
# INDIVIDUAL EMPLOYEE RIGHTS AND UNION CONTROL OVER THE ENFORCEMENT OF COLLECTIVE AGREEMENTS

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# What I'm concerned about -

- **Grievance arbitration is increasingly being relied on to enforce the workplace rights of unionized employees in Canada --**
  - **Not only traditional *collectively bargained* rights, such as protection against unjust discharge, seniority rights, job assignment rights….**
  - **But a wide range of *statutory* rights, such as anti-discrimination rights, minimum wages, health and safety rights…**
  - **And since 1995, even *constitutional* rights grounded in the Canadian Charter of Rights and Freedoms**
  - **And also some *common law* rights, such as tort claims.**

# The union veto

- **But access to grievance arbitration is generally controlled by the union, not by the individual employee.**
- **In other words, under most collective agreements, the union can veto the use of arbitration to enforce a wide range of individual employee rights against the employer.**

# The focus of my talk today -

## What should be done about the union veto?

- **I'll only be talking about *unionized* employees.**
- **In Canada (and the US), non-unionized employees are not covered by collective agreements at all, and no union has any control over their workplace rights.**

# Do we really need the union veto?

- **Almost nowhere except in Canada and the US does a union have such a strong right to bar individual access to the main forum for enforcing employee rights.**
- **Labour tribunals elsewhere are usually open to all employees, whether or not a union supports their claim – even in systems that are just as protective of collective rights as the Canadian system.**
- **It's true that in Sweden, an employee can't bring a complaint in the Labour Court without union support - but *can* go to the ordinary courts.**

# Unions and employers both like the union veto -

- **It lets unions balance the collective interests of the entire bargaining unit with individual employee rights.**
- **It lets employers safely settle employee grievances with the union, whether or not the employee is happy with the settlement.**
- **And many scholars argue that the union could not effectively represent the entire employee bargaining unit if did not control access to grievance arbitration.**
- **But the union veto does raise problems – not only for statutory rights, but for traditional employee rights under the collective agreement.**

# If a union refuses to pursue an employee's claim against the employer, then what?

- **The employee can't take the claim to arbitration himself or herself.**
- **Usually, all he or she can do is proceed against the *union.***
- **To do that, the employee has to go to another forum (the labour relations board).**
- **And has to prove that the union breached its *duty of fair representation* [the DFR].**

# The duty of fair representation [DFR]

**-In Canada, the DFR is usually set out by statute:**

> "A trade union ... shall not act in a manner that is arbitrary, discriminatory or in bad faith" **in representing any employee in the bargaining unit.** -Ontario Labour Relations Act, s. 74

- **Even if the employee proves that the union breached its DFR, the labour relations board cannot directly adjudicate the employee's claim against the employer.**
- **All it can do is send the matter to arbitration (and order the union to pay for the employee's lawyer).**

# When will a union be held to have acted in a way that's "arbitrary, discriminatory or in bad faith"?

**"…the general theme in the [DFR] jurisprudence [is] that bargaining agents should be accorded substantial latitude in their representational decisions. The bar for establishing arbitrary conduct – or discriminatory or bad faith conduct – is purposely set quite high."**

**- Manella v. Treasury Board and PSAC 2010 PSLRB 128, at para 38**

# This imposes a high burden on employees.

- To be found to be *arbitrary*, the union's conduct "must be so unreasonable and so uncaring or reckless that it is not worthy of being protected by the Board."
- To be in *bad faith*, it must involve "personal hostility or ill-will on the part of the union."
  Herlihy v. ATU, 2012 CanLII 67472, at para 15 (OLRB)
- It's hard for an employee to prove this level of misconduct on the part of the union.

# Even with that high burden, unhappy employees bring a *lot* of DFR complaints.

- **A search of the CanLII Ontario Labour Relations Board [OLRB] database on the term "duty of fair representation" from 2001 to 2012 turns up over 2000 reported cases.**

- ***"We're no longer the Ontario Labour Relations Board – we've become the Ontario Duty of Fair Representation and Construction Industry Grievance Board."*** - A former member of the OLRB

# But DFR complaints rarely succeed.

- **About 300 of those 2000 cases involved allegations of discrimination of some sort.**
- **In only 8 of the 300 was the complaint upheld, either in part or in full.**
- **None of the 8 involved discrimination on a ground prohibited by the Human Rights Code.**
- **This extremely low rate of successful DFR complaints is typical of most Canadian jurisdictions.**
- **(Surprisingly, the success rate appears to be much higher in Quebec – around 40%.)** (Legault and Bergeron 2007)

# DFR complainants are usually self-represented.

- **Employees who are in conflict with both their employer and their union often have trouble finding and paying for legal counsel.**
- **So most of the time, DFR complainants represent themselves before the labour relations board.**
- **This makes things even harder for them – and for the board.**

## Many self-represented complainants don't grasp some basic but often subtle distinctions:

1. **The fact the DFR doesn’t give them an *appeal against the merits* of the union’s refusal to press their grievance – but only a right to challenge the *propriety* of the refusal.**
2. **The difference between their *opinion* that the union has treated them improperly and *evidence* that it has in fact treated them improperly.**

# A few writers have long been concerned about how hard it is for employees to make out a breach of the DFR …

**Clyde Summers, in 1962:**

**"[T]he duty of fair representation … is almost without exception a form of words which holds the promise to the ear and breaks it to the heart. Even its advocates doubt its efficacy."**

-(1962) 37 NYU L. Rev.

# Jack Kroner, in 1967:

**"It is curious how easily the liberal conscience, once having identified the interest of the trade union with that of the individual worker in terms of his struggle against the employer, is unable to part with the viewpoint when the individual stakes out his claim against the institution itself."**

- Jack L. Kroner, "The Individual Employee – His 'Rights' in Arbitration after Vaca vs. Sipes," in T.G. Christensen (ed.), NYU 20th Ann. Conf. on Labor (Albany, NY: Bender), 1967, 75 at 88.

# I've been worried about this too, for almost as long…

- **Through the 1970s and 1980s, I argued that the DFR was not a satisfactory response to the problem of the union veto over individual employee access to grievance arbitration.**
- **DFR proceedings, I wrote back then, had "the inherent flaw of pitting employee against union, in what is often a bitter internecine fight, before even getting to the main event: the employee's claim against the employer."** - (1986) 11 QLJ 251 at 254

# My prescription, back in 1986

- For grievances over how a collective agreement has been applied to an individual employee, I argued that the union veto should be totally abolished by statute.
- So that an employee could go directly to arbitration without having to go through a DFR proceeding.
- This reform has not been introduced anywhere in Canada.
- With respect to employee complaints that challenge the propriety of a term that the employer and the union have put into the agreement (negotiation disputes), I couldn't see any viable alternative to the DFR.

# However, a quarter-century later, my views are evolving somewhat...

- On the one hand: the *breadth* of the union veto has increased, because the jurisdiction of arbitration has expanded far beyond traditional collective agreement rights.
- On the other hand: a few countervailing developments may be gradually reducing the *depth* of the veto, and therefore reducing its significance.

## What are those countervailing developments?

1. A slight evolution in the substantive DFR standard applied by labour relations boards:
   a. Where the grievance raises a human rights issue
   b. Where the grievance does not raise a human rights issue
2. Changes over the years in the labour relations board process for handling DFR cases
3. Slightly increased availability of the human rights forum to the individual employee under the “direct access” model

# 1a. Evolution of the DFR standard where the grievance raises a human rights issue

- **As noted above, the standard of conduct that a union must meet under the DFR is quite low, to ensure that the union will have considerable discretion to try to reconcile divergent interests within the bargaining unit.**
- **Does the union have to meet a more rigorous standard of representation where a grievance alleges that the employer discriminated on a ground prohibited by human rights legislation (disability, age, race, sex, etc.)?**

# The union probably does have to meet a higher standard where the employee alleges a human rights violation.

- **The jurisprudence on this question is not very clear.**
- **Beginning with a 1997 Saskatchewan case, a few DFR cases have said that a union has to be more proactive than usual in handling grievances that allege employer discrimination on a prohibited ground.**
- **In particular, if the employee appears to have psychological problems, the union may have to take extra care in getting the complaint's story and in gathering evidence.**

# But the union's added responsibilities in human rights cases are not very heavy.

- **"…to the extent that the union demonstrates that it was reasonably careful and reasonably assertive, labour relations boards will not likely worry about whether the union's decision not to pursue a grievance is correct on the language of the collective agreement, or even on the language of the applicable human rights statute."**

  - *Bingley,* 2004 CIRB 291 at para 83; *Pepper,* 2009 CIRB 453 at para 38

# 1b. Evolution of the DFR standard where the grievance does *not* raise a human rights issue

- **This is even less clear.**
- **Over the years, the labour relations boards have somewhat broadened the scope of the DFR, by applying it to negligent as well as hostile conduct by the union.**
- **In some provinces, this has been done by statute.**
- **There are a few other signs of a slight change in how the boards balance individual rights and collective interests.**

# An example: a 2009 Ontario case involving seniority rights (*Harris*, 2009 CanLII 33987)

- **The union and employer had negotiated a collective agreement clause that privileged qualifications and ability over seniority.**
- **But the union told a junior employee that it wouldn't let him enforce the clause in a job competition, even though he was clearly the more able of the two candidates. Seniority, the union said, was sacrosanct.**
- **The union brought a grievance on behalf of the more senior employee, and reached a settlement with the employer giving the senior employee the job.**
- **The junior candidate then brought a DFR complaint to the OLRB, alleging that the union had acted arbitrarily (no human rights violation was alleged).**
- **The OLRB held the union's disregard of the clear wording of the agreement to be a breach of the DFR.**

# Broadening of the labour relations boards' experience in adjudicating individual rights

- **Over the past two decades, legislatures have given labour relations boards an increasing menu of adjudicative functions beyond the traditional regulation of collective bargaining.**
- **For example, the OLRB now applies statutes ranging from the *Employment Protection for Foreign Nationals Act* to the *Occupational Health and Safety Act* to the *Smoke-Free Ontario Act.***
- **These new functions have broadened the horizons of the boards in dealing with individual rights of both unionized and non-unionized employees, and have perhaps made them better able to handle DFR complaints.**

# 2. Changes in the labour relations board process for handling DFR cases

- **Some boards have introduced a “consultation” or “filter” stage, designed to screen out the many clearly unfounded DFR complaints.**
- **Where the complaint appears to the board to have any potential merit, the consultation often gives the parties some guidance on what evidence they will have to provide at the subsequent full hearing.**
- **Although this has added yet another step to the already lengthy DFR proceedings, it does appear to have allowed the boards to focus on the stronger complaints.**

# 3. Slightly increased availability of the human rights forum to individual employees under the new "direct access" model

- **Traditionally, the human rights forum has had two stages.**
- **At the first (or "gatekeeper") stage, complaints are filed with a secretariat called the Human Rights Commission, which investigates each complaint and decides which ones are strong enough to go to the Human Rights Tribunal for adjudication.**
- **The Commission then argues those cases before the Human Rights Tribunal, on behalf of the complainants.**
- **For complainants, this model has the important advantage that they do not have to process their own complaints, or hire their own lawyers.**

# But -

- Despite that advantage, the two-stage procedure (and especially the first stage) has often been notoriously slow.
- In Ontario, for example, cases took an average of 5 years to be dealt with.

# The new “direct access” model

- So a few provinces have abandoned the two-stage process in favour of various “direct access” models.
- In Ontario, for example, the Human Rights Commission’s investigative and advocacy roles were taken away by statute in 2008.
- Complainants now can (and must) carry their own cases directly to the Ontario Human Rights Tribunal.
- This has speeded things up somewhat -- the average time needed to deal with a case has dropped from 5 years to 2 years.

# The downside of “direct access”

- To partially replace the Commission’s advocacy role, Ontario has set up a Human Rights Legal Support Centre.
- But that Centre has only been able to represent about 12% of complainant before the Human Rights Tribunal.
- It seems that the direct access model works best for people who can afford to hire their own lawyers.

# The ongoing problem of overlapping jurisdiction between the human rights forum and grievance arbitration

- **Ever since grievance arbitrators were first allowed to apply human rights statutes, human rights tribunals have often been asked to hear complaints that have already been dealt with (and usually rejected) by arbitrators.**
- **Human rights tribunals are public bodies, while arbitrators are privately appointed by unions and employers.**
- **Many employees therefore have the impression that human rights tribunals will be less inclined to subordinate individual interests to collective the interests of the individual employee.**
- **Empirical studies seem to support that impression in Quebec, but there is no evidence that it's true in other parts of Canada.**

# To deal with the problem of overlapping jurisdiction --

- **Human rights tribunals are allowed by statute to refuse to hear a claim which is going through another forum, or has already been decided in the other forum.**
- **For example, the Ontario Human Rights Tribunal may dismiss a complaint if in its view another proceeding has "appropriately dealt with the substance" of the matter.** (s. 45.1)
- **This is designed to discourage multiple litigation, while letting the human rights tribunal hear matters which may not have been handled appropriately by arbitrators.**
- **So an individual employee normally has no hope of having his or her complaint heard *both* in arbitration and in the human rights tribunal.**

# But the employee *can* choose one forum or the other.

- **If the union uses its veto to deny the employee access to arbitration, either by withdrawing the grievance or by settling it with the employer, the employee may then bring it before the human rights tribunal.**

  -*Nash v. Ottawa-Carleton District School Board*, 2012 HRTO 2299 (CanLII)

- **The Ontario Human Rights Tribunal has recently said that an individual covered by collective agreement "has a choice – he or she can choose not to file or proceed with a grievance and to pursue the application at the Tribunal instead."**

  -*Melville,* 2012 HRTO 22 at para 8

# Shilton, “Choice, But No Choice…”

- **My colleague Elizabeth Shilton argues that unionized employees are in practice so much better off having their human rights claims adjudicated in arbitration than in the human rights forum that it is misleading to say they have a real choice between those two forums.**
- **For that reason, and to protect the union’s role as collective representative, Shilton favours giving arbitration exclusive jurisdiction over all claims of unionized employees against their employers, even human rights claims.**
- **Except where the union has itself been “an active party to the alleged discrimination” (as in the leading *Morin* case, 2004 SCC 39)**
- **Shilton acknowledges that if arbitration had exclusive jurisdiction over human rights claims, the DFR would have to be strengthened, because it would then be the employee’s only backup in the event of a union veto**.

# I don’t quite agree with Shilton’s position -

- **In my view, the human rights tribunal should be available to an individual employee, at least in cases where the union refuses to take a complaint of prohibited-ground discrimination to arbitration.**
- **And perhaps in the relatively few cases where the employee would simply prefer (for whatever reason) to go to the human rights tribunal on his or her own.**

# To sum up…

- **The courts and (at least in Ontario) the human rights tribunal have both taken the approach that a union can't completely foreclose employee recourse to the human rights tribunal.**
- **So an individual employee has some access to a forum other than grievance arbitration to enforce statutory anti-discrimination rights.**
- **To that extent, the shortcomings of the DFR as a way to challenge union inaction or incompetence are perhaps less important today than in the days when arbitration was the only forum for enforcing the workplace rights of unionized employees.**

## But even if unionized employees have reasonably adequate recourse for *human rights* complaints…

- For grievances involving *traditional collective agreement rights*, no forum other than arbitration is available to the employee – and the union veto applies.
- The employee's only backup to arbitration in such cases is to go to the labour relations board with a DFR claim (under the original, weaker version of the DFR), and ask the board to order the matter to go to arbitration.
- In those cases, I still hold to the view that a right of direct individual employee access to arbitration would be the best solution.