Labour Arbitration and Public Rights Claims: Forcing Square Pegs into Round Holes

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Canada is relatively unique among countries with developed employment law systems in that unionized workers' statutory employment rights claims are almost exclusively enforced through private arbitration rather than public courts or tribunals. The anomalous requirement that public rights be enforced through a private law mechanism inevitably raises legitimate questions of "fit" and whether an alternative model might be appropriate—questions also explored by Professor Bernard Adell during his long and prolific career in labour law.

In taking up these questions, the author provides historical context for the rise of arbitration as the preferred avenue for dispute resolution in Canadian and American unionized workplaces. Thus far, industrial pluralism—a distinctively private law concept—has been used to justify this model and its three pillars of arbitral monopoly, union gatekeeping and the duty of fair representation. The author builds on Adell's work by examining the more recent expansion of arbitrators' authority to consider public rights claims, and its impacts on these pillars. The author concludes that some level of reform to dispute resolution in Canadian labour law is needed, and suggests that although more research is needed, a new model of public tribunals with jurisdiction to hear all matters of employment disputes may be a viable alternative to the current pluralist model.

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Introduction

In countries with developed employment law systems, it is public courts and tribunals that typically enforce employment rights claims.[1] In Canada, there is an important departure from this model. While non-unionized employees use public enforcement mechanisms, the employment rights of unionized employees are enforced almost entirely through private arbitration with access controlled by the union. If the union does not support their claim, employees typically have no other recourse.

This enforcement model is an integral part of the Canadian system of collective bargaining, largely borrowed from the United States' *Wagner Act*.[2] The widespread use of arbitration and the union's role as gatekeeper are US transplants that took root in the early days of collective bargaining when courts were widely regarded as unsympathetic to the collective aspirations of workers. An arbitration-based enforcement model had the considerable merit of keeping courts out of the business of interpreting

1. See Susan Corby & Pete Burgess, *Adjudicating Employment Rights: A Cross-National Approach* (Hampshire: Palgrave Macmillan, 2014) (examining France, Germany, Great Britain, Ireland, Italy, the Netherlands, New Zealand, South Africa, Sweden and the United States); the articles in the Comparative Labour Law and Policy Journal (2012) 34:1 Comp Lab L & Pol'y J (examining France, Italy, New Zealand, Japan, Brazil, Belgium and Australia).

2. The *National Labor Relations Act*, 29 USC §§ 151–169 [*NLRA*] was originally passed in 1935. Canadians persist in calling this statute the *Wagner Act*, after its key sponsor, Senator Robert F Wagner.

and applying collective agreements. However, it also blocked access to public channels of enforcement and gave unions an effective veto over individual employee claims. Proponents justified these features of the model by resorting to a philosophy of workplace regulation known as industrial pluralism, which conceptualized unionized workplaces as self-governing entities making and enforcing their own private law.[3] When the inevitable challenges to the model reached the US Supreme Court, it was endorsed and supplemented in due course with a judicially-constructed duty of fair representation (DFR) designed to regulate egregious abuses of union gatekeeping power.

The three key pillars of the industrial pluralist enforcement model—arbitration, union gatekeeping and the DFR—subsequently found their way into Canadian collective bargaining statutes. Even as the model was becoming firmly entrenched, however, its foundational conception of workplace law as private law was being undermined by legislative and jurisprudential developments in Canada that expanded the scope of labour arbitration well beyond the boundaries of rights negotiated by employers and unions. It is now widely acknowledged that Canadian labour arbitrators have jurisdiction to enforce employment-related statutes and take account of constitutional rights in the course of carrying out their functions. These rights are clearly public rather than private rights. When we enforce them within a model designed to give primacy to pluralist values and to operate with relative autonomy from public law, we are forcing square pegs into round holes, raising legitimate and serious questions of "fit".

3. In her iconic critique of industrial pluralism, Katherine Van Wezel Stone defines the term as follows:

> Industrial pluralism is the view that collective bargaining is self-government by management and labor: management and labor are considered to be equal parties who jointly determine the conditions of the sale of labor power. The collective bargaining process is said to function like a legislature in which management and labor, both sides representing their separate constituencies, engage in debate and compromise, and together legislate the rules under which the workplace will be governed. The set of rules that results is alternatively called a statute or a constitution—the basic industrial pluralist metaphors for the collective bargaining agreement.

Katherine Van Wezel Stone, "The Post-War Paradigm in American Labor Law" (1981) 90:7 Yale LJ 1509 at 1511 [Stone, "Post-War Paradigm"].

Professor Bernard Adell, to whom this volume of the *Jounal* is dedicated, had a long-standing interest in the practical and policy implications of the pluralist enforcement model. His meticulous and lucid scholarly articles and government reports reveal his support for the core principle of keeping workplace adjudication out of civil courts, and his respect for the pragmatism and flexibility of arbitration as a dispute settlement mechanism. But they also reveal his increasing skepticism of core tenets of the model, particularly the impact of union gatekeeping on individual employee rights. This concern increased as the jurisdiction of arbitrators expanded over the period in which he was most active as a scholar. He questioned "whether arbitration as it is now constituted, however efficient it might be, is a proper forum to be entrusted with a public mandate to take on any employment rights issue which one or the other parties wants to put to it".[4] He was troubled by what he saw as a mismatch between "anti-discrimination rights, which are vested in individuals, and the collective agreement administration process, which privileges collective rights".[5] He judged the DFR an inadequate instrument for reconciling individual rights and interests with collective rights and interests.[6] As far back as 1988, he raised the question of whether adjudication by a public tribunal to which individual employees had access would better balance the interests at issue.[7]

4. Bernard Adell, "Overlapping Forums in Collective Agreement Administration" in G Trudeau et al, eds, *Études en droit du Travail à la memoire de Claude D'Aoust* (Cowansville, Que: Blais, 1995) 1 at 12 [Adell, "Overlapping Forums"].

5. Bernard Adell, "Jurisdictional Overlap Between Arbitration and Other Forums: An Update" (2000) 8 CLELJ 179 at 223.

6. B L Adell, "The Duty of Fair Representation: Effective Protection for Individual Rights in Collective Agreements?" (1970) 25:3 Indus Rel 602 [Adell, "Effective Protection for Individual Rights"]; Bernard Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11:2 Queen's LJ 251 [Adell, "Collective Agreements"]; Bernard Adell, "Establishing a Collective Employee Voice in the Workplace: How Can the Obstacles Be Lowered?" in Geoff England, ed, *Essays in Labour Relations Law* (Don Mills, Ont: CCH Canadian, 1986) 3; Bernard Adell, "The Union's Duty of Fair Representation in Discrimination Cases: The New Obligation to Be Proactive" (2001–2002) 1 Lab Arb YB 263 [Adell, "The Union's Duty"].

7. Bernard Adell, "Law and Industrial Relations: The State of the Art in Common Law Canada" in Gerard Hebert, Hem C Jain & Noah M Meltz, eds, *The State of the Art in Industrial Relations* (Kingston, Ont: The Canadian Industrial Relations Association, Queen's University Industrial Relations Centre & The Centre for Industrial Relations–University of Toronto, 1988) 107 at 134 [Adell, "Law and Industrial Relations"].

In this article I take up this question, arguing that it has become even more pressing in light of legislative and jurisprudential developments that have taken place over the quarter century since Adell placed it on the table. I argue that the key design features of the pluralist enforcement model are rooted in a conception of autonomously generated workplace law. In the real world of the modern labour workplace, there are no clear boundaries between public and private rights; in this world, the rationalizations that historically sustained the pluralist model lose much of their normative force. We therefore need to reconsider the model, and embark seriously on the process of examining whether a unified public tribunal with plenary jurisdiction over employment disputes would be more effective and more legitimate.

I develop my argument as follows. In Part I, I explore the emergence of arbitration in both the US and Canada as the preferred mechanism for resolving rights disputes in unionized workplaces. In Part II, I examine the practical and policy justifications for permitting unions to act as gatekeepers to arbitration, and explain how courts and legislatures developed the DFR to relieve some of the pressure generated by union gatekeeping. In Part III, I trace the expansion of Canadian labour arbitrators' jurisdiction beyond the confines of collective agreements into territory that includes the enforcement of rights that have their source in public law. In Part IV, I examine how the key pillars of the pluralist enforcement model—the exclusive jurisdiction of arbitrators, union gatekeeping and the DFR—have responded to this expanded jurisdiction, arguing that efforts to adjudicate public rights claims within the old model have created new problems and new inconsistencies. In Part V, I address some of these problems and inconsistencies, and raise the question of whether we should abandon the old model. I argue in favour of exploring the option of a unified public tribunal, but suggest that many questions remain to be answered, both about the workings of the current model and the potential impact of a new public model before we can determine whether the objectives of administrative justice—accessibility, economy and fairness—would be better served by maintaining the status quo or by pursuing change.

I. The Emergence of the Arbitral Monopoly

Collective agreements are legally *sui generis*, and courts puzzled over their status and enforceability before and after the enactment of statutory collective bargaining frameworks. Should a collective agreement be treated like a contract? Did the terms of the agreement become implied terms of individual contracts of employment? What was the legal effect of provisions found in typical collective agreements requiring that disputes be submitted to arbitration? Did arbitration provisions bind only the parties to the agreement or did they also bind individual employees? If access to arbitration was restricted to the union and the employer, could employees take their own individual claims directly to court? Would this depend on whether employees had first exhausted dispute resolution procedures internal to their collective agreements? If employee efforts to use internal procedures had been stymied by the union, did individual access depend on whether the union had acted properly or improperly in blocking arbitration? [8]

These questions were not directly answered in the *Wagner Act*, despite widespread use of arbitration clauses.[9] They provoked significant debate among US labour scholars who frequently moonlighted as labour arbitrators. Harry Shulman, an early contributor to this debate, challenged the idea that collective agreements were enforceable through the courts.[10] He vigorously promoted the alternative idea that collective bargaining was a form of self-government in which collective agreements established a private "rule of law and reason" designed to regulate the individual workplace.[11] Arbitration clauses were an important part of that private law; if the parties agreed to arbitrate their disputes, the arbitrator became "part of a system of self-government created by and

8. For detailed discussions of the theoretical problems and the early US jurisprudence, see Archibald Cox, "The Legal Nature of Collective Bargaining Agreements" (1958) 57:1 Mich L Rev 1 at 19–23 [Cox, "Collective Bargaining"]; David E Feller, "A General Theory of the Collective Bargaining Agreement" (1973) 61:3 Cal L Rev 663 at 775–805.

9. See Dennis R Nolan & Roger I Abrams, "American Labor Arbitration: The Early Years" (1983) 35:3 U Fla L Rev 373 at 411 (by the early 1940s, over three quarters of US collective agreements contained arbitration clauses).

10. Harry Shulman, "Reason, Contract and Law in Labor Relations" (1955) 68:6 Harv L Rev 999.

11. *Ibid* at 1002.

confined to the parties".[12] While he acknowledged the arbitrator's role as adjudicative, Shulman saw it as very different in kind from the role of the conventional common law judge. Arbitrators answered to the parties rather than the state, allowing them to respond flexibly to the myriad of complex workplace problems for which rules had not been and could not be explicitly laid down in the agreement. Shulman urged strenuously that "the law"—by which he meant the entire package of courts, external legal rules and remedies—should stay strictly out of the business of enforcing collective agreements.[13] His ideas laid much of the groundwork for the school that became known as industrial pluralism.

Archibald Cox, an equally influential though much more prolific pluralist, argued that industrial self-government fostered stable and efficient relations between employers and employees, thereby promoting productivity and industrial peace. Cox did not entirely share Shulman's radical vision of the unionized workplace as a "law-free zone"; he saw a useful role for external law as a supportive framework for collective bargaining. But he nevertheless embraced Shulman's idea of arbitration as part and parcel of workplace self-government. Cox conceptualized a collective agreement as a contract, but a very special species of contract that was not simply a compendium of individual rights. For Cox, all claims arising from collective agreements—even ostensibly individual issues such as wage claims or challenges to termination—had a collective dimension, and their adjudication could have broad collective impact.[14] He saw both the negotiation and the administration of collective agreements as points on a continuum whereby workplace rights were generated, both intimately linked to the union's status as bargaining agent.[15] For this reason, Cox strongly endorsed union gatekeeping over arbitration,

12. *Ibid* at 1016.

13. *Ibid* at 1023–24.

14. Archibald Cox & John T Dunlop, "The Duty to Bargain Collectively During the Term of an Existing Agreement" (1950) 63:7 Harv L Rev 1097; Archibald Cox, "Rights Under a Labor Agreement" (1956) 69:4 Harv L Rev 601 [Cox, "Rights Under a Labor Agreement"]; Archibald Cox, "Reflections Upon Labor Arbitration" (1959) 72:8 Harv L Rev 1482; Archibald Cox, "Individual Enforcement of Collective Bargaining Agreements" (1957) 8:12 Lab LJ 850 [Cox, "Individual Enforcement"]; Cox, "Collective Bargaining", *supra* note 8; Archibald Cox, "Current Problems in the Law of Grievance Arbitration" (1958) 30:3 Rocky Mountain L Rev 247.

15. Cox, "Rights Under a Labor Agreement", *supra* note 14 at 618–38.

which he viewed as necessary not only to the union's capacity to balance competing interests within the bargaining unit, but also to the efficient resolution of disputes through a process that fostered flexibility and compromise. Indeed, he favoured an interpretive presumption that unions controlled access to arbitration, arguing against individual access to enforcement that would, in his view, give "the individual power to press claims inconsistent with the interests of other workers", and risk "serious impairment of the operation of the contract grievance procedure".[16]

Clyde Summers and Alfred Blumrosen were important scholarly voices on the other side of the debate. They accepted that collective bargaining was a necessary counterweight to the otherwise absolute hegemony of employers, but rejected the pluralist orthodoxy that rights created by collective agreements were quintessentially collective, and that access to enforcement must be channeled through unions. Summers argued forcefully that individual employees should have full control over the adjudication of their own rights claims.[17] Blumrosen's more measured approach accepted union control as logical and legitimate except where disputes involved what he called "critical job interests": termination and major discipline, compensation and seniority rights. [18] In such cases, he argued that individual interests trumped collective interests, and unions should not be permitted to prevent individual employees from adjudicating these types of claims.[19]

16. Cox, "Individual Enforcement", *supra* note 14 at 857.

17. See Clyde W Summers, "Union Powers and Workers' Rights" (1951) 49:6 Mich L Rev 805; Clyde W Summers, "Individual Rights in Collective Agreements and Arbitration" (1962) 37:3 NYUL Rev 362; Clyde W Summers, "Collective Power and Individual Rights in the Collective Agreement: A Comparison of Swedish and American Law" (1963) 72:3 Yale LJ 421.

18. Alfred W Blumrosen, "Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy" (1959) 13:4 Rutgers L Rev 631 [Blumrosen, "Critical Job Interests"]. See also Alfred W Blumrosen, "Group Interests in Labor Law" (1959) 13:3 Rutgers L Rev 432 [Blumrosen, "Group Interests"]; Alfred W Blumrosen, "The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship" (1963) 61:8 Mich L Rev 1435.

19. Blumrosen located his own position in a middle ground between Summers and the pluralists. See Blumrosen, "Group Interests", *supra* note 18 at 454–55. He subsequently developed his argument in favour of an individual right to arbitration. See Blumrosen, "Critical Job Interests", *supra* note 18 at 651–53.

The US Congress sought to dispel some of the legal confusion around the enforcement of collective agreements in the late 1940s by enacting what is now section 301 of the *NLRA*.[20] Section 301 expressly permits suits in federal court on "contracts between an employer and a labor organization".[21] This amendment may have been intended to make federal courts the enforcers of collective agreements; if so, it was only partially successful. While section 301 expressly labeled a collective agreement a "contract" and preempted the jurisdiction of state courts in connection with collective agreements, it failed to clarify whether individual employees had standing to bring their own actions, or whether section 301 suits could be brought only by the parties to the collective agreement. Even more importantly, it failed to explain how courts should deal with the many collective agreements requiring that disputes be resolved through arbitration.

After several false starts, the US Supreme Court produced its own answers to these questions in a trio of 1960 judgments that have become known as the *Steelworkers Trilogy*.[22] Citing Cox and Shulman (but neither Summers nor Blumrosen), the Court embraced the "industrial self-government" metaphor,[23] and with it the pluralist vision of arbitration.

20. Section 301 was part of the *Labor Management Relations Act of 1947*, 29 USC §§ 401–531, widely known as the *Taft-Hartley Act*.

21. *NLRA*, *supra* note 2, § 301. The full text of section 301(a) of the *NLRA* provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act [chapter], or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Ibid. It was part of the package of 1947 amendments to the *NLRA* known as the *Taft-Hartley Act*.

22. *United Steelworkers of America v American Manufacturing Co*, 363 US 564 (1960) [*American Manufacturing*]; *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574 (1960) [*Warrior Gulf*]; *United Steelworkers of America v Enterprise Wheel & Car Corp*, 363 US 593 (1960) [*Enterprise*]. For a discussion of the *Trilogy*, see Stone, "Post-War Paradigm", *supra* note 3; Katherine VW Stone, "The Steelworkers' Trilogy and The Evolution of Labor Arbitration" in Laura Cooper & Catherine Fisk, eds, *Labor Law Stories: An In-Depth Look at Leading Labour Law Cases* (New York: Foundation Press, 2005) 149. See also Feller, *supra* note 8.

23. *Warrior Gulf*, *supra* note 22 at 579–80. See also *American Manufacturing*, *supra* note 22 at 569–70 (Brennan J, concurring).

The Court accepted that a collective agreement is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate".[24] Accordingly, arbitration does much more than simply replicate judicial decision making; it is "part and parcel of the collective bargaining process itself",[25] and arbitrators are "indispensable agencies in a continuous collective bargaining process".[26] As the Court saw it, "[t]he processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective agreement."[27]

Canadian governments enacting their own versions of the *Wagner Act* in the mid-1940s and early 1950s arrived at very much the same conclusion, although they took a more direct route. Unlike the *Wagner Act* itself, which initially left open the question of how collective agreements would be enforced, the 1944 Order in Council that set the Canadian pattern for collective bargaining statutes addressed enforceability head-on. It required parties to provide their own mechanism within collective agreements for the "final settlement, without stoppage of work, on the application of either party, of differences concerning its interpretation or violation".[28] In addition, it empowered the War Labour Relations Board to order such a mechanism if the parties failed to do so.[29] Post-war Canadian labour codes followed suit, mandating dispute resolution mechanisms within collective agreements, and backing up those mandates with model arbitration clauses "deemed" to be included in any collective agreement that failed to provide for comprehensive dispute settlement.[30]

24. *Warrior Gulf*, *supra* note 22 at 578.

25. *Ibid.*

26. *Enterprise*, *supra* note 22 at 596.

27. *Warrior Gulf*, *supra* note 22 at 581.

28. *Wartime Labour Relations Regulations*, PC 1944-1003, s 18(1).

29. See *ibid*, s 18(2). See also Laurel Sefton MacDowell, "The Formation of the Canadian Industrial Relations System During World War Two" (1978) 3 Labour/Le Travailleur 175 (arguing that the focus of Canadian governments on the enforceability of collective agreements was influenced by the wartime context in which stability of production—i.e., "industrial peace"—was the core policy objective, and the prevention of strikes was all-important).

30. Some statutes mandated collective agreements to make provision for dispute settlement "by arbitration", while for others, the language was "by arbitration or otherwise". See AWR Carrothers, *Labour Arbitration in Canada: A Study of the Law and Practice Relating to the Arbitration of Grievance Disputes in Industrial Relations in Common Law Canada*

Canadian scholars generally favoured arbitration over court enforcement, accepting Cox's "continuum" theory that the enforcement of agreements through arbitration was closely allied with the collective bargaining process[31] (although some had reservations about whether union gatekeeping was inevitable and appropriate in all cases).[32]

Despite statutory support for arbitration, Canadian labour legislation did not expressly designate arbitration as the *exclusive* channel through which collective agreements could be enforced. For several years after collective bargaining became formalized, Canadian courts continued to accept direct claims from unionized employees dealing with issues that had traditionally been adjudicated in the courts, including claims for wages[33] and wrongful dismissal.[34] Typical judicial reasoning is reflected in the judgment of Ontario's Chief Justice McRuer in *Re Grottoli v Lock & Sons Ltd*, in which he accepted jurisdiction to deal with an individual claim for vacation pay. In his view, the certification of a union "does not abrogate the common

(Toronto: Butterworths, 1961) at 21–24. Prior to its move to a *Wagner Act* model in 1948, Ontario had a "labour court", a division of the regular superior court system. See *The Collective Bargaining Act, 1943*, SO 1943, c 4, s 1(d). Manitoba's *Labour Relations Act* continues to provide a right of action for damages for breach of collective agreements, open both to the parties to the agreement and to others "bound" by the agreement, but also contains the more standard provision requiring parties to provide their own enforcement mechanisms in collective agreements. See *Labour Relations Act*, RSM 1987, c L10, ss 78(1), 150.

31. See CH Curtis, *Labour Arbitration Procedures: A Study of the Procedures Followed in the Arbitration of Union-Management Disputes in the Manufacturing Industries of Ontario* (Kingston, Ont: Department of Industrial Relations, Queen's University, 1957) (Curtis described collective bargaining as "a continuous process" in "two distinct stages": the negotiation of the agreement, followed by the administration and enforcement of the agreement which culminates in arbitration at 1–2). See also Bora Laskin, "Collective Bargaining and Individual Rights" (1963) 6:1 Can Bar J 278 at 290–91; BL Adell, Comment, (1967) 45:2 Can Bar Rev 354 at 364–66 [Adell, "Labour Law"] (for commentary on *Northcott v Hamilton Street Railway*); HW Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45 Can Bar Rev 786 at 823–29.

32. See Laskin, *supra* note 31 at 284–89; Adell, "Effective Protection for Individual Rights", *supra* note 6; Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 137–39.

33. See e.g. *Re Grottoli v Lock & Son Ltd*, [1963] 2 OR 254, 39 DLR (2d) 128 (H Ct J) [*Grottoli* cited to OR]. This decision was cited with approval by the Supreme Court in *The Hamilton Street Railway Co v Northcott* (1966), [1967] SCR 3, 58 DLR (2d) 708 [*Northcott* cited to SCR].

34. See e.g. *Woods v Miramichi Hospital et al* (1966), 59 DLR (2d) 290, 66 CLLC 602 (NB CA).

law relationship of the employer and the employee" and a right of action for wages remained.[35] As he saw it, refusing to permit individual lawsuits

> would create rather chaotic conditions with reference to the simple matters of employees who operate under a collective bargaining agreement getting paid promptly and it would also put in the hands of a union that has been certified as a collective bargaining agent extraordinary power over non-members of the union who were employees of the same employer.[36]

When the issue eventually reached the Supreme Court of Canada in *Northcott v Hamilton Street Railway*,[37] the Court permitted individual employees to proceed with a claim for wages because it found no outstanding dispute about the employees' entitlement to the wages.[38] The only issue was the calculation of wages due, and consequently there was no need for the court to interpret the collective agreement.[39] The peculiar facts of *Northcott* lent themselves to that conclusion, since an arbitration board had already pronounced on the merits of the dispute. However, subsequent courts interpreted *Northcott* more broadly, permitting employees to circumvent arbitration procedures and go directly to court when the remedy sought was damages rather than reinstatement.[40]

Canadian legal scholars were disturbed by the courts' willingness to encroach on the turf of arbitrators. In a 1967 note on *Northcott*, Adell argued cogently that the courts should stay out of the enforcement of collective agreements.[41] By the 1970s, Canadian courts were beginning to heed this advice and extricate themselves from direct enforcement, shifting their focus from the nature of the remedy to the issue of whether the rights at issue were addressed in the collective agreement. The decision in *General Motors of Canada Ltd v Brunet*[42] marked a key stage in this shift. Brunet had been discharged under a collective

35. *Grottoli*, *supra* note 33 at 256.

36. *Ibid* at 255. There was no statutory duty of fair representation in place in Ontario at this time. See discussion in Part II, *below*.

37. *Supra* note 33.

38. *Ibid* at 5.

39. *Ibid* at 5–6.

40. See discussion in *St Anne Nackawic Pulp & Paper Co Ltd v Canadian Paper Workers Union, Local 219*, [1986] 1 SCR 704 at para 10, 28 DLR (4th) 1 [*St Anne Nackawic*].

41. Adell, "Labour Law", *supra* note 31.

42. [1977] 2 SCR 537, 13 NR 233 [*Brunet* cited to SCR].

agreement containing standard just cause and arbitration provisions, and the union refused to arbitrate his grievance. The SCC held that Brunet could not circumvent the arbitration procedure by suing directly for wrongful dismissal; since his claim was based solely on the agreement, arbitration was his only recourse.[43] In *St Anne Nackawic*,[44] the Court confirmed the exclusive jurisdiction of arbitrators to enforce collective agreements, applying the *Brunet* approach to a civil suit in which an employer sought damages against a union arising out of an illegal strike. The Court expressly repudiated the many exceptions to arbitral exclusivity that had evolved within the earlier case law, insisting that

> [t]he courts have no jurisdiction to consider claims arising out of rights created by a collective agreement. Nor can the courts properly decide questions which might have arisen under the common law of master and servant in the absence of a collective bargaining regime if the collective agreement by which the parties to the action are bound makes provision for the matters in issue, whether or not it explicitly provides a procedure and forum for enforcement.[45]

Under this approach,

> [t]he collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law.[46]

II. Union Gatekeeping and the Duty of Fair Representation

Canadian collective bargaining statutes did not directly address the question of whether arbitration would be open to individual employees, or whether access would be restricted to the parties to the agreement.

43. *Ibid* at 544. The Court distinguished *Northcott* by characterizing it as essentially an enforcement action on the arbitration award which had been obtained earlier. *Ibid* at 551.
44. *Supra* note 40.
45. *Ibid* at 720.
46. *Ibid* at 718. The Court retained a single exception: situations such as the need for an injunction in which arbitration will not provide an "adequate alternative remedy". *Ibid* at 727–28.

As in the US, that issue was left to be determined at the bargaining table.[47] While some agreements permitted employees to file their own grievances, union support was normally required to proceed to arbitration.[48] As we have seen, the leading US industrial pluralists viewed this as the proper approach since the institutional benefits of arbitration could be achieved only if parties to the agreement controlled the process.[49] This view is implicit in the US Supreme Court's close embrace of the "industrial self-government" metaphor in the *Steelworkers Trilogy*, and explicit in *Brunet*, where the Supreme Court of Canada accepted the pluralist dogma that union control was "part of the bargain between General Motors and the Union", built into the "conditions governing the rights which the plaintiff now seeks to exercise".[50] As the Court saw it, allowing individual employees to circumvent collective control over the adjudication process would improperly and "radically" alter the "nature of the contract" between the employer and the union.[51] In both the US and Canada, however, the courts were well aware that the combined effect of arbitral exclusivity and union gatekeeping might block meritorious claims of employees who could not attract the support of their unions. Courts sought ways to protect the interests of individual employees without the risk of destabilizing industrial self-government by opening individual enforcement channels. They found a compromise in a tool that left the autonomy of the bargaining parties largely intact, but controlled the most

47. See *Noël v Société d'énergie de la Baie James*, 2001 SCC 39 at para 45, [2001] 2 SCR 207 [*Noël*].

48. See Carrothers, *supra* note 30 at 69–74. The model arbitration clauses provided by labour statutes provide for arbitration between the "parties" to the collective agreement (i.e., the union and the employer).

49. See Cox, "Rights Under a Labor Agreement", *supra* note 14 at 616–27.

50. *Brunet*, *supra* note 42.

51. In *Brunet*, the Supreme Court of Canada flagged two open questions: whether employees might have independent access to arbitration under the Quebec labour code, and whether they might have direct access to the courts to enforce their rights if their union had acted in "bad faith". Neither of these possibilities has yielded any fruit for individual employees in Canada in the decades since *Brunet* was decided, although courts have made passing reference to at least the latter possibility from time to time. See e.g. *Noël*, *supra* note 47 at paras 68–69. In the US, unionized employees have direct access to the courts under section 301 even where the matter is subject to an arbitration clause in cases in which the union has breached its DFR. See *Vaca v Sipes*, 386 US 171 (1967) at 185–88 [*Vaca*].

egregious abuses of union decision making. That tool became known as the DFR.

A DFR was first acknowledged by the US Supreme Court in *Steele v Louisville & Nashville Railroad Co*,[52] which arose out of the heavily regulated railway industry governed by the *Railway Labor Act*.[53] The facts of the case offered a compelling exemplar of the hazards of giving powerful majorities control over the employment rights and prospects of less powerful minorities. At issue in *Steele* were blatantly racist seniority, promotion and hiring practices favouring white over black locomotive engineers. These practices were supported and negotiated by the union, which had statutory authority to represent both white and black workers despite the fact that black workers were excluded from union membership. Nowadays, a problem like this would likely be addressed through anti-discrimination legislation; however, in 1944, no such legislation existed. The black workers therefore brought a civil action asking the courts to recognize what was in effect a statutory tort, arguing that since the union had a statutory right to represent them, it also had an implicit duty to do so without discrimination. The Court accepted this argument, analogizing the union's authority as exclusive bargaining agent to the power of a legislature "which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights".[54] It was appropriate, the Court held, to impose a comparable duty of "equal protection" on the union—a duty "to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially and in good faith".[55]

The US Supreme Court soon extended the DFR to industries governed by the *NLRA*, as well as to the administration and negotiation of collective agreements. In *Vaca v Sipes*, a case dealing with a union's refusal to arbitrate an employee discharge grievance, the Court affirmed it had jurisdiction to deal with DFR claims, but found that the employee

52. 323 US 192 (1944) [*Steele*].
53. 45 USC 45 §§ 151–188 (1940).
54. *Steele*, *supra* note 52 at 198.
55. *Ibid* at 202, 204.

had failed to prove a violation of the duty.[56] The Court considered Summers' and Blumrosen's arguments that courts should allow individual employees direct access to remedies for breach of collective agreement rights, but was persuaded by Cox's position that the advantages of open access for individual employees were outweighed by the institutional benefits that flow from "providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and invoke arbitration".[57] Important among those benefits was the smooth functioning of the workplace, fostered by the ability of the parties to screen frivolous grievances and make binding settlements.[58] The Court saw no "substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration".[59] Accordingly, the Court confirmed that individual employees had no right to insist that their grievances be arbitrated; they are bound by union decisions not to arbitrate, and can challenge or circumvent those decisions only if the union has violated its DFR. The Court also confirmed what has now become the classic standard for regulating union conduct under the DFR: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[60]

The US has never codified the DFR. Canadian governments, by contrast, have preferred to address the issue directly by statute. Ontario first introduced its statutory DFR in 1970, borrowing from the *Vaca* standard:

> A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not

56. *Supra* note 51. The defendants had also argued that the Court had no jurisdiction because the DFR fell within the exclusive jurisdiction of the National Labour Relations Board. The Court rejected that argument. The rationale for concurrent jurisdiction in the US revolves around section 301 of the *NLRA* and is not applicable in Canada.
57. *Ibid* at 191.
58. *Ibid*.
59. *Ibid* at 192.
60. *Ibid* at 190.

members of the trade union or of any constituent union of the council of trade unions, as the case may be.[61]

This language has remained unchanged since it was first enacted,[62] and has been replicated with some variation in most provincial and federal labour codes.[63] In almost all cases, the DFR in Canada is enforced exclusively by labour boards, not by courts.[64]

The *Vaca* standard sets the bar low for unions, and high for employees seeking to have union decisions set aside. In giving meaning to these statutory standards, Canadian labour boards have largely followed *Vaca* in allowing wide latitude for unions to exercise their discretion in administrating collective agreements. They have unambiguously rejected the notion that unions are mere "agents" who must take instructions from employee principals, and have emphasized repeatedly that unions have the right to settle grievances over the objection of individual employees and to refuse to process grievances to arbitration. Indeed, labour boards have stressed that unions may be obliged to refuse to file or pursue grievances that have negative impacts on the collective interests of the bargaining unit, even when such grievances might have merit when considered in isolation.[65] They accept the principle that union conduct should be scrutinized more carefully where disputes involve "critical job

61. *The Labour Relations Amendment Act, 1970 (No 2)*, SO 1970, c 85, s 23 (adding s 51(a) to the *Labour Relations Act*). Its background is discussed by the Ontario Labour Relations Board in *Gebbie v United Automobile, Aerospace and Agriculture Implement Workers of America, Local 200*, [1973] OLRB Rep 519 at 525–26, citing Archibald Cox, "Rights Under a Labour Agreement" (1956) 69:4 Harv L Rev 601, as well as the US case law.

62. See *Labour Relations Act, 1995*, SO 1995, c 1, Schedule A, s 74 [*LRA*]. Ontario also has a statutory "duty of fair referral" which applies to unions "engaged in the selection, referral, assignment, designation or scheduling of persons to employment". *Ibid*, s 75.

63. See Michael Mac Neil, Michael Lynk & Peter Englemann, *Trade Union Law in Canada* (Aurora, Ont: Canada Law Book, 1994) (loose-leaf), ch 7 at 3–4.

64. Where the DFR has not been codified, it is acknowledged as a common law duty enforced by courts. See *Canadian Merchant Service Guild v Gagnon*, [1984] 1 SCR 509, 9 DLR (4th) 641 [*Gagnon* cited to SCR]; *Gendron v Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR 1298, 66 Man R 2(d) 81 [*Gendron* cited to SCR]; Mac Neil, Lynk & Englemann, *supra* note 63, ch 7.

65. See *Rayonier Canada (BC) Ltd v International Woodworkers of America, Local 1-217*, [1975] 2 CLRBR 196 [*Rayonier*]; see *Moulder v BC Ferry v Marine Workers' Union*, (30 August 2013), No B169/2013, online: <www.lrb.bc.ca/decisions/B169$2013.pdf> (BCLRB).

interests",[66] but even in such cases they acknowledge that unions have discretion to refuse to arbitrate and the right to make mistakes.[67] They are quick to forgive unions for procedural errors such as missed time limits, even where those errors have fatally impaired success at arbitration in cases affecting critical job interests.[68] Canadian courts have generally accepted that this approach appropriately balances the interests at stake.[69]

Following the US lead, Canadian courts and labour boards rationalize a low DFR standard by reference to the same pluralist concerns that led courts to endorse arbitral exclusivity. The British Columbia Labour Relations Board (BCLRB) decision in *Rayonier* is frequently cited in support of this approach.[70] The case involved a union decision not to process a grievance on behalf of Ross Anderson, an employee who claimed that he had been laid off out of seniority. Anderson argued that the more senior employee for whom he had been passed over should have been stripped of all seniority when he refused a recall from an earlier layoff. The union's defense was that, whatever the merits of Anderson's argument on the strict letter of the collective agreement, the union and employer had consistently administered the agreement to permit employees to decline short-term recalls without loss of seniority. A panel of the BCLRB chaired by Paul Weiler dismissed Anderson's complaint.

66. *Centre Hospitalier Régina Ltée v Labour Court*, [1990] 1 SCR 1330 at 1354, 69 DLR (4th) 609 (dropping a discharge grievance as part of "batch" settlement violates the DFR).

67. See *Haley v Canadian Airline Employees' Association*, [1981] 2 CLRBR 121 (CLRB) [*Haley*].

68. See *Ibid*. In its decision, the Canada Labour Relations Board discussed and rejected Adell's argument in Adell, "Effective Protection for Individual Rights", *supra* note 6, that individual employees should have the right to process their own grievances to arbitration. The board commented that "[Adell] may again be in the forefront of reform thinking but today individuals clearly do not have this right. The right is still, and we think should be, that of the union bargaining agent". *Haley*, *supra* note 67 at 126 [citation omitted].

69. See e.g. *Gagnon*, *supra* note 64; *Noël*, *supra* note 47; *Gendron*, *supra* note 64.

70. *Rayonier*, *supra* note 65. *Rayonier* was cited with approval by the Supreme Court of Canada in *Gagnon*, *supra* note 64 and *Noel*, *supra* note 47. See also *Judd v Communications, Energy and Paperworkers Union of Canada, Local 2000* (2003), 91 CLRBR (2d) 33 (BCLRB) (in which the BC Board explains the *Rayonier* principles in lay language designed to be understood by unrepresented employees).

With extensive reference to Cox's writings, the Board explained that

> the administration of the collective agreement is not simply the enforcement of individual contract claims: it is also an extension of the collective bargaining process. As such, it involves significant group interests which the union may represent even against the wishes of particular employees.[71]

In the Board's view, these considerations justified "considerable latitude" for unions in carrying out their statutory functions. The Board concluded that "[t]he 'method of self-government' of these parties operated in this case 'within the zone of fairness and rationality' and should not be reversed by 'the edicts of any outside tribunal'."[72]

In *Rayonier*, and other cases, boards and courts have emphasized that allowing unions "considerable latitude" in decision making delivers institutional benefits not just to unions and employees, but also to employers. In *Noël*, a case dealing with whether individual employees have standing to apply for judicial review of arbitration decisions, the Supreme Court of Canada highlighted the advantages for employers of negotiating exclusively with the union:

> An employer can expect that the problems negotiated and resolved with the union will remain resolved and will not be reopened in an untimely manner on the initiative of a group of employees, or even a single employee. This means that, for the life of a collective agreement approved by the bargaining unit, the employer gains the right to stability and compliance with the conditions of employment in the company and to have the work performed continuously and properly.[73]

Similar advantages flow from the employer's ability to deal only with the union in processing grievances: "If the representation function is performed properly . . . the employer is entitled to compliance with the solutions agreed on."[74] The Court acknowledged that union control over access to arbitration was not a mandatory feature of the system; parties could negotiate other arrangements if they saw fit. It was clearly the Court's view, however, that union control was a normal and desirable

71. *Rayonier*, *supra* note 65 at 203.
72. *Ibid* at 207.
73. *Noël*, *supra* note 47 at para 44.
74. *Ibid* at para 45.

feature of an enforcement regime designed to promote workplace stability and industrial peace.

III. Labour Arbitration and Public Rights: The Expanding Scope of Arbitral Jurisdiction

As we have seen, for scholars, labour boards and courts, the policy justifications for the pluralist enforcement model rest on an idea of industrial self-government that is firmly tethered to the dynamics of collective bargaining. The logic is that the bargaining parties make their own private law and should be free to enforce it with minimal interference from the state. Since that model was entrenched, however, there have been a series of converging developments in Canada that have conspired to suck important public rights into the maw of arbitration. Arbitrators now deal with constitutional and statutory rights, along with rights generated through collective bargaining.

The expansion of arbitral jurisdiction into the realm of public rights has been extensively examined elsewhere;[75] I sketch it here only in sufficient detail to understand the issues it poses for the pluralist enforcement model. Most commentators date the beginning of this expansion to the SCC's 1975 decision in *McLeod v Egan*,[76] a discipline case dealing with a refusal to work overtime. The union argued that even if the collective agreement permitted compulsory overtime, employees could not lawfully be ordered to work in excess of the maximum weekly hours of work allowed under

75. See e.g. Adell, "Overlapping Forums", *supra* note 4; Donald D Carter, "Looking at *Weber* Five Years Later: Is it Time for a New Approach?" (2000) 8 CLELJ 231; Richard MacDowell, "Labour Arbitration: The New Labour Court?" (2000) 8 CLELJ 121; Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000) 26:1 Queen's LJ 43; Andrew K Lokan & Maryth Yachnin, "From *Weber* to *Parry Sound*: The Expanded Scope of Arbitration" (2004) 11 CLELJ 1; Jo-Anne Pickel, "*Isidore Garon* and *Bisaillon*: More Complications in Determining Arbitral Jurisdiction", Case Comment, (2007) 13 CLELJ 329; Dana F Hooker & Carman J Overholt, "Defending Claims In Different Fora: The Competing Jurisdiction of Arbitrators And Tribunals In British Columbia" (2010) 43:1 UBC L Rev 47; Elizabeth Shilton, "Choice but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2013) 38:2 Queen's LJ 461.

76. [1975] 1 SCR 517, 46 DLR (3d) 150 [cited to SCR].

Ontario's *Employment Standards Act* (*ESA*).[77] The arbitrator expressed doubt about whether he had the power to take account of public law, but held that in any event, the employer's order did not violate the statute and the discipline was therefore justified.[78] On judicial review, the Supreme Court of Canada disagreed with the arbitrator's conclusion that there was no statutory violation. More importantly, it held that an employer could not lawfully assign compulsory overtime in excess of the statutory maximum, and quashed the arbitrator's award.[79]

While the Court did not expressly comment on the question of arbitral jurisdiction over statutory rights, its holding confirmed that arbitrators could and should consider the law of the land in resolving problems before them. The decision provided little guidance, however, on how far an arbitrator could stray outside of the four corners of the collective agreement. In due course, some Canadian legislatures sought to clarify this issue through amendments to labour statutes. In 1992, Ontario enacted what is now subsection 48(12)(j) of its labour code, giving arbitrators the power "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement".[80] Provisions like these affirmed the power of arbitrators to have regard to statutory law, but did not clear up all ambiguity on the crucial question of whether that power extended to the direct enforcement of statutory rights, or whether arbitral jurisdiction was limited to situations in which statutes impinged on the interpretation and application of the language of the collective agreement.[81]

Ontario and British Columbia went a step further in order to provide an explicit answer to that question with respect to one important category of statutory rights: minimum employment standards.

77. RSO 1970, c 147, as repealed by *Employment Standards Act, 2000*, SO 2000, c 41 [*ESA* 2000].

78. *Re United Steelworkers, Local 2894, and Galt Metal Industries Ltd* (1971), 23 LAC 33.

79. See *McLeod v Egan*, *supra* note 76 at 523–24.

80. *LRA*, *supra* note 62. The provision was originally enacted in slightly different form by the *Act to Amend Certain Acts Concerning Collective Bargaining and Employment*, SO 1992, c 21, s 23(3). Similar provisions are currently found in the labour codes of British Columbia, Quebec and Nova Scotia, as well as the federal code.

81. For discussion of the debate among arbitrators on this question before and after these legislative amendments, see Bernard Adell, "The Rights of Disabled Workers at Arbitration and under Human Rights Legislation" (1992) 1 Can Lab LJ 46; Adell, "Overlapping Forums", *supra* note 4.

In 1996, Ontario amended its *ESA*, barring unionized employees from access to normal statutory enforcement procedures and requiring them to process employment standard complaints through the grievance procedure in their collective agreements. The amendments explicitly provided that the *ESA* is "enforceable against the employer . . . as if it were part of the collective agreement".[82] In 2001, BC achieved a similar objective by exempting unionized employees from the protection of key minimum standards, such as hours of work and holidays, if their collective agreements address these issues, and providing that where it continues to apply, the statute can be enforced only through the collective agreement.[83]

However, the more general question of whether arbitrators have the power to enforce statute-based employment rights was not resolved until 2003, when the Supreme Court of Canada issued its decision in *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*.[84] That case dealt with a collective agreement that expressly provided that the termination of probationers was discretionary, ungrievable, non-arbitrable and excluded from the scope of the just cause clause. In addition, the agreement contained an unusually comprehensive management rights clause affirming the authority of management to make all operational decisions "except as expressly limited by the clear and explicit language of some other provision of this Agreement".[85] The union nonetheless filed a grievance alleging that a probationary employee had been terminated for reasons linked to her maternity leave, and the termination therefore violated Ontario's *Human Rights Code*.[86] An arbitration board decided that it had jurisdiction to determine whether unlawful discrimination was a factor in the termination. The Court upheld that decision, holding that "a grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of

82. *Employment Standards Improvement Act, 1996*, SO 1996, c 23, amending *Employment Standards Act*, RSO 1990, c E.14, as repealed by *ESA* 2000, *supra* note 77. These amendments are discussed in MacDowell, *supra* note 75 at 143–47, and are now found in *ESA* 2000, *supra* note 77, s 99(1).

83. See *Employment Standards Act*, RSBC 1996, c 113, s 3(2)–(9). See also David B Fairey, "New 'Flexible' Employment Standards Regulations in British Columbia" (2007) 21 JL & Soc Pol'y 91 at 99–100.

84. 2003 SCC 42, [2003] 2 SCR 157 [*Parry Sound*].

85. *Ibid* at para 2.

86. RSO 1990, c H.19.

human rights and other employment-related statutes as if they were part of the collective agreement",[87] notwithstanding the provisions of that agreement. Although the Court saw subsection 48(12)(j) of Ontario's *LRA* as *reinforcing* and *affirming* its conclusion, it grounded its conclusion on the more fundamental proposition that human rights codes are effectively incorporated into collective agreements through implicit limitations on management rights. As the Court put it, "[t]he obligation of an employer to manage the enterprise and direct the workforce is subject not only to express provisions of the collective agreement, but also to the statutory rights of its employees, including the right to equal treatment in employment without discrimination."[88] In effect, it held that arbitrators have freestanding "power to bring human rights and other employment-related statutes into practical operation", even in the teeth of the contrary intention of the parties.[89]

Parry Sound confirmed that arbitral jurisdiction had expanded to include the enforcement of statutory employment rights. With respect to constitutional rights, that expansion had already been confirmed almost a decade previously by the SCC in *Weber v Ontario Hydro*.[90] *Weber* involved an Ontario Hydro employee who brought a civil action against his employer, alleging trespass, nuisance, deceit and invasion of privacy. The employee's claims were based on clandestine surveillance of his home and activities, which had taken place as part of the employer's investigation of abuse of sick benefits. Since Weber's employer was a Crown agency, he also alleged a violation of his *Charter*-protected rights to liberty and security, and to protection from unreasonable search and seizure.[91] The Court dismissed his actions, holding that the claims fell within the exclusive jurisdiction of an arbitrator.[92]

87. *Parry Sound*, *supra* note 84 at para 1.

88. *Ibid* at para 32.

89. *Ibid* at para 45.

90. [1995] 2 SCR 929, 24 OR (3d) 358 [*Weber* cited to SCR]. *New Brunswick v O'Leary*, [1995] 2 SCR 967, 163 NBR (2d) 97, the companion decision to *Weber*, did not involve a constitutional claim.

91. *Canadian Charter of Rights and Freedoms*, ss 7–8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

92. *Weber*, *supra* note 90 at para 76. The Court was unanimous that the tort claims belonged within the exclusive jurisdiction of an arbitrator. See *ibid* at para 1. A six-judge majority took the same view with respect to the *Charter* claims. See *ibid* at para 67.

In doing so, the Court emphasized that the test for defining the exclusive jurisdiction of an arbitrator involves an assessment not just of whether the dispute arose *directly* from the collective agreement, but also of whether it rose *indirectly* from the agreement: "The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration, or violation of the collective agreement."[93] In applying this test to *Weber*, the Court concluded that both the tort and constitutional claims arose in their "essential character" from the collective agreement.

Parry Sound and *Weber* are not easily reconcilable with the pluralist conception of the unionized workplace as a private enclave within which the parties are free to make and enforce their own law. Indeed in *Parry Sound*, the Court expressly acknowledged that its approach "[i]n some sense . . . is inconsistent with the traditional view that a collective agreement is a private contract between equal parties, and that the parties to the agreement are free to determine what does or does not constitute an arbitrable difference."[94] In acknowledging this, the Court articulated a more complex conception of both collective bargaining and arbitration:

> [T]his willingness to consider factors other than the parties' expressed intention is consistent with the fact that collective bargaining and grievance arbitration has [*sic*] both a private and public function. The collective agreement is a private contract, but a contract that serves a public function: the peaceful resolution of labour disputes.. . .This dual purpose is reflected in the fact that the content of a collective agreement is, in part, fixed by external statutes.[95]

IV. How Has the Pluralist Enforcement Model Adjusted to the Arbitration of Public Rights?

As we have seen, all three pillars of the pluralist enforcement model—the arbitral monopoly, union gatekeeping and the duty of fair representation—were originally rationalized as essential components of a system designed to enforce private law tailored to individual workplaces. In the decades since *McLeod v Egan*, however, we have also seen the evolution of a conception of law in the unionized

93. *Weber*, *supra* note 90 at para 57.
94. *Parry Sound*, *supra* note 84 at para 30.
95. *Ibid* [emphasis in original, citation omitted].

workplace that places public as well as private rights within the scope of arbitration. This conception has placed new pressures on the system. In this part, I examine how courts and tribunals have responded to the intrusion of public rights in applying the pluralist enforcement model.

A. Exclusive or Concurrent Jurisdiction?

Has the expansion of arbitral jurisdiction had any impact on the exclusivity of arbitral jurisdiction? It remains black-letter law in Canada that labour arbitrators have exclusive jurisdiction over the interpretation, application and enforcement of collective agreements. That principle has unquestionably been challenged, however, by court decisions that embed statutory rights within collective agreements and describe both constitutional and statute-related claims as "arising" from the collective agreement for jurisdictional purposes, even though they clearly do not have their source there. For one category of statutory rights, those created by the *ESA*s in Ontario and BC respectively, the statutes clearly leave unionized employees no recourse other than arbitration;[96] for those rights, the arbitral monopoly is secure. With respect to other types of public rights, however, courts, arbitrators and statutory tribunals continue to struggle with jurisdictional questions.[97]

The challenge in locating clear principles for determining whether and when arbitral jurisdiction over public rights is exclusive is strikingly illustrated by the current state of the law on the application of human rights codes, an issue frequently present in grievance arbitration. In *Parry Sound*, the Court expressly left open the question of whether arbitral jurisdiction to enforce human rights codes is exclusive or concurrent.

96. In Ontario, unionized employees may apply to the Director of Employment Standards for special permission to use statutory procedures, but such permission is clearly exceptional, and the examples provided in the *ESA* policy manual make it clear that it will not be forthcoming simply because the employee's union has decided not to proceed with a grievance. See Employment Practices Branch, *Employment Standards Act 2000: Policy and Interpretation Manual* (Toronto: Carswell, 2001) (loose-leaf release 3), vol 2, ch 26 at 31.

97. See Brian Etherington, "Weber and Almost Everything After: 20 Years Later—Its Impact on Charter, Common Law and Individual Statutory Rights Claims" (One Law for All": Has *Weber v Ontario Hydro* Transformed Collective Agreement Administration and Arbitration in Canada? Symposium delivered at the Faculty of Law, Queen's University, 30 October 2015). The papers from this symposium will be published in a 2016 volume honouring Professor Adell.

Shortly thereafter, the Court was confronted with that very question in two cases, *Quebec (Commision des Droits de la Personne et des Droits de la Jeunesse) v Quebec (Attorney General)*[98] (*Morin*) and *Canada (House of Commons) v Vaid.*[99] *Morin* involved a claim that certain amendments to the wage provisions of the collective agreement covering Quebec teachers violated human rights legislation. The dispute placed the teachers at odds with their union, which had negotiated the amendments, and the teachers chose to pursue their claims through a human rights complaint before a public tribunal. The respondents to the complaint (which included the union) argued that the dispute fell within the exclusive jurisdiction of an arbitrator. The Supreme Court of Canada disagreed.

Writing for the majority, McLachlin CJC held where there is jurisdictional competition between an arbitrator and a statutory tribunal, the question of whether arbitral jurisdiction is exclusive or merely concurrent must be answered on a case-by-case basis by applying the *Weber* test. She emphasized that

> *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction.[100]

The answer to the jurisdictional question depends on the "governing legislation, as applied to the dispute viewed in its factual matrix".[101] In *Morin*, as McLachlin CJC saw it, the dissident teachers were attacking the *terms* of the collective agreement rather than its application; therefore the dispute did "not arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement".[102] Despite a strong dissent from Bastarache J, who saw the problem as a classic wage dispute of the sort that "form[s] the very foundation of a contract and working conditions",[103] the majority of the Court found no basis to halt the human rights proceedings. In reaching this conclusion,

98. 2004 SCC 39, [2004] 2 SCR 185 [*Morin*].
99. 2005 SCC 30, [2005] 1 SCR 667 [*Vaid*].
100. *Morin*, *supra* note 98 at para 11 (McLachlin J, as she then was, also authored the majority judgment in *Weber*).
101. *Ibid.*
102. *Ibid* at para 24.
103. *Ibid* at para 57.

they were clearly influenced by the conflict of interest between the teachers and the union; since the union controlled access to the grievance procedure, the teachers would have no recourse if arbitral jurisdiction were exclusive.[104]

The *Morin* approach points in the direction of a regime of concurrency in human rights cases involving unionized employees. However, a year later in *Vaid*,[105] a unanimous Court distanced itself from any such general proposition. Vaid, a parliamentary employee, claimed that he had been constructively dismissed for reasons tainted with racial discrimination and sought to pursue this claim before a human rights tribunal. His employer's central preliminary objection was that its employment decisions were protected by parliamentary privilege and immune from legal challenge; much of the Court's decision is devoted to its dismissal of this objection. However, the employer also argued that, in the alternative, Vaid should have pursued his dispute as a grievance rather than a human rights complaint. The Court agreed. In language with closer affinity to the dissent than to the majority judgment in *Morin*, the Court observed that "[a] grievance that raises a human rights issue is nevertheless a grievance for purposes of employment or labour relations."[106] It saw the dispute as a conventional discharge grievance, concluding that despite the allegations of racial discrimination "[t]here is nothing here . . . to lift these complaints out of their specific employment context."[107] Confronted with inconsistencies in the case law, the Court responded simply that "[t]his is not an area of the law that lends itself to overgeneralization."[108]

In the wake of the Supreme Court's decisions, jurisdictional rules have developed somewhat inconsistently across the country. Outside of Quebec, arbitrators are generally considered to have fully concurrent

104. This factor had not persuaded courts in cases like *Vaca* and *Brunet* that individual employees should be permitted to evade the requirement to arbitrate. Although she does not expressly say so, McLachlin CJC undoubtedly saw this case as different because of the public nature of the rights at issue.

105. *Supra* note 99.

106. *Ibid* at para 95 [citation omitted].

107. *Ibid* at para 94.

108. *Ibid* at para 97. See also *Parliamentary Employment and Staff Relations Act*, RSC 1985, c 33 (2nd Supp) (Vaid's employment relations were governed by this Act rather than the general labour legislation applicable to federal employees, and the Court invoked language unique to the governing act, but not markedly different from that of other labour statutes, to support its holding).

jurisdiction with human rights tribunals to apply human rights codes to workplace disputes. Within Quebec, however, a jurisdictional line is drawn between complaints that challenge the validity of the terms of the collective agreement (i.e., *Morin*-type cases) and those that merely allege the code has been violated in the course of administering terms and conditions of employment (i.e., *Vaid*-type cases). With respect to the first type, arbitrators and human rights tribunals have concurrent jurisdiction, whereas in the second type, arbitrators have exclusive jurisdiction.[109] The varying approaches taken by different courts may be partially accounted for by differences in statutory language, but they also reflect, at least in embryo, an emerging divergence of opinion as to how the value of arbitral exclusivity should be weighed against the value of individual access to adjudication in cases involving public rights.

B. Union Gatekeeping and Public Rights

The introduction of public rights into the mix of arbitral issues has rendered the arbitral monopoly over dispute resolution in unionized workplaces both less secure and more difficult to identify. It has had little impact, however, on union gatekeeping and the role of the individual employee within the arbitration process. As we have seen, statutory frameworks initially left the issue of access to arbitration to be dealt with through collective bargaining, and they continue to do so. There is no evidence of any pressure for law reform and no evidence that the influx of statutory rights has altered the established rules. Under most agreements, unions continue to play their traditional gatekeeping role.

There is some evidence, however, of pressure from employees to be permitted to play a larger individual role in arbitrations dealing with statutory rights issues through the application of what I will call the *Hoogendoorn* principle. This principle flows from a 1967 decision of the SCC in *Hoogendoorn v Greening Metal Products and Screening Equipment Co.*[110] The case involved a collective agreement containing a union security clause requiring that all employees agree to pay union dues. Hoogendoorn refused to pay on religious grounds.

109. For a discussion of how Canadian appellate courts have dealt with this issue, see Shilton, *supra* note 75 at 483–90.

110. (1967), [1968] SCR 30, 65 DLR (2d) 641.

When his union insisted that he be terminated, the employer put the issue to an arbitrator who concluded that Hoogendoorn must either agree to pay dues or lose his job. Hoogendoorn applied for judicial review.[111] The Supreme Court of Canada quashed the decision on the ground that the arbitrator had failed to comply with the principles of natural justice; since Hoogendoorn's status would be directly affected by the outcome of the arbitration, and the union was adverse in interest, he should have been given notice of the hearing and independent standing to defend his own interests.

The *Hoogendoorn* principle establishes an exception to the rule that the union controls the arbitration procedure. That exception, however, is very limited. It gives individual employees an independent voice only where the case has been sent to arbitration and there is a clear conflict of interest between the employee and union. Employee efforts to use this principle to independently pursue their own statutory rights claims at arbitration have largely been unsuccessful. In *Ontario (Ministry of Community Safety and Correctional Services) v OPSEU (Therrien) (Re)*[112]—a case dealing with a series of grievances raising human rights issues—the Grievance Settlement Board (GSB) rejected an individual employee's demand for party status. The GSB reviewed the philosophy behind union gatekeeping and acknowledged that separate standing for an individual employee might be justified "where the continued representation of a grievor's interests by his or her union at arbitration is utterly incompatible with natural justice and industrial relations fairness".[113] However, it held that the grievor had not made out such a case, even though her grievances overlapped with workplace harassment complaints and human rights complaints filed against union personnel.

In *Kawartha Pine Ridge District School Board and OSSTF, District 14 (Re)*, an arbitrator made an even more categorical ruling in a case involving a teacher transfer based on behaviours "related to [his] disability".[114] The teacher had sought standing primarily to ensure that the arbitration did not stray into issues that might damage his right to pursue an

111. In the normal course, an individual employee has no standing to apply for judicial review of an arbitrator's decision under a collective agreement. See *Noël*, *supra* note 47.

112. (2008), 173 LAC (4th) 193 (Ont).

113. *Ibid* at 201.

114. (2011), 197 LAC (4th) 83 at 85 (Ont).

independent human rights complaint.[115] In a clear affirmation of pluralist principles, the arbitrator dismissed his standing application, expressing the view that the presence of statutory human rights issues did not alter what she described as "the fundamental framework of labour relations where a union is recognized as the exclusive representative of employees at arbitration".[116]

C. Has the Introduction of Public Rights into Arbitration Changed the DFR Standard?

Because most agreements continue to make unions gatekeepers, an employee's main legal lever for challenging adverse union decisions continues to be the DFR, regardless of whether public or private rights are at issue. Few employees have attempted to use the DFR to mount a direct challenge to a union's right to control access to grievance procedures when the grievances involve public rights. The BCLRB dealt with one such challenge in a series of decisions involving two brothers expelled from union membership for refusing to pay fines levied by the union. Since their collective agreement required all employees to be members in good standing, the union insisted that the brothers be terminated. In the resulting DFR complaints, the brothers argued that decisions like *Hoogendoorn* and *Weber* had changed the gatekeeper rule and shifted control of individual grievances from the union to the individual. Therefore, the union had violated the DFR by refusing their demands to have their cases addressed at arbitration.[117] The Board disagreed, reaffirming the pluralist principle

115. Most human rights tribunals will not permit complaints to proceed if the dispute has already been arbitrated, regardless of whether the arbitrator had exclusive jurisdiction. See Shilton, *supra* note 75 at 490–502. The Human Rights Tribunal of Ontario discussed this issue in *Hussain v Ontario (Ministry of Community and Social Services)*, 2014 HRTO 1788 [*Hussain*].

116. *Supra* note 114 at 95. See also *Canadian Union of Public Employees, Local 79 v Toronto (City)*, 2012 ONSC 1158, 290 OAC 347 (reviewing narrow exceptions to the lack of standing of individual employees on judicial review).

117. This is a paraphrase of the arguments, which do not appear to have been clearly posed before the labour board. See *Speckling (Re)*, (9 October 2003), No B333/2003, online: <www.lrb.bc.ca/decisions/B333$2003.pdf> (BCLRB) [*Speckling* No 333]; *Speckling (Re)*, (9 October 2003), No B334/2003, online: <www.lrb.bc.ca/decisions/B334$2003.pdf> [*Speckling* No 334]; *Speckling (Re)*, (9 October 2003), No B335/2003, online: <www.lrb.bc.ca/decisions/B335$2003.pdf>.

that "[a] union's discretion not to take claims to arbitration is a critical aspect of its ability to effectively represent the employees."[118] In the Board's view, the Supreme Court's case law had not altered that rule; on the contrary, "[t]he rationale of *Weber* was to support, not undermine, the statutory labour law scheme."[119] The Board's decision emphasized that although the *Hoogendoorn* principle gave employees a right to participate in an ongoing arbitration where their union is adverse in interest, it did not give them a right to demand that an arbitration take place. The Board was not prepared to modify this principle. In fact, it expressed the view that it would not be "consistent with the labour relations policy of the Code to give tort and other such claims pursuant to *Weber* a higher priority in terms of access to arbitration than matters relating directly to employees' terms and conditions of employment".[120] On judicial review, the court upheld the Board's decision.[121]

Union gatekeeping per se will likely continue to withstand DFR challenge, but it is nevertheless arguable that the presence of public rights claims should alter the relatively relaxed standard labour boards apply to the processing of employee grievances. This was certainly Bernard Adell's view. In an article published in 2002, he asked: "Is a union more exposed to a DFR complaint when it deals with a grievance that seeks to vindicate not only a collective agreement right but also a statutory or common law right?"[122] "Intuitively", he argued,

> one would expect the answer to be yes, because it is hard to imagine that labour relations boards (and the courts that review their decisions) would allow a union as much leeway when it handles employees' statutory and common law rights as when it handles employee rights that are created entirely through collective bargaining.[123]

At that time, Adell identified "a subtle but significant rise in the standard of representation that unions must meet in order to comply with the DFR, especially in discrimination grievances."[124] Prior to his death

118. *Speckling* No 333, *supra* note 117 at para 144.
119. *Ibid.*
120. *Ibid* at para 145.
121. *Speckling v Labour Relations Board of BC et al*, 2006 BCSC 285, (*sub nom Speckling v CEP, Local 76*) 52 BCLR (4th) 302.
122. Adell, "The Union's Duty", *supra* note 6 at 266.
123. *Ibid.*
124. *Ibid.*

in 2014, he was in the process of updating his research to see whether progress had been made on this front. Presenting preliminary findings at a 2012 workshop, he concluded that "[i]t is now considerably clearer than it was in 2002 that grievance arbitration has extensive (and usually final) authority over anti-discrimination rights, as well as many other employee statutory rights".[125] On the question of whether a more robust DFR standard was evolving to hold unions to clearer account in matters concerning public rights, he found the evidence equivocal. I agree.

When broad questions of statutory rights are involved, DFR complaints first raise a threshold question: Does the DFR apply at all? As we have seen, the rationale for subjecting union decision making to a DFR is the fact that where a union holds bargaining rights, its representative function operates as a barrier to individual enforcement. It follows that the DFR does not apply to matters where the union's bargaining agency does not operate as a barrier to individual pursuit of rights. For that reason, the BCLRB held that it did not apply to the filing of a human rights complaint because in BC, individuals can pursue such complaints without the involvement of the union.[126] The Board acknowledged that "[c]ollective agreements often contain language that brings human rights and accommodation issues within the ambit of a union's bargaining authority, to be remedied in accordance with the grievance arbitration procedure", and confirmed that the DFR does apply to "a union's handling of human rights and accommodation issues addressed by way of the grievance procedure".[127] However, the fact that a matter can be grieved does not change the scope of the union's obligations under the Code itself, nor does it extend "the Board's supervisory jurisdiction to include the filing of human rights complaints under the *Human Rights Code*".[128] It follows that the DFR requires unions to take up claims involving statutory rights

125. Bernard Adell, "The Duty of Fair Representation: 'A Form of Words . . .'?" (Slideshow delivered at Adjudicating Human Rights in the Workplace: After Ontario's Pinto Report, Where Do We Go Next?, Queen's Centre for Law in the Contemporary Workplace, 9–10 November 2012) [unpublished].

126. *Holt v Coast Mountain Bus Co* (2001), 167 CLRBR (2d) 98 at paras 35–39.

127. *Ibid* at para 39.

128. *Ibid*. See also Mac Neil, Lynk & Englemann, *supra* note 63, ch 7 at 63–68 (the authors provide a survey of the types of cases where labour boards will and will not apply the DFR). Unions may, of course, bind themselves under their own constitutions to provide ancillary services of this type, but labour boards do not enforce union constitutions.

only when those rights are integral to disputes over which the arbitrator has *exclusive* jurisdiction. As we have already seen, the line between exclusive and concurrent jurisdiction is not easy to identify, and locating it is even more challenging in cases where public rights intersect with those established in the collective agreement, as they frequently do. Labour boards may well be prepared to give employees the benefit of any jurisdictional doubt. We can also expect difficult questions to arise about how far unions must go in advising employees on the pros and cons of arbitration versus public tribunals in pursuing public rights claims.

The DFR certainly applies to the filing and processing of grievances, and there is evidence that, at least in some Canadian jurisdictions, labour boards are expecting unions to meet a higher standard when processing grievances involving public rights. This is particularly evident where human rights interests and the duty to accommodate are at issue. Quebec's Commission des Relations du Travail has expressly adopted a higher standard for cases involving public rights, holding that the Supreme Court's decision in *Parry Sound* has "substantially modified" the DFR by imposing a duty on unions that is "particularly challenging [*delicat*] and restrictive" and requires them to "make additional efforts and bring extra sensitivity to the case".[129] The Canada Industrial Relations Board likewise demands that unions must "take an extra measure of care and show an extra measure of assertiveness when representing a member who is alleging a violation of statutory anti-discrimination rights".[130]

Not all boards have expressly adopted these higher standards. Most boards expect unions to go the extra mile in servicing employees whose disabilities impede their capacity to communicate their needs to their union. However, this expectation is not unique to cases in which the

129. *Chhuon c Assoc des employés du Groupe Holiday inc*, 2005 QCCRT 115 at paras 45–46 [translated by author]. See also *Maltais et Syndicat canadien des communications, de l'énergie et du papier, Section locale 22 (SCEP)*, 2006 QCCRT 316 at paras 65–66 (in which the CRT expressly linked the higher standard to the union's duty of accommodation); Nancy Martel & Pierre E Moreau, *Le devoir de juste représentation* (Montreal: LexisNexis, 2009) at 87–89.

130. *Bingley v Teamsters, Local 91* (2004), 121 CLRBR (2d) 178 at para 83. The Board justified this standard in discrimination cases at least in part on the basis of its conclusion that under human rights legislation "a union may be held responsible for the discriminatory effects of an employment policy decision by not seeking to put an end to the discrimination". *Ibid* at para 61. This view of the law is most certainly wrong. See *Gungor v Canadian Auto Workers Local 88*, 2011 HRTO 1760 at paras 48–58.

employee's dispute with the employer involves public rights.[131] And going the extra mile can backfire on unions who overcompensate in favour of employees with human rights claims. For example, in *Oliver v Newfoundland and Labrador Association of Public and Private Employees* the Newfoundland and Labrador Labour Relations Board agreed that the federal standard applied to the union's conduct in negotiating accommodation, but held that in the course of accommodating one employee, the union had violated its DFR to *another* employee who had experienced financial hardship as a result of the accommodation to which the union had agreed.[132]

Slowly but certainly, however, a higher DFR standard is emerging overall. This is not surprising, since the DFR is the most flexible of the three pillars supporting the pluralist enforcement system, and the system's expansion to include public rights means that something has to give. But a higher DFR standard for public rights claims creates pressures elsewhere within the enforcement system. As the BCLRB put it, it is not consistent "with the labour relations policy of the Code" that there should be "higher priority in terms of access to arbitration" for matters involving public rights than for "matters relating directly to employees' terms and conditions of employment".[133] Either the policy or the enforcement system will have to change.

V. Should We Abandon the Pluralist Enforcement Model?

The broad expansion of jurisdiction into public rights has created conceptual, institutional and practical problems for labour arbitration. As we have seen in Part IV, the three pillars of the existing system are

131. See e.g. *Schwartzman v MGEU* (2010), 190 CLRBR (2d) 184 (Man LB); *Switzer v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, [1999] OLRB Rep 757. The decision of the Saskatchewan Labour Relations Board in *K H and Communications, Energy and Paperworks Union, Local 1-S*, [1997] Sask LRBR 476, discussed in Adell, "The Union's Duty", *supra* note 6 at 268, falls into this category. Where the employee's communication skills are impaired by disability, his problems with the employer often overlap with his problems with the union.

132. 2012 NLLRB 10 at paras 35–42.

133. *Speckling*, No 333 *supra* note 117 at para 145.

still standing, but are creaking under the weight they are now asked to bear. Arbitral exclusivity is under constant pressure, as both employees and employers engage in forum shopping and costly, time-consuming, jurisdictional challenges. Jurisdictional overlap increases the potential for costly multiple proceedings and inconsistent decisions, and sometimes denies justice altogether for unionized workers who choose the wrong forum.[134] The expansion of jurisdiction has had no apparent impact on union gatekeeping and it is unlikely that this pillar will give way without a push from the legislature since it suits employers at least as much as it suits unions. However, its rigidity puts pressure on the third pillar, the DFR. Even where arbitral jurisdiction over public rights claims is not exclusive, statutory rights are often too closely intertwined with collectively bargained rights to be sensibly separated. Certainly many workplace human rights claims cannot be meaningfully adjudicated for unionized employees except as part of a public/private package that only a labour arbitrator can deal with.[135] The more frequent and intricate the linkages between public and private rights, the more likely it is that there will be increased pressure from individual employees for access to arbitration. This pressure could transform the DFR from a mere safety valve into a relatively open channel to adjudication for individual employees whose claims involve a blend of public and private rights, inevitably reigniting the debate about whether individual employees should have direct access to arbitration.

When that debate first took place in the mid-twentieth century it was won by the pluralists who made a convincing case that union control over workplace law enforcement protected important industrial relations values. That case will be a much harder sell now that arbitrators enforce public as well as private rights. Arbitral exclusivity and union gatekeeping mitigated only by the DFR may have been logical (if not inevitable) features of a system in which the law to be enforced was negotiated, and enforcement was conceptualized as an extension of the bargaining process. They have considerably less logic and legitimacy when applied

134. See Ontario Law Reform Commission, *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes* (Toronto: Ontario Law Reform Commission, 1995) at 64–96; Lokan & Yachnin, *supra* note 75; Hooker & Overholt, *supra* note 75.

135. See Shilton, *supra* note 75 at 494–502.

to our current conception of workplace law, which involves public rights—including both quasi-constitutional and constitutional rights. The substantive content of the new workplace law inevitably raises questions as to why disputes should be adjudicated before arbitrators who answer to the employer and the union, and only if a union—a private actor licensed to place collective and institutional concerns over individual rights—decides that they will be adjudicated. It inevitably raises questions about why individual employees should only be able to challenge union decisions to let their public rights claims languish if the union has departed egregiously from accepted decision-making practice. It also raises questions about why we are attempting to resolve the many contradictions created by the expansion of arbitral jurisdiction by raising DFR standards and placing heavier legal burdens on unions. Does it really make labour-relations sense to make unions the target of litigation when the core employment dispute behind a DFR is almost always with the employer?[136]

So what is to be done? One option is to roll back the clock and allow arbitrators to get back to basics, leaving questions of public law to be dealt with by public tribunals.[137] But this solution is not realistic in the modern workplace where public and private rights will inevitably converge and intersect. This makes a unified approach to adjudication necessary and desirable both to avoid expensive and confusing duplication and to ensure that employees can access forms of dispute resolution that integrate their public and private rights. The scope of arbitration did not expand because legislatures and adjudicators were insensitive to how unionized workplaces function; it expanded in response to the reality that public and private workplace rights are inextricable.

136. See Adell, "Collective Agreements", *supra* note 6 at 254. Adell questioned the logic of requiring individual employees to successfully take on their union as a prelude to getting to what he called "the main event: the employee's claim against the employer". He asked, "[i]s it necessary to make a prolonged, three-sided donnybrook out of a controversy which might well yield quickly to a one-step, bipartite hearing on the merits between employee and employer?" *Ibid* at 254.

137. See Michel Picher, "Defining the Scope of Arbitration: The Impact of *Weber*—An Arbitrator's Perspective" (1999–2000) 1 Lab Arb YB 99; George Surdykowski, "The Limits of Grievance Arbitration: *Weber* and *Pilon* in Perspective" (1999–2000) 1 Lab Arb YB 67; Lewis Gottheil, "Defining the Scope of Arbitration: The Impact of *Weber*—A Union Perspective" (1999–2000) 1 Lab Arb YB 157.

That reality, which is clearly here to stay, militates in favour of a single unified forum to resolve disputes. We could achieve this, of course, by putting all of our eggs in the arbitral basket—reforming the legislative framework to clarify that arbitrators have exclusive jurisdiction over workplace disputes involving unionized employers regardless of the rights at issue.[138] But now that the ramparts of industrial self-government have been breached, there is no obvious reason why that unified forum should be constructed on pluralist principles. Since public rights are inevitably implicated in workplace disputes, serious consideration should be given to channeling those disputes into a unified public tribunal capable of dealing with all related issues as a seamless package, without challenge to its jurisdiction.

The idea of such a public tribunal is not a novel one. "Labour courts" in various configurations have been widespread in western Europe and elsewhere for many years.[139] In a 1991 report prepared for Ontario's Law Reform Commission (OLRC) project on workplace dispute adjudication, Bernard Adell proposed a version of such a public "labour court".[140] Always looking for a middle ground, he did not insist that public adjudication should put labour arbitrators out of business. Instead, he recommended an employment rights tribunal with jurisdiction to deal with employment standards complaints, complaints of unjust discharge by non-unionized employees and grievances under collective agreements. However, he concluded that where both union and employer preferred to use private arbitrators, they should remain free to say so in their collective agreements.[141]

Adell's recommendation did not find favour with the OLRC, which instead proposed its own elaborate system of mutual deferral and referral, combined with cross-training and cross-appointments for adjudicators. Neither Adell's nor the OLRC's recommendations appealed to the

138. See Peter A Gall, QC, Andrea L Zwack & Kate Bayne, "Determining Human Rights Issues in the Unionized Workplace: The Case for Exclusive Arbitral Jurisdiction" (2005) 12 CLELJ 381.

139. How labour courts function in various jurisdictions is a focus of Corby & Burgess, *supra* note 1.

140. Bernard Adell, *Adjudication of Workplace Disputes in Ontario: A Report to the Ontario Law Reform Commission* (1991), Ch 7 at 119ff [unpublished] [Adell, "Adjudication"].

141. *Ibid* at 119–27.

government of the day.[142] However, the idea of a unified public tribunal has by no means gone away. Since Adell wrote on this issue, proposals for consolidating workplace dispute resolution continue to surface. Of particular note are the twenty-first-century proposals put forward by governments in Ontario and BC.[143] Although both were relatively unambitious, focusing on the consolidation of existing public tribunals without directly touching on grievance arbitration, they encountered strong and broad resistance from users of existing systems. Many of the concerns expressed had pluralist roots, including worries that public tribunals would not deal appropriately with rights rooted in collective agreements, and that collective rights and individual rights were too different in kind to be adjudicated together before a single tribunal.[144] Players on both sides of the labour/management divide feared that attempts to meld public and private law into a legally coherent "workplace law" would compromise important values and modes of cooperation that had evolved over time in unionized workplaces. Reform proposals were ultimately abandoned, at least in part because those who sought change could not produce empirical research that justified those risks.[145]

It is true that there is little research on the potential impact of consolidating workplace adjudication in Canada, and in particular on folding grievance arbitration into a unified public tribunal. It is also true, however, that there is little research supporting pluralist claims that the three pillars of the enforcement system are critical to the culture of unionized workplaces, or that they foster productivity and industrial

142. Ontario Law Reform Commission, *supra* note 134 at 137–58. The Commission's recommendation was roundly criticized. See e.g. Randi Hammer Abramsky, "The Ontario Law Reform Commission Report on Delay and Multiple Proceedings: A Critique", Comment (1996) 4 CLELJ 353. The recommendation was never implemented.

143. See Ontario Ministry of Labour, *Looking Forward: A New Tribunal for Ontario's Workplaces* (2001), online: <www.ontla.on.ca/library/repository/mon/1000/10293245.pdf>; British Columbia Law Institute, *Report to the Ministry of Labour and the Ministry for the Attorney General* (2010) at 9–10, online: <www.bcli.org/sites/default/files/BCLI_Workplace_Dispute_Resolution_Report.pdf>.

144. See Bernard Adell shared this concern. See Adell, "Adjudication", *supra* note 140 at 127–31, n 11 (points to UK research supporting the separation of human rights adjudication from employment rights adjudication). See also Ronald Ellis, "Super Provincial Tribunals: A Radical Remedy for Canada's Rights Tribunals" (2001) 15 Can J Admin L & Prac 15 at 16–18.

145. British Columbia Law Institute, *supra* note 143 at 51–52.

peace. Policy-makers and adjudicators have accepted these truisms for decades, but they have never been seriously tested or proven. The burden of proof should not rest solely on those who seek change. An evidence-based choice as to what system will better promote the objectives of administrative justice—accessibility, economy and fairness—will require research directed at both the current system and a unified public tribunal.

The British Columbia Law Institute's study of the BC reform proposal deemed the experience of consolidated tribunals outside Canada unreliable for Canadian policy-making purposes because of differences in legal frameworks.[146] This is unfortunate, since comparative legal research can yield valuable insights, even though it must always be undertaken with caution. But whether or not we can learn from successful "labour court" models in other countries, we can surely learn from domestic experiments in consolidation. For example, Ontario's Labour Relations Board currently deals with cases involving individual and collective issues under a wide variety of statutes including the *LRA* and the *ESA*, and also sits as a grievance arbitrator for the construction industry. In other Canadian jurisdictions, labour boards also deal in various combinations with individual and collective claims under employment standards legislation, human rights codes and pension standards legislation.[147] Their experiences could help us begin to answer such questions as: the role of subject expertise in adjudicating a variety of specialized claims; whether consolidated tribunals can provide effective service to both individual and institutional "clients" and what roles unions and individual workers should play in addressing individual rights claims in unionized workplaces. We could also learn much about institutional design issues, such as how pre-hearing mechanisms can be used to filter frivolous claims (a function now performed for arbitration by union gatekeeping) and how public systems should be paid for.

146. See *ibid* at 5.

147. See Elizabeth Shilton & Kevin Banks, "The Changing Role of Labour Relations Boards in Canada: Key Research Questions for the 21st Century" (2014) at 3–9, online: <www.queensu.ca/clcw/sites/webpublish.queensu.ca.clcwwww/files/files/LabourBoardReportMay72014(1).pdf> (reviewing the current jurisdiction of all labour relations boards in Canada as of 31 December 2013).

Conclusion

The pluralist enforcement model is intimately linked to the notion that private rather than public law governs the workplace. If that was ever the case, it is no longer so; the modern workplace is now governed by an amalgam of public and private rights that overlap and intertwine. The policy justifications that created, supported and maintained the old model are much less persuasive now that the model is burdened with tasks it was not designed to do. When we enforce modern workplace law within our old model, we force square pegs into round holes, and problems of fit are predictable.

So let us return to the question posed by Bernard Adell in 1988. Would a public tribunal model work better? His own answer was a compromise: We should have a public tribunal, but the parties to collective agreements should be able to opt for private arbitration if they so wish. Adell made that proposal, however, prior to the great expansion of arbitral jurisdiction following in the wake of subsection 48(12)(j) of the *OLRA*, *Weber* and *Parry Sound*. Now, he would almost certainly have delivered a harsher verdict on the ability of private arbitration to do justice for individual employees, despite its many institutional attractions.

Adell would also have supported more research to assist policy-makers in assessing the impact of these important developments. In 1988, when he raised the question of whether a public tribunal would work better, he called for more empirical research on the arbitral process before an answer could be given.[148] That research has not been done. We do not know if workplace culture and efficiency would suffer if current enforcement mechanisms were abandoned or altered in any significant way. We do not know if public adjudication would undermine stability and productivity in unionized workplaces. We do not know if allowing employees to proceed with rights claims that have not been filtered by the union would damage the collective interests of unionized employees.

We *do* know that the current system has lost much of its coherence and its legitimacy now that its fundamental premise—the autonomy of workplace law—has disappeared. So let's find out what questions need to be asked and answered to make solid, evidence-based decisions about workplace adjudication policy in the future.

148. See Adell, "Law and Industrial Relations", *supra* note 7 at 134.

Let's design a research program—in consultation with adjudicators, policy-makers and participants in the system at every level—to answer those questions. In the course of reform, there may be much in the current enforcement model that should be salvaged—for example, we have never had any reason to regret the decision to remove workplace dispute resolution from the courts and many grievance procedures are exemplary models of effective pre-hearing procedure. But stripped of the industrial pluralist ideology that has sustained them, and subjected to the cold eye of empirical research, the three pillars of the current system are unlikely to stand.