularly featured a length of service integration, a very beneficial solution for the EPA pilots. It was readily recognized by the CPAL pilots as both overly greedy in substance and lacking a fair process. The CPAL pilots were able to unilaterally block the process with an irrevocable commitment obtained from the employer that it would not implement any merged seniority list that did not have the specific approval of the CPAL pilots in spite of CALPA being the designated bargaining agent for the CPAL pilots. In other words, a CALPA solution would not be implemented without the express agreement of the CPAL pilots. When that commitment became known, CALPA had no choice but to abandon its internal process and agree to conduct an open mediation/arbitration process that became the Feller Arbitration.

The Feller Arbitration followed the traditional arbitration model, a three person board, Arbitrator Feller as chair plus a nominee from each party. The Board met with the parties separately and together, received submissions and proposals from the parties, carefully weighed the evidence put before them and came to their conclusion.

As traditional as it was in process, the Feller Award was radical and forward thinking in substance which brought it extensive criticism largely from vested interests. Compounding the reaction to its substance was the unfortunate presence of the prior aborted merger attempt

⁵³ The Thompson-Davis-Dalton-Fenwick merged seniority list, so named after the four merger representative who authored it, was hastily compiled by reference only to Length of Service, a manner very favourable to the EPA pilots and seen by some as pay-back for their strike loyalty. It was quickly proposed as the merger solution before most affected pilots realized what was happening. However, the resulting backlash brought a concerted effort to overturn the Thompson-Davis list and establish an equitable process to yield an equitable solution.

(Thompson-Davis) which understandably drew comparisons to itself. Accordingly a great deal of acrimony remained over "lost" opportunity. Consequently the degree of likely acceptance of the Feller Award was cast in doubt but was never tested.

In the course of its one year life, events outran the Feller Arbitration with CPAL acquiring Nordair, followed by PWA, an Alberta Government backed regional, acquiring CPAL from its parent Canadian Pacific Ltd. These events pre-empted the step of implementation of the Feller Award. That is, because the Feller Arbitration was a creature of the union, CALPA, the Award could have no effect until it was implemented or negotiated into a collective agreement by CALPA on behalf of the pilots it represented. This step remained incomplete at the point when PWA management took over the administration and running of CPAL. The new management made it clear, at the open urging of the PWA pilots, that the Feller Award would not be implemented, and they looked to CALPA to quickly produce a global seniority solution encompassing CPAL, PWA, Nordair, and EPA pilots. Concurrently within CALPA, the unique structure of the CALPA governing board made it possible for like-minded representatives of the smaller regional carriers to effectively join together and force a multi-party (as opposed to sequential) seniority merger process, the Teplitsky Arbitration, in which the three regionals were able to coordinate their strategic plan against one opponent with the premium jobs, CPAL. Procedurally and strategically this was a significant setback for the CPAL group.

Clearly it was evident by this point that the trump card of no-management-acceptance, if it existed at all, was not in the hands of the CPAL pilot group as it had been in the earlier CALPA merger attempt with the EPA pilots. It was squarely in the hands of the PWA pilot group. The no-management-acceptance condition was a tactical matter not contemplated, in fact tacitly forbidden within the philosophy of management remaining aloof from internal union disputes. However the presence of this apparent veto was clear and effective within the CPAL-EPA merger, present again with the non-implementation of the Feller Award and an increasingly prominent factor in the Air Canada matters discussed below.

The Teplitsky Arbitration was structured, not with a traditional chair and party-nominees, but as a one person panel. The new employer, by now renamed Canadian Airlines International Ltd. or

CAIL, exerted considerable pressure on the participants for a streamlined process and speedy result. Also, the potentially unwieldy nature of the process with more than two parties and therefore, in order to follow the traditional model, the need for the panel to have more than two party-nominees and how that could play out in the decision making of the panel were all factors that led away from a decision for a traditional panel and to a decision for a one person panel.

This was a much criticized decision given the complexities of the pilot seniority issues and the operations of the collective agreements that would have to be integrated into a single, new agreement. Previous panels for pilot seniority arbitrations made use of pilots as party nominees and therefore resource persons for the chair, similar to the McEachern Panel with the BC Doctors discussed above. The party-nominees fulfilled very useful roles. Their absence was a substantial loss to the Panel and the process, a factor that became even more apparent in the Mitchnick Arbitration discussed below.

Arbitrator Teplitsky appeared to take the need for timely resolution genuinely to heart. In his preliminary meeting with the parties he set short deadlines for exchange of data, background materials, and proposals between the parties. His evidentiary hearings were short and abrupt with a tight control on allotted time from the chair. An untimely Air Canada strike made travel across Canada to attend hearings almost impossible, which Arbitrator Teplitsky seized as a further opportunity to shorten his process conducting short hearings by conference call. Even the CAIL corporate counsel⁵⁴ sitting as *amicus curiae* for the process expressed concern about the likelihood successful judicial review on grounds of denial of natural justice.

Arbitrator Teplitsky chose the singular factor of length of service to integrate the three seniority lists of CPAL, PWA, and Nordair, and then added the EPA pilots at a discount of 20% to their length of service. Simply put this meant an EPA pilot with ten years service was given a new seniority position among eight year pilots of the other three airlines. Under pressure from CALPA and the PWA pilots, CAIL management quickly accepted and implemented the Award,

⁵⁴ Eric J. Harris, QC

which meant positions were bid, awarded and training begun to move people into their new positions.

Only the EPA pilots sought recourse to the courts with a successful suit brought in the Nova Scotia Supreme Court. However, that decision was quickly overturned by the Nova Scotia Court of Appeal and the subsequent application for leave to the Supreme Court of Canada was denied. In spite of the fact that it was the EPA pilots who challenged the Teplitsky Award, the logical (in terms of perceived losses) party to appeal was the CPAL group. However, for a variety of reasons they chose to abide by the concept that the process had run its course and that the alternative of possibly years of bitter litigation was less attractive than any potential seniority gains gained through such protracted and divisive litigation. This decision to abide by a prior commitment to final and binding stood in stark contrast to the decisions of the Air Canada pilots over the following two decades.

The AC pilots were cognizant of the events that tactically brought the CPAL pilots into a compromised position from which they had to defend their jobs in the Teplitsky Merger. However, they were also cognizant of the need to do something to curtail potential management mischief in assigning flying to a lower cost regional airline or partner or Connector Airline as they became known as. In other words, the AC pilots recognized the need to protect their jobs.

Less attracted to the concept of merging with their domestic partners or Connectors such as Air B.C., Air Ontario, and Air Nova, they moved toward an alternative process developed in the U.S industry known as “scoping”. Scoping was considered by some to be a viable alternative to merging and consisted of contractually restricting operations that the parent airline could shift over to its lower cost feeders through specific provisions in their collective agreement that defined the maximum size of airplanes available to the connector airline and everything bigger would therefore remain in the exclusive domain of the main airline. In the Air Canada case this evolved to be a seventy-seat restriction⁵⁵. Airplanes with up to seventy seats could be flown by

⁵⁵ *Collective Agreement between Air Canada and the Air Canada Pilots Represented by the Canadian Air Line Pilots Association*, 1991, Letters of Understanding #17 and 18.

connector airlines while those with more than seventy seats were be kept exclusively within Air Canada and therefore flown only by Air Canada pilots.

This was inevitably a problematic because it was essentially a static solution to a dynamic problem. The relentless pressure of deregulation and corporate consolidation would bring intense pressure particularly within CALPA to merge the pilot groups.

The same peculiar allocation of voting power within CALPA's governing board inevitably led to a CALPA declaration that a merger existed between Air Canada and its connectors based on common ownership. Concurrently CALPA initiated an unsuccessful Labour Board application for a declaration of common employer.

The CALPA merger declaration triggered CALPA's own, internal merger process initiating a simultaneous negotiation, mediation, and arbitration process, which ultimately became the Picher Arbitration. In its early stages the AC pilots willingly participated in the process believing they could persuade the Picher Panel, by way of their numbers and prominent industry position, a solution entirely favourable to their pilots. That is they sought placement of the connector pilots at the bottom of the Air Canada seniority list. The Picher Panel, one of the classic model of chair and party-nominees, heard evidence, deliberated and ultimately rejected both the Air Canada pilots' end-tail solution and the Connector's traditional, date-based seniority solution but found sufficient overlap in the nature and quality of the junior Air Canada flying to warrant “dovetailing” the junior portion of the Air Canada group with the Connector group.

The process appeared reasonably fair and therefore beyond dispute yet the result was deemed unacceptable by Air Canada pilot leadership who turned to their rank and file to consciously generate a hostile backlash to the Picher Award. In that context it publically announced it had advised Air Canada management that it would never enter into negotiations to implement the Picher Award (a reappearance of the ultimate trump card) to overcome the final and binding provision of the Award. For this tactic there was no answer. The Picher Arbitration was a creature of CALPA and therefore would have no force and effect without the backing of the participant groups to implement it through collective bargaining with the employer. Even

Arbitrator Picher acknowledged that fact in the course of writing his award saying it meant nothing without joint support of the affected groups in implementing the result with the employer.

As a direct consequence, CALPA itself was fatally wounded. In order to escape the provisions of the Picher Award, the AC pilots left CALPA, formed a new, in-house union, the Air Canada Pilots Association, ACPA, and readily gained certification at the federal Labour Board. With the withdrawal of the Air Canada pilots CALPA, overnight, became an empty shell, lacking the critical mass to be of any effect in the industry. CALPA shortly thereafter merged itself into its big American counterpart, the Airline Pilots Association, (ALPA). Thus, with a rather ignominious exit, CALPA's life ended exactly sixty years after it was founded on high principles.

The Air Canada Connectors had endured the considerable time and expense through the Picher Arbitration process presumably, like the Crown Counsellors, under the mistaken notion of finality in its outcome. At the end of the day they had a thoughtful and well-reasoned award that meant nothing because they had nowhere to go with it. It was no answer to try and force through any court or other forum any concept of successorship of the Picher Award onto ACPA as the obvious successor in rights and obligations to CALPA. The unassailable wall was the simple fact it needed the support of the Air Canada pilots to implement. The absence of their support was a complete bar to implementation of the Award. Final and binding had no meaning to the Air Canada pilots with respect to the Picher Award because they could and did simply walk away from any and all obligations incurred under CALPA. Finality eluded the Connector pilots who had nothing whatsoever to show for their time and effort. Collectively, both pilot groups were arguably worse off for being a divided in the face of ongoing management mischief in its allocation of flying (and therefore jobs) and other matters of labour relations. That never appeared to gain sufficient importance in the Air Canada group to govern their merger behaviour.

In a final chapter to the Connector saga, the Connector pilots initiated litigation seeking damages in both contract and tort for the actions of the AC pilots through the whole process leading up to the abandonment of the Picher Award. They named individuals and sought individual and

personal damages from those individuals, leaders of the Air Canada pilots through the process, not from either CALPA or ACPA. Possibly that was a tactical decision in the knowledge that CALPA had or would soon cease to exist and ACPA had little if any assets to attach in the event of a successful damages award. In addition, there may have existed some desire for personal revenge arising out of the unprincipled conduct of CALPA and its officers, (primarily Air Canada pilots), over all the years.

This action wound its way through the Ontario court system, trial, appeal, and ultimately to the Supreme Court of Canada where it was dismissed. The courts undoubtedly sensed the futility of seeking implementation of the Picher Award given the clear, strong opposition of the Air Canada pilot group to the point where they even abandoned their union, and possibly sensed the unsavoury nature of CALPA's character and conduct in its final years, thus rendering it a useless place to turn for a remedy. Further, aside from the legal difficulty of finding liability on a personal level, there was a clear awareness in the Supreme Court of Canada of the chilling effect that success in this action would have on labour relations generally and unions' abilities to act in what they perceived to be their best interests in particular.

Nevertheless, the Court for whatever ever its reasons regrettably passed over an important opportunity, even in obiter, to pronounce on the importance, within the ongoing process of labour dispute resolution, of finality of the process which manifests in the over-arching need for the parties to abide by their commitments to the concept of final and binding. What stood for many decades as the unimpeachable traditional model of an arbitration panel chosen by the parties, acceded to jurisdictionally by the parties, and complied with by the parties, had been successfully undermined by the actions of the Air Canada pilots. On the other hand, for the Connector pilots, the finality and the dignity in achieving at least some tangible success in what most reasonable observers (the reasonable man) would see as a substantively and procedurally fair process culminated in a zero.

On January 4, 2000, a new but long-anticipated dimension was added to the industry when Air Canada finally realized its long-pursued quest to take over Canadi>n Airlines thus triggering a

bigger pilot seniority merger than any previous mergers in Canada. Both groups were large enough to garner the necessary resources to properly conduct a thorough and extensive process. Both groups also brought similar jobs to the new airline: the full spectrum of overseas and domestic flying, large jet airliners, and small, and both groups had extensive prior merger experience. That is, they were similarly situated, although the Air Canada group outnumbered the Canadi>n group by ratio of 5:3 with approximately 2000 to 1200 members.

There were some particularly important differences in the new process: the two pilot groups were in different unions, ACPA for the Air Canada pilots, and the ALPA (successor to CALPA) for the Canadi>n pilots. Therefore the process would not be in intra-union process but would be conducted under the auspices of the Canadian Industrial Relations Board, (CIRB), in accordance with the principles laid down in the *Canada Labour Code*,⁵⁶ (the *Code*), including some very recent amendments enacted in 1999. Of particular significance was the fact that no escape route would be available by simply opting out of the union and into a new union. The employer, Air Canada, was in a sensitive position as the future recipient of the result and, at least on the surface, needed to remain neutral which by and large it did with only a few inappropriate public statements, more so near the outset of the process. A major difference from previous mergers was that the final result would be implemented by CIRB order, not negotiated into a collective agreement.

On August 3, 2000, the CIRB declared Air Canada and Canadi>n Airlines International to be a single employer and on October 17, 2000, ordered a consolidation of the bargaining units which triggered a membership preference vote. With no surprise the vote favoured ACPA, given the relative numbers in each group. A transfer of ALPA's representation rights to ACPA occurred in May 2001. However, the CIRB ordered that ALPA would continue to represent the former Canadi>n pilots on seniority matters. Appropriate arrangements were made for dues check-off, (an obligation on the employer to deduct funds for the exclusive use of the union to conduct its business), to fund ALPA's litigation by the former Canadi>n pilots. However the use of general ACPA dues, collected from all pilots including the former Canadi>n pilots, to further the

⁵⁶ *Canada Labour Code*, R.S.C. 1985

seniority interests of the former Air Canada pilots has remained a very difficult and contentious issue to this day.

From this point onward all the pilots were Air Canada pilots and were only distinguishable as Original Air Canada, “OAC” pilots and Original CAIL pilots or “OCP” borrowing the two letter International Civil Aviation Organization⁵⁷ designators, AC and CP, from each of the former airlines. Airplanes were repainted, uniforms changed, so the CAIL identity was eliminated. Although flying was essentially pooled from an external perspective, crews were not intermingled because there was no integrated seniority list with which positions, trips, vacations, etc., could be allocated. It was an uncomfortable and tense period with each side wary that their flying was being siphoned off to the other side. There were numerous allegations of corporate mischief in this regard particularly around delicate scheduling times such as the Christmas period.

At the outset, the parties agreed to a protocol, referred to as the “Mitchnick Protocol”, which contemplated arbitration under a sole arbitrator, Morton Mitchnick. For a second time an arbitration was embarked upon with a single arbitrator rather than the traditional model which included party-nominees. As the process went on it became more apparent to the parties that the absence of party-nominees at least as resource persons for the arbitrator was very detrimental to the process itself. There were occasions where the complexities of pilot bidding, positions, awards, and the myriad of scheduling provisions appeared to many observers to overwhelm the arbitrator. There were frequent regrets expressed about the choice of model featuring a single arbitrator and resolve was expressed to avoid that in the future.

The Mitchnick Protocol further provided that the Mitchnick Award when rendered would be incorporated into a CIRB order and be final and binding on all the parties, including Air Canada, with only one provision for CIRB reconsideration and/or judicial review. Arbitrator Mitchnick issued his award on March 31, 2001. The OCP pilots were displeased with the substance (result)

⁵⁷ ICAO is the world governing body of airline activities which operates under the United Nations

of the Award and held grave concerns regarding the process as it had been conducted by Arbitrator Mitchnick.

In keeping with the protocol, the CIRB incorporated the Mitchnick Award into an order which had the effect of directly implementing it with Air Canada. There were no contract negotiations to effect implementation, once ordered by the CIRB it was *fait accompli*. Very quickly thereafter crews became intermingled, positions were bid on and won or lost, pilots were promoted and demoted, and crews were allotted to flights, according to the Mitchnick seniority list. The airline had pressing needs to move forward and realize the benefits of its major purchase particularly as the industry reeled through the 9-11 generated recession.

The OCP pilots, in accordance with the protocol, applied for CIRB reconsideration. In July 2002, approximately fifteen months after the Mitchnick Award was implemented, in Decision 183, the CIRB through its Chair, Mr. Paul Lordon, ruled that the Mitchnick Award “was not consistent with the Mitchnick Protocol and failed to give effect to the remedial approach to seniority integration as directed by the *Code*”⁵⁸. This ruling set aside the Mitchnick Award, and set out a process for re-determination of the seniority integration and set out principles that accorded with the *Code* to guide that process.

However in practical terms, since Air Canada had integrated its operation following the CIRB Order of the Mitchnick Award, and could not return their operation to a pre-integration state, the Mitchnick Award had to remain in place until a replacement was developed. Immediately this fact became a strong motivation for the OAC pilots to resist any progress toward a replacement of the Mitchnick Award. These circumstances provided fertile ground for intense internal animosity to flourish within the new bargaining unit and even in the cockpits of the airplanes, a very tenuous situation.

The OAC pilots sought initially to reinstate the Mitchnick Award by way of judicial review of CIRB Decision 183 (Chairman Lordon's ruling setting aside the Mitchnick Award). On March

⁵⁸ CIRB Decision 183

27, 2003, the Federal Court of Appeal dismissed ACPA's judicial review application. ACPA sought to appeal that decision to the Supreme Court of Canada but their application for leave was dismissed with costs on November 20, 2003.

In addition to setting aside the Mitchnick Award, CIRB Decision 183 strongly encouraged the parties to find a solution through negotiation, not to look to the CIRB for a solution. However, to no one's surprise given the polarized positions of the parties by this point, once again agreement proved unattainable. Nevertheless, with the assistance of well-known mediator, Brian Keller, the parties were able to agree on another protocol, The Keller Protocol, to resolve outstanding matters by way of a three person panel with Keller as chair, (the Keller Panel). The seniority integration would be accomplished in accordance with guidelines laid down in Decision 183, through a process of mediation/arbitration. Interestingly, Arbitrator Keller made "final and binding" a pre-condition to his acceptance of the chairmanship of the panel.

The Keller Protocol was accepted and approved by the CIRB, also in an order. Its primary differences from the Mitchnick Protocol were threefold: first, that the scope of its issues was narrowed by the Decision 183; second, that it specifically excluded further review even by the CIRB; and, third, that it contained the aforementioned "final and binding" commitment by the parties, save, of course, for judicial review.

The Keller process was as lengthy as the original Mitchnick process, with extensive submissions from both parties and hearings over the first six months of 2003. On the last scheduled day of hearings/meetings with the parties the ACPA delegation, without voicing any prior concern, withdrew, abandoning the process, and so advising the Board through their nominee, "because of the direction the award was heading and the process that was used to get there."⁵⁹ Therefore, because the process could not continue with only one party, it abruptly stopped. The Board deliberated and formed its decisions based on what it had received to that point. There was no agreement within the Board so the opinion of the Chair was issued as the Keller Award on 16 June 2003, with two conflicting dissents. It was immediately implemented by CIRB Order, replacing the Mitchnick Award, and remains in effect.

⁵⁹ ACPA withdrawal statement read to the Keller Board, June 2003.

As quickly as the following day, the OAC pilots, in a direct breach of the Keller Protocol, applied to the CIRB for an urgent review of the Keller Award under the Board's residual review jurisdiction provision of §18 of the *Code*. Ten days later the CIRB granted the OAC request in Order No. 236. The OCP pilots opposed this application and sought review by the Federal Court of Appeal of the CIRB decision to conduct a review in the face of the Protocol agreed to by the parties and adopted by the CIRB.

These events (post-Keller and contra-Keller) did not take place in a political vacuum and their context is significant: Air Canada was struggling in bankruptcy and trying to re-organize under the provisions of the Companies' Creditors Arrangements Act, (CCAA)⁶⁰, and had reached a crucial point in the form of a vote by the pilots on major concessions prerequisite to the process continuing and thereby avoiding liquidation. The publishing of the Keller Award, which would then be implemented almost immediately causing the Keller seniority list would immediately take the place of the Mitchnick seniority list for all purposes, once again triggered a strong negative reaction from the OAC pilots; a similar response to that following the Picher Award. The reaction was manifest in a variety of appropriate and inappropriate means such as letter-writing campaigns to Members of Parliament and its Standing Committee on Transportation, as well as, to the CIRB and demonstrations *en masse* at the CIRB offices in Toronto and at CIRB hearings. There was, of course, no vote or any other opportunity to reject the Keller Award as there had been with Picher. In a dangerous move of brinkmanship, the ACPA leadership directly and publicly linked the prospects of success of the pending CCAA concessionary ratification vote to their discontent in the seniority process.

There was genuine concern in all quarters that the disgruntled OAC pilots would flirt with the demise of the entire airline by an exercise of clumsy brinkmanship through a negative vote on concessions, unless their seniority demands were fulfilled in the CIRB process. Liquidation of Air Canada was a very real possibility looming in the face of an unsuccessful labour concession attempt while under bankruptcy protection of the CCAA.

⁶⁰ Companies' Creditors Arrangement Act, R.S., c. C-25, s.1.

For whatever motivation moved it, the CIRB reversed and agreed to a “limited review” of Keller’s Award in spite of not having received any submissions of evidence on the substance of the issues decided in the Award. Thus the CIRB either inadvertently or consciously, in effect provided a cooling off period for the CCAA process to proceed. The following day an ACPA statement said that in light of the CIRB's decision to review the Keller Award, the ACPA leadership now recommended approval of the crucial concession vote. The concession vote passed and the CCAA reorganization continued and ultimately succeeded. Meanwhile, unhappy with the OAC disregard for its own commitment to the Protocol, the OCP pilots filed for judicial review on jurisdictional and natural justice grounds of the CIRB decision to conduct even a "limited" review.

The CIRB issued its reconsideration decision, Decision 263, in January, 2004, a unanimous finding of a CIRB panel that the OAC pilots had agreed to make the Keller Award final and binding. This was a carefully constructed finding that could live alongside the CIRB’s statutory jurisdiction that it could always review its own decisions⁶¹, by finding that the parties could not trigger a review due to their commitment to final and binding. Then the CIRB went further and declined to review the Keller Award of its own volition stating that “there is a point in any process where the parties must either resolve their dispute or accept that they have made maximum gains”. Further, the Board stated that reviewing the Keller Award “is not just a simple case of making a few adjustments to the Award, but would require assessing the complex balance of the Award’s entire result.” And that a decision by another panel “would be just another educated point of view, would require re-litigating the entire case, and likely ignite yet another round of review.”⁶² The CIRB appeared to lean heavily toward final and binding yet seemed unable to bring itself to a definitive statement to that effect.

In light of this outcome, the OCP pilots withdrew their application for judicial review of CIRB Decision 263. However, the OAC pilots applied for a reconsideration of this CIRB decision which was dismissed by the CIRB in Decision Letter 1269.

⁶¹ *Canada Labour Code*, §18

⁶² CIRB Board Decision 263, ¶61

The OAC pilots had also sought judicial review of the actual Keller Award on grounds that it was not decided within the parameters laid down in Decision 183. The Board denied that application which became CIRB Decision 263. ACPA applied for reconsideration of that decision and was denied. ACPA sought judicial review of CIRB Decision 263 but was denied by the Federal Court of Appeal orally, from the bench. ACPA then sought judicial review of the Keller Award itself alleging that "various acts and omissions of Chairman Keller deprived ACPA of procedural fairness and gave rise to a reasonable apprehension of bias. In the Federal Court, Madam Justice Dawson, after disposing of the various acts and omissions as inconsequential, stated with respect to Board Decision 263: "This decision articulates sound policy reasons for withholding relief. Most particularly, there is a public interest in bringing finality to this dispute. As well, in light of the Board's views: that common sense must prevail; the decision of another panel of the Board would be "just another educated point of view"; and the conditions of subsection 18.1(2) of the Code had been met...".⁶³ Subsequent leave to appeal to the Supreme Court of Canada was denied.

The acute need to bring finality to the process was recognized and addressed by Madame Justice Dawson. In this sense it is regrettable that none of the myriad of ACPA applications for leave to appeal to the Supreme Court of Canada succeeded which could have provided an opportunity for the Supreme Court to buttress Madame Justice Dawson's clear statement on the policy need for finality and the parties prior commitment to final and binding.

The ACPA executive had allowed itself to side more and more openly with the unofficial leaders of the group of disgruntled OAC pilots. Successive regular ACPA elections eventually brought a slate to power whose concern was seniority and only seniority with all other issues interpreted in light of seniority. For example, in early 2005 Air Canada and Boeing reached a tentative agreement for the purchase of over a billion dollars worth of new Boeing 777 and 787 airplanes. Provisions existed in the ACPA Collective Agreement for the determination of matters such as rates of pay for new airplane type entering the fleet but Air Canada wanted some concessions

⁶³ *Air Canada Pilots Association v. Air Line Pilots Association and Air Canada*, 2005 FC 723 at ¶146.

and opened a negotiation, the result of which would necessarily be subjected to a ratification vote by the pilots. The negotiation produced a set of terms for the introduction of these planes which, under the terms of the Boeing Agreement, would start to arrive in so short a time that training and preparation were difficult, though possible. A group of particularly dissatisfied OAC pilots linked the proposal to the seniority issue as a pre-condition for approval and openly campaigned against referendum approval of the Boeing package, which was defeated. Without sufficient time remaining to prepare for their arrival, Air Canada had no choice but to abandon the Boeing deal with embarrassment and the loss of several million dollars in deposit money.

The ACPA executive then voluntarily entered into and bound itself to an arbitration, (a dubious venture under the ACPA constitution), with Air Canada to resolve the Boeing 777 and 787 issues. This route merely bypassed general ratification. They chose Arbitrator Martin Teplitsky known to the parties from the seniority arbitration that integrated the CAIL pilots from four component airlines. ACPA, describing itself as the duly certified bargaining agent for all Air Canada pilots and therefore the single voice of all Air Canada pilots without regard to all the seniority litigation, proceeded to couple the Boeing 777 and 787 issues with seniority by asking Arbitrator Teplitsky to make recommendations to resolve all outstanding seniority issues among Air Canada pilots as well as to resolve the Boeing 777 and 787 issues.

Air Canada qualified its support for Teplitsky's findings in advance by saying it would only consider recommendations that were in keeping with the *Code* as determined by the CIRB. ACPA invited the OCP pilots to participate in their Teplitsky process in an attempt to legitimize that process Teplitsky. The OCP pilots declined saying there were no outstanding seniority issues; that they were all resolved in the Keller Award.

Arbitrator Teplitsky held short, one-sided, (OAC pilots through ACPA only), hearings and ruled that the precise package of Boeing 777 and 787 terms that had been voted down in the ACPA referendum would be implemented and they were. He then turned his attention to the seniority issue and went on to recommend significant and substantive changes to the Keller Award without hearing any of the evidence the Keller panel had heard, weighed and carefully balanced over a period of several months of interactive process and expert evidence. The Teplitsky Award

was placed before the CIRB⁶⁴ who readily identified it as a sham and a back-door attempt by the OAC pilots to do that which it had failed to do through the proper processes. That decision of the CIRB was appealed to the Federal Appeal Court and dismissed and a further application for leave to the Supreme Court of Canada was also dismissed.

Finality in this process remains elusive. Despite its express commitment in the Keller Protocol to “final and binding”, ACPA on behalf of the OAC pilots has stopped at nothing to undo and overturn the Keller Award starting the day after it was released in June, 2003. Two applications to the CIRB to review the Keller Award on its merits were dismissed, judicially reviewed, and denied leave by the Supreme Court of Canada. A separate CIRB application to review the Keller Award procedurally went the full route with the same result; judicial review dismissed their application and SCC leave was again denied. In all, several applications before both federal courts and the Supreme Court of Canada have been denied. In addition, numerous applications under §37 of the *Code*, Breach of Duty of Fair Representation, have been brought before the CIRB although they are not canvassed in this writing. CIRB Decision 349 that rejected the Teplitsky exercise said, again, the Keller Award is final and binding, yet ACPA insisted on appealing that decision too, as far as it could, again uniformly without success.

ACPA has shown it is unable to recognize any form of finality.

By all present appearances litigation will not deliver ACPA its desired result. Numerous CIRB decisions, Federal Court and Federal Court of Appeal decisions, and Supreme Court of Canada leave applications have all been decided against them. Yet nothing appears to have registered on this group of people in terms of the finality of the process. Thus, further direct labour action remains a possibility, and has arisen with the advent of the first collective agreement negotiation since the CCAA proceedings. In a recent (September 2008) vote ACPA concluded it will make seniority issues a priority bargaining issue in the first collective agreement to be negotiated since Air Canada's emergence from CCAA protection in 2004. It remains unclear how ACPA can

⁶⁴ CIRB Decision 349, March 2006.

negotiate matters that have been so thoroughly reviewed by all the forums of labour dispute resolution in Canada. It is an appalling lack of finality in the process.

It is not out of the question that the disgruntled OAC pilots, if they encounter an opportunity, may go to the brink again and misjudge the edge of the cliff as they have so frequently misjudged their positions in the past. It is not out of the question that in their zeal to have their own way, they may do irreparable harm to or possibly inflict a fatal blow on their employer.

As is often the case in Canadian jurisprudence informative analogies are sought and reviewed in the United States. Currently there is an analogous sequence of events unfolding in the US with the pilot seniority integration arising out of the merger of US Airways with America West Airlines, announced in 2005. Although the surviving name is US Airways, the merger is much more of a take-over by America West of US Airways than the other way around. The two pilot groups agreed to seniority arbitration in accordance with ALPA policy under Arbitrator George Nicolau, an experienced arbitrator in pilot seniority matters. The US Airways pilots advanced the "principle" of date-of-hire while the America West Pilots persuaded Arbitrator Nicolau that a balanced distribution of the benefits of the merger would take into account their greater career advancement in their pre-merger airline. In effect, Arbitrator Nicolau was persuaded give effect to the greater career advancement of the America West pilots by selecting ratios that produced the result that pilots of equivalent status and ranking were slotted together in the merged list even if one took longer than another to get to that position in his pre-merger airline. In other words, senior captain with senior captain and junior captain with junior captain regardless if one junior captain took longer to achieve that status than his counterpart from the other airline. This result also eliminated instant wind-fall gains which would have accrued to the US Airways pilots at the expense of the Air West Pilots in this case because of the generally slower career progress in US Airways than in Air West. In effect Arbitrator Nicolau gave the factor of current career progress greater weight than the historical data of employment starting date.

In response the US Airways pilots decertified from ALPA and started their own, in-house union, the US Airways Pilots Union. The current situation is a stand-off in which the new, merged US Airways is unable to mingle crews and flights thereby accessing the efficiencies that drove the

merger in the first place. Self-interest or even greed, thinly veiled as the sanctity "principle" of date of hire drove the larger US Airways group to deal a heavy blow to their national union and cripple their own airline at a time of desperate financial times in any event. Whether the new, combined airline can withstand this or whether the pilots will come to their senses before their employment brinkmanship claims the ultimate price from them remains to be seen at this writing.

Elsewhere, the US airline industry is further consolidating with the union of Delta and Northwest to form the biggest airline in the world. Delta is based in Atlanta, Georgia, with 48,000 employees of which 6,600 are pilots flying over 450 airplanes. Northwest is based in Egan, Minnesota, and is only slightly smaller. The combined company will keep the Delta name. Recognizing the crippling effects of other mergers stalled in pilot seniority integration, particularly the US Airways - Air West merger, the authors of the Delta - Northwest merger sought prior approval from the respective pilot groups and a prior resolution to the seniority question. The approval was obtained but resolution of the seniority integration is beginning 02 October 2008 under a traditional three member negotiation/mediation/arbitration panel chaired by Mr. Richard Bloch. A decision is expected by late November, 2008, a very short time frame. Both pilot groups are members of ALPA. Whether there is adherence to the arbitrated result remains to be seen.

Across the Atlantic Ocean another major airline pilot merger is sitting at its early stages, held in check by a moratorium until 2009. It will have, added to the usual difficulties, cross border application of labour laws and procedures. A new company, Air France-KLM, was incorporated under French law in 2004 to be the parent company of both Air France and KLM⁶⁵ with its headquarters at Roissy-Charles de Gaulle Airport near Paris. It is predominantly a privately held company: 81.4% privately owned shares of which 37% are owned by former Air France shareholders and 21% are owned by former KLM shareholders. The French Government's stake is currently at 18.6%. As of March 2005, Air France and KLM together had slightly over 102,000 employees and were operating 554 aircraft to 225 destinations. By most common

⁶⁵ Koninklijke Luchtvaart Maatschappij, Royal Dutch Airlines

measures a combined Air France and KLM will be one of the four biggest airlines in the world along with the new Delta, American, and British Airways. The merging of Air France and KLM is considered to be mostly complementary in that each carrier's operating strengths and concentrations complement each other more than overlap or duplicate each other. Therefore large scale staff redundancies are not anticipated which greatly eases the difficulties in post-merger integration of work forces.

In spite of the diligent work already done by the two pilot groups and many others in preparation for the coming merger, the process stalled mainly due to bureaucratic requirements within the world airline industry. For example, international flights operate by way of bilateral agreements between the country of origin and destination of any given flight. Holland maintains a slate of bilateral agreements with all the countries KLM flies to just as France does for Air France. Any change in any of those agreements or route authorities requires the agreement of the other participating country. That is, at the time of the announced merger there was no mechanism for mingling, or substituting a KLM route authority with/for an Air France route authority, or visa versa, thus the new airline, Air France-KLM could not mingle the operations of the two previous airlines. Bilateral agreements are in the hands of governments, not airline companies. Attempts to renegotiate bilateral agreements are typically met with a plethora of demands for changes in service levels and access to prime destination slots. Substantial changes are necessary to facilitate this cross-border integration.

EU law originates from treaties and is kept under the guardianship of several branches of the EU including the European Parliament, (the Parliament), the Council of Ministers, (the Council), and the European Commission, (the Commission). Recent judgments since 2001 of the Court of Justice⁶⁶, reveal the EU's approach to modifying the concept of bilateral agreements as indicated in the following excerpt from the 2004 Report from the Commission to the Council⁶⁷: "those Member States which had undertaken commitments with the United States were not entitled to

⁶⁶ referred to collectively as "Open Skies" judgments of the European Court of Justice covering a variety of airline matters including the EU approach to modifying Bilateral Agreements, the strategic agreement between Air France and Alitalia, (Italy), and the framework agreement forming Air France-KLM.

⁶⁷ Report from the Commission – Report on Competition Policy 2004 SEC/2005/0805, 52005SC0805.

do so and had breached the exclusive competence of the Community in a number of areas. Moreover, the Court ruled that the negotiation of bilateral agreements by Member States on behalf of their national carriers while excluding other Community carriers constitutes an infringement of the freedom of establishment provided for in Article 43 EC.⁶⁸ As a result, the nationality clauses contained in bilateral agreements with third countries need to be replaced by a “Community clause”. The modification of existing bilateral agreements and the recognition by third countries of the Community clause are necessary to ensure that air transport services are operated on a sound legal basis.” However, the Commission recognized that some time will be required in that bilateral agreements are negotiated not imposed and third parties may resist any change in order to gain even a temporary advantage.⁶⁹ Nevertheless, the Commission has signalled its determination to ensure this change in the concept of bilateral agreements to facilitate harmonization of the European airline industry: “the two previously independent carriers will merge to become ultimately a single operator in the market”.⁷⁰

In anticipation of the pilot merger, the two pilot groups have negotiated a Protocol Agreement to arbitrate the resolution of the seniority integration under the auspices of the International Federation of Air Line Pilots Associations headquartered in London, England. It remains to be seen what degree of adherence is found by the parties for the arbitrated result.

⁶⁸ Treaty Establishing the European Economic Community, [11957E100, 25 March 1957, subsequently renamed the Treaty Establishing the European Community or EC Treaty.

⁶⁹ The biggest single bilateral partner for European airlines is, of course, the United States. Current isolationism and protectionism trends in the U.S. may aggravate the difficulties in the area as is evidenced by U.S. manoeuvring for any advantage, short term of otherwise, within various NAFTA provisions such as softwood lumber.

⁷⁰ *Supra*, note 40 at 63

Chapter IV Conclusions

One overarching requirement applicable in every merger setting which itself has a major impact on the ultimate success of a corporate merger. That is communication with all employees, equally vital for management and non-management, of the premerger entities in both quality and quantity. The absence of communication breeds uncertainty, mistrust, and can cause permanent damage to workforce moral, it can cause the failure of a merger. This frequently manifests itself in wild rumours and speculation. Communication must be honest, factual, and specific to the maximum extent possible, acknowledge and address potential problems or downsides in the merger, and provide answers to settle employees' personal stability concerns and, to the greatest extent possible, answer future doubts. It cannot all be achieved at the time of the first merger announcement, of course, but future problems as they appear must be acknowledged at the outset with a timetable for addressing issues. Subsequent frequent communication must adhere to the timetable or rationalize alterations in order to maintain any trust from naturally and understandably unsettled employees. It is essential that communication portray a viable and believable plan that is sustained through the process.

Communication per se, of course, is not the precisely the element necessary for success but it represents and underpins trust in management or the new management on the part of all the employees. Communication is but the vehicle necessary to win the trust and support of

employees whose lives have been shaken but the uncertainty and disruption that invariably accompany a merger announcement. Communication reveals to the employees the presence of a sound management plan for the merger which will take into account not only the needs of the new corporation but also of all its employees. The absence of communication or the absence of believable communication, as was strikingly evident in the DaimlerChrysler case, leaves a vacuum for fear, uncertainty, and eventually even hostility of one group toward the other as the perceived threat to an employee's stability in his or her work-life.

In the end, the DaimlerChrysler merger was not consummated as a merger but amounted to an exercise in marketing publicity. In retrospect there is little if any evidence that there was ever any genuine intent to merge the operations of the two manufacturers or even any significant portion of their management structures. Whether any benefit was gained from the merger exercise by either partner or whether both partners were left diminished at the end of the exercise is arguable.

As much as DaimlerChrysler was not a merger there have been numerous mergers of major corporations that went to full integration and from which it is possible to identify what are the underlying components and principles. Consideration of merger principles requires an immediate differentiation by function between management and labour employees. Management may include executive, senior, middle, and junior management. Labour may include unionized and non-unionized. In most merger situations of any significant size or impact, management employees will be dealt with according to the whim of the "new" management and non-management employees will most likely be unionized and dealt with according to prevailing labour codes and terms and conditions residing in collective agreements.

A perception of fairness will underlie any successful merger. Absent fairness, acceptance will be less than enthusiastic or may be non-existent. Fairness is a concept that spans and has strong parallels across many disciplines including economics and law. Fairness is an undeniably worthy objective that is very difficult to define and may, in the eyes of sceptics, be impossible to achieve. Nevertheless, it is the best ideal to strive for. The field of economics is a helpful place to look for analyses of the concept of fairness. Economics scholars have long dwelt on defining

fairness and their work can be informative. The abstract concepts of Rawls' original position and veil of ignorance, all constructed in the abstract to ensure a void of bias and predetermination which will ultimately lead to fairness, bear remarkable resemblance to the "reasonable man" who has thrived for centuries in the Law. The reasonable man has a good heart and an empty head which is a qualification of well-meaning intent and lack of bias. In other words, the reasonable man is positioned to see issues fairly and without bias or predetermination.

Sanctity and non-discrimination are not valid as general principles of fairness but perhaps are better described as counter-principles. They are examples of an external factor or emotion prevailing over sound economic logic and analysis. There is no ultimate or trumping value of fairness. Since merger situations can become highly charged emotional events great care must be taken to avoid emotionally driven processes and evaluations.

It is compelling logic that success in altering bargaining unit boundaries, as in the case of a merger, relies on fairness as perceived by those affected. In spite of its elusiveness, fairness is founded on principles that are sufficiently universal so as to be applicable in almost any circumstances. There are means to assign values to components of change and corresponding means to sum the changes that involve classic economic analyses such as opportunity cost, marginalism, and diminishing marginal utility. Ultimately the evaluation of fairness or the perception of fairness will involve an evaluation of the distribution of benefits resulting from a merger.

The judgments of a reasonable man are the essential requirements of workforce integration. Equipped with tools to evaluate alternatives, the reasonable man can arrive at an objective determination of fairness at the end of the day through a reasoned and carefully evaluated analysis of the distribution of the benefits of the change.

Chapter II, Substance, traces the evolution of the substantive factors that comprise seniority from its simple beginning to its much more complex current form specifically in the Canadian airline industry. The early understanding of seniority as a simple substitute term for length of employment is satisfactory within a static work group. A work group thrives and grows within

its own boundaries and classic seniority provides an adequate vehicle for the distribution of employment benefits with the group. However, at the point where the makeup or boundaries of the group is changed, such as in a merger, then disparities will appear in employment benefits that will have accrued over time. That is, one work group may be within a more prosperous corporation than another (for a myriad of reasons) but the effect is that in combining the groups the seniority in the more prosperous group may simply be worth more because of having developed farther over time. To ignore this discrepancy is to deny those workers the benefit of factors such as harder work or sacrifices or even just good luck. To account for those discrepancies in a more sophisticated analysis, summation, and distribution of the benefits is an essential step to achieve fairness.

There are a great many case studies to draw upon even within the airline industry, moreover within the Canadian airline industry. Early cases appeared insensitive to anything other than who purchased whom or in other words who was the survivor and who was bought, who was the winner and who was the loser. Subsequently arbitrators placed considerable emphasis on simply how long each employee had toiled in the industry to the point where date-based seniority began to take on the characteristics of the classic sanctity argument from economics. However when it became apparent that that singular integration factor began to produce absurdities in results arbitrators began modifying it as a primary factor with the influence of a secondary factor. In most cases of this type the primary, date-based resolution was modified by the application of a factor derived from an analysis of the financial health and well-being of the purchased company. The rationale for this grounded in the proposition that the health of the purchased company was so bad the prospects of any future employment were severely diminished in any event. It was this analysis that Arbitrator Gallagher chose as the foundation for his Award in the Transair case which effectively discounted the Transair pilots' date-based seniority to account for the dire financial condition of their company at the point they were purchased by PWA. It was an opposite application of this analysis with which Arbitrator Teplitsky denied the CPAL pilots any seniority benefit from the greater value of their flying jobs coming into the merger with them as compared to those of the other three airlines in that merger.

Arbitrator Mitchnick in the AC - CAIL merger was attracted to the same analysis as Arbitrator Gallagher was in the Transair - PWA merger. Arbitrator Mitchnick heavily weighted his view of the dire financial condition of CAIL leading up to the Air Canada purchase. This became the prominent factor in how he selected selecting groups for ratios that gave a very strong preference to the OAC pilots over the OCP pilots.

Where Arbitrator Mitchnick erred and was subsequently overturned by CIRB Chairman Lordon was that Arbitrator Mitchnick appeared to follow prior, available arbitral jurisprudence from both the U.S. and Canada which typically granted an unfettered discretion to the arbitrator to consider all factors deemed relevant by the arbitrator. Chairman Lordon found, in review, that because this arbitration derived its jurisdiction from an order of the Board, Arbitrator Mitchnick was not unfettered in his discretion of what constituted the proper factors upon which to decide the issues but that in fact, Arbitrator Mitchnick was constrained by the recently amended §18.1 of the *Code* which, in Chairman Lordon's interpretation, (subsequently supported on Board and judicial review) when read in conjunction with §35 of the *Code*, required the arbitrator to protect collective agreement rights, both bargaining and bargained rights, during the integration of the seniority lists.

" [94] The fundamental remedial nature of section 35, as noted, is to ensure that bargaining rights and bargained rights are protected in circumstances where changes in an employer's operations have led to a real threat to the rights of bargaining agents or to the bargained rights of employees, whether such rights are set out in a collective agreement or whether the rights have yet to be bargained. Therefore, it is appropriate that, to give meaning to section 35 and section 18.1, negotiated collective agreement rights expressly set out in collective agreements of ongoing effect must be protected. Also, the Board must be cautious not to override one set of such rights in favour of another. The negotiated rights of the merging bargaining units must be recognized equally and given equal value unless a persuasive basis can be made out for preferring the rights of one group over another. In the present matter, as in many instances, the bargaining rights of the merging units must also be considered, since the application for a declaration of single employer and the Board's consequent order followed by a merger of bargaining units did not immediately occur following the assumption of control by Air Canada."⁷¹

⁷¹ CIRB Decision 183, Lordon, 10 July 2002 at 53

It is key to this analysis to note that the CAIL pilots' bargained rights (whatever bundle of rights that would ultimately be determined) were recognized and legitimized by the act of Air Canada concluding an interim collective agreement with the CAIL pilots under ALPA on 30 March 2000, that for all intents and purposes mirrored the collective agreement between Air Canada and ACPA. Therefore, that at the point in time when the CIRB agreed to the declaration of a common employer and to consolidate the bargaining unit on 17 October 2000, the bargained rights of the CAIL pilots were, in fact, virtually identical to those of the Air Canada pilots. From this starting point Arbitrator Mitchnick contravened the provisions of §18.1 and §35 which required him to preserve those rights when deeply discounted the bargained rights of the CAIL pilots due to the financial ill-health of their airline prior to its purchase by Air Canada. Accordingly Arbitrator Mitchnick's Award was overturned and Chairman Lordon subsequently approved a new process under Arbitrator Keller that would resolve the seniority integration within the parameters laid down by Chairman Lordon in Decision 183:

"...the Board's goal and that of an arbitrator acting pursuant to Board statutory authority must be, whenever possible, to preserve such existing rights.

" [98] What this means in the present circumstances is that the Board's statutory jurisdiction over seniority rights is not an open one to be exercised arbitrarily, but is to be exercised in respect of such rights as they are framed and set out in the relevant collective agreements..."⁷²

And:

" Any arbitration under the Code, unless the affected employees otherwise agree, should seek to preserve the relative value of the benefits of the employees, because their work position reflects the trade-offs and choices which they may have already made respecting location of work, education, training, the choice to work for one employer or another and the many other factors that have resulted in that work position."⁷³

Thus, Chairman Lordon's Decision 183 amounted to a statutory overturning of prior arbitral jurisprudence from Canada, and around the aviation world. It may have brought to an end the sanctity-style argument that the only valid principle in seniority integration is Length of Service

⁷² *Ibid.* at 55

⁷³ *Ibid.* at 97

(or its variant, Date of Hire). Rather, it required arbitrators to balance as fairly as possible the collection or bundle of bargained rights that accompanied each group into the merger.

Accordingly, Chairman Lordon in ordering the re-arbitration that resulted from overturning Arbitrator Mitchnick stated:

"[170] These principles may be summarized as follows:

" b) the integration should take place upon the basis of the facts, including job situations, aircraft actually working and collective agreement and seniority rights, as of that date; ...

"e) on the basis of the evidence before Arbitrator Mitchnick and this reconsideration panel, a date of hire seniority integration is not appropriate and the seniority list should be integrated on a ratio basis, treating those in defined similar categories similarly;...

"g) it will be necessary to examine seniority lists in detail to identify the specific points of division or categories to be utilized and the ratios to be applied. However, the focus in doing so, rather than being one of discounting should be to group pilots in a similar work situation together with those whose seniority allowed them to fly similar equipment with similar status at the relevant time being grouped together."⁷⁴

Therefore, the current state of seniority mergers in Canada conducted under the *Code*, is that the arbitrator is required to balance as fairly as possible the accrued value of the respective seniority of each of the individuals according to all the factors that comprise seniority. This is a substantial evolution over several decades from the end-tailing of the BC Airlines pilots to the PWA seniority list and the blind adherence to date-based rationale at the exclusion of all other factors. Seniority has gained acceptance at the CIRB and reviewed in courts above, as a comprehensive bundle of rights, earned over time and transportable over bargaining unit boundaries. Seniority integrations are to be done according to a fair distribution of benefits, not according to a singular historical fact.

⁷⁴ *Ibid.* at 109, ¶170

Turning to the other side of the coin, process, there is no doubt that every party who acceded to “final and binding” in these studies was fully cognizant of the meaning and impact of that term. That is, there appears to be no controversy over meaning in the doctrine, but rather all the controversy lies in adherence to the doctrine.

Final and binding can only come by way of a limited number of routes: first, by parties abiding by tradition; second, by parties abiding by commitment; third, by one party yielding; and, fourth, by the parties having no further recourse. In the cases studied above, undoubtedly the Doctors and the Crown Counsel anticipated a traditional acceptance by the Government to follow their wise and thorough arbitrations and were likely very surprised when that did not happen. There was never much evidence of specific commitment—the Doctors seem to have yielded—but the Crown Counsel might have taken their case to the point of no further recourse if other events had not intervened. In two vastly different seniority integrations, it is clear that ACPA has steadfastly refused to accede to the doctrine of "final and binding" either by commitment or even by escalation to the point of no further apparent recourse.

Historically, parties bound themselves to contractual agreements, generally respecting the “binding” concept unless a flaw or imperfection could be revealed in the agreement. In Labour, parties typically pre-bound themselves to processes out of the need to obtain finality in processes such as difficult negotiations for collective agreements. The methodology involved submitting the dispute to a highly respected neutral third party who would produce a solution that was both politically acceptable to the parties and highly respected by the parties. Thus, in most cases, final and binding was rooted in respect for and commitment to the process. If respect withered, so too did finality.

In the foregoing cases, starting with the doctors, all the conventional trappings of a classic labour dispute-resolution were present. Sophisticated parties made their case before a highly distinguished and highly credible panel which, in due course, pronounced their thorough and detailed finding. However, the Provincial Government for whatever political pressures motivated it was unable to maintain its position as an aloof observer of the process and neutral, general supervisor of labour relations. It argued that its involvement was justified and necessary

simply because the resolution of the issues at hand would have a profound effect on the government's management of the Province's finances. Electorally it was a powerfully situated government with a huge legislative majority. It used its power in Bill 9 to set aside the McEachern Award and legislatively substitute its own solution. Moving into the dispute as a direct participant terminated the Government's traditional role of neutral supervisor of provincial labour relations. At the same time, the doctrine of "supremacy of the legislature" even though cast in the current political rhetoric of the need for responsible provincial financial management swept aside any and all adherence of the parties to "final and binding" with respect to the traditionally developed Award.

It is an interesting follow-up that the Doctors, in spite of their experience in 2002 at the hands of the Legislature, were able, a mere four years later, to conclude the longest agreement in their history running for 6 years from 2006 to 2012. Perhaps this signals a renewed mutual respect between the parties and for the process. However, is there finality in that agreement by way of a return to respect for and commitment to the process or is it subject to further legislative disruption? There is no doubt that the BC Government underwent a wholesale change in attitude towards labour relations from its early days in 2001 and 2002, to underwriting its generous incentive programme of 2006. In 2006, the Province's financial condition was sufficiently buoyant that the Government could afford to buy labour peace, a stark contrast to the financial necessity arguments advanced in support of roll-back labour provisions of a few years earlier. However, the question remains unanswered as to which attitude will prevail when the post 2008 economic downturn effects begin to be felt through the provincial economy as they inevitably will do. Is there any certainty remaining in labour relations, or are these current solutions fluid and temporary in nature? Peace can be easily purchased in good times but principles and commitment are bound to come under great stress in difficult times.

Arising out of somewhat different circumstances than the Doctors, the Crown Counsel dispute was staged upon small numbers, not the big provincial impact numbers of the Doctor's dispute. Politically, previous BC governments had always shied away from attacking the Doctors as stalwart pillars of society above and immune to the attacks of mere politicians. Extending that theory, it can be postulated that the mere 400 Crown Counsellors were open to attack as a small,

less visible labour group, and part of the criminal justice system that is very fashionable to attack within the political realm. However, possibly the most difficult to reconcile politically is the profound resistance of the supposedly union friendly NDP government of the late 1990s to the classic labour ambitions of unionism and collective bargaining advanced by the early Crown Counsel Association. It would appear that the hostile atmosphere carried over across the 2001 change of government in B.C. However the new Liberal government, very early in its mandate, showed its willingness to resort to its ultimate labour club, legislation. In this regard, the Crown Counsel group may well have simply been in the wrong place at the wrong time. In the end, one must inevitably conclude that political influence is variable, uncertain, and of unpredictable impact.

Resorting to legislation escalated labour disputes and resolution to a level beyond the effectiveness of party-prescribed final and binding. It simply made “final and binding” a meaningless term at that level, the traditional level of dispute resolution where the parties would abide by their commitment to "final and binding". The availability of a final ultimate club removed the delicate balance from the process and rendered useless any efforts to resolve disputes if one side was simply going to impose its will at some future point of its choosing. An imbalanced and handicapped system commands no respect, the essential element for the commitment to “final and binding”, to wit: the B.C. Teachers illegal strike of 2005 which was conducted partly in open defiance of provincial legislation. With the Provincial Government as a direct party in these disputes, there is too great a strain on the concept of fairness in legislation when it is blatantly obvious that the government can and will simply design and implement legislation specifically to answer its political needs in labour relations, leaving the other side defenceless in response.

The only possibility for renewed respect is to elevate the processes to a level where respect survives, above the political reach of the participants, namely the highest court of the land to which the provincial government must accede along with all other parties. The doctors will not be pursuing any litigation particularly now that they have entered into a lengthy agreement running for several years, to 2012. The Crown Counsel dispute with their 2005 litigation had the good fact pattern with which it could have proceeded up the chain of courts to re-establish

adherence to the doctrine of final and binding but it settled in 2007 in the bonus-for-labour-peace programme.

Some of the answer to this process dilemma came from the Supreme Court of Canada in its June 2007 decision in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*⁷⁵, (Health Services) a case which arose out of several unions and union locals seeking relief from the BC Government's roll-back of collective agreement provisions attained by workers in health care jobs. The roll-backs were seen by their opponents political targets of the new Government at what it saw were unwarranted concessions by the previous government to its union friends as its term in office came to an end.

In 2002 the BC Government passed the *Health and Social Services Delivery Improvement Act*⁷⁶ (the *Act*) which legislated changes to collective agreements (including contracting out provisions which are specially sensitive in the labour movement) previously negotiated by certain health care unions. The unions challenged the legislation claiming it breached §2(d) Freedom of Association, and §15 Equality, of the *Charter of Rights and Freedoms*. The §2(d) challenge was based on the fact that the Government had quickly implemented the *Act* without meaningful consultation or negotiation with the affected unions. Negotiation in this context was specifically denied constitutional protection by the Supreme Court of Canada in a 1980s case⁷⁷. However, the Health Services case directly and specifically overruled previous jurisprudence to grant constitutional protection to collective bargaining.

The repercussions of the Health Services case with respect to the circumstances of the Doctors and Crown Counsel may be readily predictable. The elevation of collective bargaining to a constitutionally protected right should effectively raise it above the whim of whatever current government is sitting in the legislature and restore some certainty to the traditional process, in other words, circumscribe the supremacy of the legislature argument. In other words, it has

⁷⁵ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27

⁷⁶ *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2

⁷⁷ *Reference Re Public Service Employee Relations Act (Alta.)*, 1 S.C.R. 313

restricted the recourse of the Government to simply turn to legislation in order to procure the collective bargaining result it wishes to have. The absence of that option may well facilitate a return to meaningful bargaining, mediation, and arbitration in which both sides are certain from the outset of the compliance of the other party with the result.

In the private law cases of the Air Canada pilots there is currently no analogous force to re-engage the commitment to the doctrine of final and binding. The Air Canada pilots in their Connectors case were able to walk away from the result of the Picher Arbitration with no direct consequence beyond the collapse of their union, CALPA. In considering the Connectors case for financial relief, the Supreme Court of Canada chose not to pronounce on the wisdom and necessity for parties to commit to final and binding even in *obiter*. It may be argued that one result of that omission is the refusal of the Air Canada pilots to abide by their commitment to final and binding in their merger with the Canadian pilots under Arbitrators Mitchnick and subsequently Keller.

Although the Air Canada pilots are, in fact, working under the provisions of the Keller Award and not, with one exception (involving the vote on the B-777 agreement), conducting illegal strikes as the BC Teachers did in 2005. Nevertheless, their failure to abide by their prior commitment to accept the outcome of the Keller Arbitration has produced a long and acrimonious period of labour relations that has yet to find an end. In spite of agreeing to accept the outcome of the Keller Arbitration the Air Canada pilots litigated every decision as far as they possibly could, which included three unsuccessful applications for leave to the Supreme Court of Canada. Perhaps it would have been appropriate for that Court to hear one of those appeals even if just to pronounce on the need for finality.

Simultaneously, the Air Canada pilots have brought the seniority issue into its relationship with their employer. The union, ACPA, has adopted the stance that as the sole bargaining agent for all the Air Canada pilots it can determine all issues between itself and the employer regardless of any minority rights held by the former Canadian pilots and upheld repeatedly by the CIRB and the courts. About to embark on its first negotiation for a collective agreement since Air Canada emerged from CCAA protection the union has stated that the seniority matters will be the top

priority in negotiations for a new collective agreement. That is, they intend to use the bargaining capital of the whole group for the benefit of the original Air Canada pilots and to the detriment of the former Canadian pilots. These are but a few examples of this process without an end.

The CIRB stressed in several written decisions the public policy need to bring the matter to an end. Perhaps was most notably stated in Decision 263 in which the Board declined to review the Keller Award: “there is a point in any process where the parties must either resolve their dispute or accept that they have made maximum gains”. Further, the Board stated that reviewing the Keller Award “is not just a simple case of making a few adjustments to the Award, but would require assessing the complex balance of the Award’s entire result.” And that a decision by another panel “would be just another educated point of view, would require re-litigating the entire case, and likely ignite yet another round of review.”⁷⁸

The same was echoed by the courts, in particular the Federal Court in the written reasons of Dawson, J, reviewing CIRB Decision 263, to not disturb the Keller Award, stated: "This decision articulates sound policy reasons for withholding relief. Most particularly, there is a public interest in bringing finality to this dispute."⁷⁹ (Emphasis added). However, Canada's highest court remains silent on this issue.

In some way an end must be found which will possibly come through a CIRB or court action initiated by the former Canadian pilots within the Air Canada group. The current state of preoccupation with the seniority question by the Air Canada pilots' union executive precludes the union and the employer from properly conducting its business as contemplated under the Code. The price this state of affairs extracts from the employees, the corporation, and the shareholders is an unjustifiable burden that cannot be borne indefinitely by these parties. In some way the current state of affairs must be terminated.

⁷⁸ **Supra** note 62 at 76

⁷⁹ **Supra** note 63 at 77

Bibliography

Statutes and decisions referred to in Chapter II and III:

Canada Labour Code, R.S.C. 1985,

CIRB Decisions No. 183, 263, 349

Air Canada Pilots Association v. Air Line Pilots Association, [2003] F.C.J. No. 488 (F.C.A.)

Air Canada Pilots Association v. Air Line Pilots Association, [2003] F.C.A. 160

Air Canada Pilots Association v. Air Line Pilots Association, [2005] F.C.A. 60)

Federal Court denies ACPA review of Keller on procedural grounds:

Air Canada Pilots Association v. Air Line Pilots Association, [2005] F.C. 723

ACPA appeal of Federal Court denial of review denied from bench:

Air Canada Pilots Association v. Air Line Pilots Association, [2006] F.C.A. 74]

ACPA application denied for leave to the SCC to appeal the Federal Court of Appeal decision to deny review of the Federal Court decision to deny review of Keller on procedural grounds: S.C.C. 29 June 2006. File #31413.

Arbital Jurisprudence Airline Pilot Seniority Integrations⁸⁰

Braniff-Mid-Continent (1952) (Frank P. Douglass)

West Coast - Empire (1952) (Robert Boyd)

AOA-Pan American (1952) (David Cole).

Flying Tiger - Slick (1954) (Benjamin Aaron)

United-Capital (1962) (Harry Abraham).

United-Capital (1962) (David Cole)

Saturn - Aaxico (1967) (Saul Wallen).

Eastern-Mackey (1967) (David Cole)

Braniff-Panagra (1967) (David Cole)

Alaska-Cordova (1968) (Harry Platt)

Airlift-Slick (1968) (David Cole)

Air West-West Coast-Pacific-Bonanza (1968) (Lewis Gill).

Alaska-Alaska Coastal (1969) (Lewis Gill)

Northern Consolidated-Wien (1968) (Sam Kagel)

American-Trans Caribbean Airlines (1974) (Russell Smith)

Saturn-TIA (1977) David Feller)

Saturn-Tia (1978) (Lewis Gill)

Air New Zealand-New Zealand National Airways (1980) (David Feller)

⁸⁰ The author acknowledges and thanks the U.S. Air Line Pilots Association (ALPA), Washington, DC, and the New Zealand Air Line Pilots Association, Auckland New Zealand, for much of this historic material.

North Central-Southern (1980) (Ted Vass)

Flying Tiger-Seaboard (1981) (Laurence Seibel)

Pan American-National (1981) (Lewis Gill)

Republic-Airwest (1981) (Richard Bloc)

Alaska International-Great Northern (1982) (David Feller)

Continental-TXI (1983) (Marcia Greenbaum)

Air Wisconsin-MVA (1985) (Rolf Valtin)

United-Pan Am (1985) (David Feller)

Piedmont-Empire (1986) (by agreement)

Continental-New York Air (1986) (Richard Bloc)

PSA-US Air (1987) (Laurence E. Seibel)

Delta-Western (1987) (Marcia Greenbaum)

Frontier-Continental (1987) (George Nicolau).

People Express-Continental (1987) (non union, by management)

Canadian Pacific-Eastern Provincial (1987) (David E. Feller)

Pacific Western-Canadian Pacific-Nordair-EPA (1987) (Teplitski).

Alaska-Jet America (1987) (by agreement)

Northwest-Republic (1989) (Thomas T. Roberts)

Federal Express-Flying Tiger (1990) (George Nicolau)

Air Alliance-Air BC-Air Nova-Air Ontario (1991) (Michel G. Picher)

People Express-Continental Pilot-Frontier Pilot Merger (1991) (Jerome H. Ross)

Pan Am-Delta (by agreement) (1991)

Pan Am-United (London transferees) (1992) (Marcia L. Greenbaum)

Air Canada-Canadian (Mitchnick/London) 2003 [C.I.R.B.]

Books and Texts

Banakar and Travers, *An Introduction to Law and Social Theory*, Portland, Oregon, U.S.A., Hart Publishing, 2002.

Bannock, Baxter, and Davis, *Dictionary of Economics*, London, U.K., Penguin, 1998.

Besanko, Dranove, Shanley and Schaefer, *Economics of Strategy*, Singapore, John Wiley & Sons, 2005.

Boardman, Greenberg, Vining, and Weimer, *Cost-Benefit Analysis*, Upper Saddle River, New Jersey, U.S.A., Prentice Hall, 2001.

Brander, James A., *Government Policy Toward Business*, Mississauga, Ontario, Canada, John Wiley & Sons Ltd., 2006.

Brown & Beatty, *Canadian Labour Arbitration*, Aurora, Ontario, Canada, Canada Law Book Ltd., 1984.

Folsom, Ralph H., *European Union Law*, St. Paul Minnesota, U.S.A., Thomson West, 2005.

Hanson, Patti, *The M & A Transition Guide*, New York, New York, U.S.A., John Wiley & Sons Ltd. 2001.

Heyne, Boettke, and Prychitko, *The Economic Way of Thinking*, Upper Saddle River, New Jersey, U.S.A., Prentice Hall, 2003.

Milgrom and Roberts, *Economics, Organization & Management*, Eaglewood Cliffs, New Jersey, U.S.A., Prentice Hall, 1992.

Rawls, John, *A Theory of Justice*, Cambridge, Massachusetts, U.S.A., Harvard University Press, 1971.

Rhoads, Steven E., *The Economist's View of the World*, Cambridge, U.K., Cambridge University Press, 1999.

Segal, Morley, *Points of Influence*, San Francisco, California, U.S.A., Jossey Bass, 1997.

Weiler, Paul, *Reconcilable Differences*, Toronto, Ontario, Canada, The Carswell Company Ltd., 1980.

Williamson, Oliver E., *The Economic Institutions of Capitalism*, New York, New York, U.S.A., The Free Press, 1985.