The Duty of Fair Representation: Individual Rights in the Collective Bargainiug Process, or Squaring the Circle

Margriet Zwarts*

In the author's opinion, trade unions have become a social and economic force of critical importance, capable of wielding a power over union members that rivals the power of employers. Until recently, the existence of this power — and the potential for abuse — has been largely ignored and trade unions have been allowed to justify the sacrifice of individual interests in the name of the collectivity. Only within the last few years have we seen legislative recognition of the individual union member's right to control, however feebly, union behavior. Thus, the two legislatures who share jurisdiction over labour relations in Québec have imposed a duty of fair representation on unions, leaving them free to decide when and why they will act, provided they do so fairly. The task of deciding what is fair has been given to the Canadian Labour Relations Board and the Tribunal du travail. This has led both tribunals into an often crabbed and seemingly endless debate on how to reconcile individual interests with collective interests. They have, as a result, been forced to articulate implicitly or explicitly their view of the role unions play in Québec today. Regrettably, the Board and the Tribunal have decided that Canadian unions remain weak and that collective interests must be buttressed. The author concludes that the statutory duty of fair representation seems to have changed little and that we must await the day when a new compromise will be struck, with a more equitable and realistic balancing of individual and collective rights.

Selon l'auteur, les syndicats se sont transformés en une force sociale et économique d'importance capitale, capables d'exercer sur leur membres une autorité comparable à celle des employeurs. Jusqu'à tout récemment, l'existence de ce pouvoir ainsi que la possibilité d'abus qui en résulte, restaient essentiellement ignorées: On a ainsi permis aux syndicats de justifier au nom de la collectivité, le sacrifice d'intérêts individuels. Ce n'est que depuis quelques années qu'on a vu une reconnaissance législative du droit de chaque syndiqué d'exercer un droit de regard, si anémique soit-il, sur la conduite de son syndicat. De cette façon, les deux législatures qui se partagent la juridiction sur les relations du travail au Québec ont imposé aux syndicats un devoir de juste représentation; ceux-ci garderont alors une discrétion large qui devra toutefois être exercée de façon juste. On a chargé le Conseil canadien des relations du travail et le Tribunal du travail de déterminer la nature et la portée de ce devoir, ce qui devait les mener à s'aventurer dans une discussion pénible et vraisemblablement interminable au sujet de la réconciliation des intérêts individuels et collectifs. Par conséquent, ils se sont vus forcés de déclarer, implicitement ou explicitement, leur perception du rôle contemporain des syndicats. Malheureusement, le Conseil et le Tribunal semblent croire que les syndicats canadiens demeurent faibles et que les intérêts de la collectivité devront rester favorisés avec plus de vigueur. L'auteur conclut que le devoir statutaire de juste représentation n'a en fait changé que peu de choses et que nous devons dès lors attendre la venue d'un nouveau compromis qui saura équilibrer de façon plus réaliste et équitable les droits individuels et collectifs.

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*M.A. (Tor.); B.C.L., LL.B. (McGill).

Synopsis

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Introduction

"[A]w a muddle! Fro' first to last, a muddle!" Thus the central character in Charles Dickens' *Hard Times*[1] sums up a life that unfolds in a desolate Lancashire mill town and that ends with his accidental death in an abandoned mine shaft — the black pit that aptly epitomizes the abyss of his blind despair. Like so many of Dickens' characters, Stephen Blackpool dies as a victim to the will of a social institution created for no apparent purpose other than that of stifling individuality and keeping the masses of humanity downtrodden. In *Hard Times*, that villain social institution is the trade union.

When we first encounter Stephen he is an honest and steady workman, virtuous although long-suffering, and with an innate grace far exceeding that of his social betters. Despite his crippling marriage to a drunkard and the horror of his daily work, he has managed to salvage some human dignity from the hardships of his life as a factory hand. Then, the United Aggregate Tribunal arrives on the scene. Stephen makes and keeps a promise not to involve himself in the trade union movement. A union agitator, whose natural endowments mark him as a man "above the mass in little but the stage" on which he stands,[2] manoeuvres Stephen's fellow workers into punishing him

[1] C. Dickens, *Hard Times* (New York: New American Library, 1961) 267.
[2] *Ibid.*, 142.

for his refusal to show solidarity. Having lost the sympathy of the union, Stephen proceeds to lose the sympathy of his employers. In rapid sequence, then, Stephen is fired, cast out of his community and dies. All of this, Dickens tries to persuade us, stems from the collusion between trade unionists and capitalists, neither of whom can tolerate independent thought or individualism within their midst. The evil that lies in the heart of trade unionism is, moreover, so insidious that even its victim, Stephen, fails to understand how or why his honourable desire to keep his word comes to be rewarded by social, then economic, and finally physical death.

Anti-union rhetoric, such as that found in *Hard Times*, was not of course uncommon in the early days of the trade union movement. What is prophetic in Dickens' work, however, is his vision of the union as a social institution that would sacrifice the interests of the very worker it was supposed to represent. Curiously, the legal recognition of trade unions in the 1870's did not bring forth any special legislation to curb the power unions might exercise over their members. Perhaps it was believed that the new legislation sufficiently circumscribed union power or that, in any case, the small craft unions typical of the era would never command enough support to be truly harmful to their own members. Cases such as *Allen* v. *Flood*[3] reveal some judicial sympathy for the plight of the individual who tries to defy the union. But apart from the rare cases where the union flagrantly abused its power,[4] the courts normally showed themselves indifferent to what might happen within the union. For example, when considering the rights of an individual to be admitted to a union, the courts rather whimsically likened unions to gentlemen's clubs;[5] in neither case could the law force the members to associate with those whom they found odious.[6]

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[3] [1898] A.C. 1, [1895-9] All E.R. Rep. 52 (H.L.). In the end, however, Flood and his companions lost their case. But *cf. Quinn* v. *Leathem* [1901] A.C. 495, [1900-3] All E.R. Rep. 1 (H.L.).

[4] See *Rigby* v. *Connol* (1878) 14 Ch. D. 482, [1874-80] All E.R. Rep. 592.

[5] The English jurisprudence relating to gentlemen's clubs is rich. Courts will intervene to force association only when a club abuses its normally wide discretion to control membership. See, *e.g.*, *Fisher* v. *Kean* (1878) 11 Ch. D. 353; *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 615, [1881-5] All E.R. Rep. 126. In Canada, club jurisprudence is rare but it seems from cases such as *Andreas* v. *Edmonton Hospital Board* [1944] 4 D.L.R. 747 (Alta S.C., App. Div.), that courts are loath to interfere with the free exercise of club members' discretion in admitting new members. It appears also that, as in England, courts will step in to prevent expulsion only when discretion is abused. See, *e.g.*, *L'Académie de Musique de Québec* v. *Payment* [1936] S.C.R. 323, [1936] 4 D.L.R. 279.

[6] See *Weinberger* v. *Inglis* [1919] A.C. 606 (H.L.). For a modern expression of the same attitude, see *Faramus* v. *Film Artists' Association* [1963] 2 Q.B. 527, 547, [1963] 1 All E.R. 636 (C.A.) *per* Upjohn L.J. On the whole, the courts were more concerned with the adverse effects of unionism on employers, rather than on the workers themselves. Compare the holding

As Dickens foretold, the trade union has become a social and economic institution of paramount importance, capable of exercising a power over union members that rivals the power of employers. Under the *Canada Labour Code*[7] and the Québec *Labour Code*,[8] a legally accredited union is given exclusive authority to negotiate and to administer the collective agreement that will determine the unionized worker's terms and conditions of employment. As a result, this worker can no longer hope to win special benefits for himself by dealing directly with his employer; he must assert his rights through the union. If the union refuses to negotiate a particular term or to advance a grievance, the individual affected is ostensibly left without recourse. If the union has secured a closed or union shop agreement, the individual may become even more dependent on his union for, unless the union agrees to admit him as a member, he can expect no job from an employer bound by the agreement. Unions have been vested with the power to act as lawmaker, judge and policeman of workers' rights.

As the strength and importance of unions has grown, the criticisms voiced by Dickens in *Hard Times* have taken on a new relevance. It would be naive to believe that modern unions always exercise their powers with the utmost good faith and that unionists have somehow remained miraculously untainted by incompetence or corruption. A more serious charge levelled against unions is that they seem to have forgotten their role as the advocate of workers' rights. Like the United Aggregate Tribunal, modern unions are accused of pursuing goals diametrically opposed to those of the working men they are mandated to represent. For example, the union may wish to husband its resources, whereas an individual worker who has been fired may want to see union funds spent on the arbitration of his dismissal. Because the union controls both the money and the arbitration procedure, the individual must yield to the decision of the union, no matter how meritorious his claim. Worse, the union may negotiate a superseniority clause to reward staunch supporters. The less ardent in the bargaining unit would be understandably aggrieved by such discriminatory treatment, but will not be able to complain because they are not parties to the negotiations. Worse still, a predominantly white union could negotiate the systematic phasing out of all those jobs

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in *Allen* v. *Flood*, *supra*, note 3, with the decision in *Quinn* v. *Leathem*, *supra*, note 3. See also *Russell* v. *Amalgamated Society of Carpenters and Joiners* [1912] A.C. 421, [1911-13] All E.R. Rep. 550 (H.L.) for an excellent example of judicial indifference to the rights of union members. The Law Lords refused to recognize the legal status of a union for the purposes of an action to recover superannuation benefits owed by the union to a member of some forty years' standing.

[7] R.S.C. 1970, c. L-1, s. 116, as am. S.C. 1972, c. 18, s. 1 replacing s. 116 with subs. 136(1) and adding s. 154.

[8] R.S.Q. 1977, c. C-27, s. 67.

hitherto held by blacks and unless a court sees fit to intervene, on the basis of fundamental rights legislation, as did the United States Supreme Court when confronted with such a fact pattern,[9] the black workers in the bargaining unit have no legal cause to complain. If courts and legislatures remain indifferent to individual rights within the union, the result may be that the modern union becomes as remote and unassailable as was the employer in the nineteenth century; once again, the individual will be powerless.

Although it is in the main overstated, the case against modern unionism does raise an intractable problem. Unionization involves the pursuit of collective interests, often at the expense of individual interests. Whatever may have been the case in the past, the collective interests of present-day unions are determined democratically by the majority of its members. In the face of that majority will, no individual interests can, at least in theory, prevail. In the name of fairness, however, courts and legislatures sometimes derogate from democratic principles and will insist that individual interests should prevail.

There are two methods whereby individual rights can be protected: either the worker is allowed to assert certain employment rights individually, or the union's exclusive power is tempered by a duty of fair representation. In Québec, the recent jurisprudence and legislation indicate that the first method is no longer available. The underlying assumption of this development is, presumably, that the individual should not be allowed to disturb the equilibrium established by our collective bargaining system. The union remains the watchdog of the collective agreement even though, at times, threats of penalties are necessary to make it behave as such. The courts and the lawmakers have unequivocally affirmed that labour relations involves two, and only two, parties: the union and the employer. The employee can only hope that the union will be required to act fairly. There remains one crucial question to be addressed: what meaning are we to ascribe to "fairness"? It may be perfectly clear that, in fairness, blacks should have the same rights as whites under a collective agreement, even if ninety percent of the membership opposes the granting of such rights. It is not quite so clear that, in fairness, every worker who is dismissed from his job has an absolute right to arbitrate the dismissal.

The fairness of union decisions can only be ascertained by weighing the relative urgency or merit of collective and individual interests. Even this test, however, does not provide a particularly helpful way of proceeding, since it presupposes that we have formed some understanding of the role unions play in modern Canadian society. If the modern-day union is seen as no different from any big business, then union members should presumably have rights at

[9] *Steele* v. *Louisville & Nashville Railroad Co.* 323 U.S. 192 (1944).

least as powerful as those of a corporate shareholder: the member should have an absolute right to arbitrate in circumstances analogous to those which trigger the shareholder's appraisal rights — that is, whenever the individual is in jeopardy of losing membership in the organization. But if the union remains, in our view, the vulnerable and humble champion of labour, we might be more inclined to let it exact tougher standards of discipline. To save money and energy for more worthy battles, the union should be left free to screen out frivolous or vexatious claims.

Although it shares certain qualities with both, the modern Canadian union is in fact neither big business nor grass-roots champion. It follows that neither corporate democracy nor military autocracy serves as an appropriate model. It is the failure, perhaps even the unwillingness, to establish an appropriate model that has plagued the case law on the duty of fair representation. For without such a model, the task of reconciling the individual worker's interests with those of his union becomes impossible.

I. Enforcement of the Collective Agreement hy the Individual

Spectacular cases of union corruption — the stuff of Royal Commissions and yellow journalism — arise but rarely.[10] Much more frequently, the complaints brought against unions involve the same humdrum, and yet for the employee critical, set of facts: The employer sees fit to discipline an individual and the union refuses to arbitrate the individual's claim of a breach of the collective agreement. The individual then turns to the courts, asking that they do justice according to his reading of the collective agreement. Before deciding on the merits of the case the courts must ask whether an individual can seek to enforce a collective agreement without the assistance of his union.

Neither the *Canada Labour Code* nor the Québec *Labour Code* offers a straightforward answer to this preliminary question.[11] Both stipulate that

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[10] See, *e.g.*, Government of Canada, *Report of the Industrial Inquiry Commission on the Disruption of Shipping on the Great Lakes, the St. Lawrence River System and Connecting Waters* (1963).

[11] The *Canada Labour Code*, R.S.C. 1970, c. L-1, s. 132 used to read as follows: "Notwithstanding anything in this Part, any employee may present his personal grievance to his employer at any time." There is no judicial authority on the meaning of this provision. Two readings, at least, are possible: the section either confers a right on the individual to process his own grievance or confers a privilege on the employer to negotiate for a collective agreement that allows individual processing of grievances. For a similar problem of interpretation, see *National Labor Relations Act of 1935*, §9(a), 29 U.S.C. §159(a) (1970) and the debate between Cox, *Rights Under a Labor Agreement* (1956) 69 Harv. L. Rev. 601, 622 and Summers, *Individual Rights in Collective Agreements and Arbitration* (1962) 37 N.Y.U.L. Rev. 362, 378.

grievances must be submitted to arbitration according to the terms of the collective agreement or, in the absence of such terms, to an arbitrator selected by the parties to the agreement. Since the individual is not himself a party to the agreement,[12] he cannot settle with the employer on the choice of an arbitrator. Whatever right the individual may have to take his grievance to arbitration without the assistance of his union must, then, be found in the collective agreement. If, as is usually the case, the union is made the sole master of the arbitration process, the individual has a right to arbitrate a dispute arising from the collective agreement only in so far as the union is prepared to pursue that right for him. It can also be taken for granted that a court, when faced with an express clause in a collective agreement barring individual access to the arbitration process, will not assume jurisdiction to decide on the merits of the individual's complaint.

This refusal to assume jurisdiction stems from an understandable reluctance to side-step the terms of a freely bargained and legally effective collective agreement. It also makes logical sense, as long as we are prepared to accept that the benefits flowing from collective bargaining are best pursued collectively. More often than not, an individual complainant will ask the court either to act as though it were an arbitrator or to refer the dispute to arbitration. He wants not damages but reinstatement, or the substitution of some lesser penalty. The types of remedies that an arbitrator can order were not available at common law. Indeed, arbitration itself avails only because a union has been accredited or recognized and has negotiated with the employer for an arbitration procedure. It follows from our initial assumption that arbitration is rightfully controlled by the union. Moreover, in the absence of an express clause in the collective agreement, we should presume that the union alone is responsible for the bringing of any dispute to arbitration. We might also note that there are cogent policy reasons for allowing the union to control the arbitration procedure. For example, to require the arbitration of every grievance would quickly drain even the most powerful and wealthy unions of money and energy; it would also tax the employer unnecessarily.[13]

Yet certain job interests, such as seniority rights or the right not to be dismissed without just cause, are today considered fundamental. It might appear unduly harsh to deny the worker access to the enforcement procedure, especially if he himself proposes to bear the cost. If we decide once and for all that, absent a clause to the contrary in the collective agreement, the union is vested with the sole authority to control the arbitration procedure, we may be

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[12] See the definition of "parties" in *Canada Labour Code*, R.S.C. 1970, c. L-1, subs. 107(1) as am. S.C. 1972, c. 18, s. 1 and the definition of "collective agreement" in the Québec *Labour Code*, R.S.Q. 1977, c. C-27, para. 1(d).

[13] See Cox, *supra*, note 11, 625.

telling the individual employee that collective agreement guarantees of seniority and the like are nothing more than paper rights — rights that he possesses, but that are unenforceable except by the good offices of the union. Before we accept an irrebuttable presumption in favour of the union's power to control the arbitration procedure, we should perhaps be allowed to consider whose interests are sacrificed by so doing.

Be that as it may, the Supreme Court decision in *General Motors of Canada Ltd* v. *Brunet* has made it amply clear that an irrebuttable presumption already exists.[14] Regrettably, the reasons for judgment have to do more with statutory and collective agreement interpretation than with policy. Claiming reinstatement and damages for lost wages, Brunet had sued both his employer and his union in the Québec Superior Court for their failure to observe the collective agreement. The employer countered with a preliminary objection to the Court's jurisdiction to hear complaints arising from an alleged breach of a collective agreement. Mr Justice Pigeon duly noted, as had Laskin C.J.C. in *McGavin Toastmaster* v. *Ainscough*[15] and Judson J. in *Le Syndicat catholique des employés de Magasins de Québec* v. *Cie Paquet Ltée*,[16] that all the rights enjoyed by a unionized employee against his employer must flow either from the collective agreement or from labour relations legislation. In effect, the statutory regime of collective bargaining, which applies once a bargaining unit is certified, sweeps away all rights the employee may have enjoyed under his individual contract of employment.[17] The logical conclusion, given this premise, is that these rights can be enforced legally only by the mechanism spelled out in the collective agreement or the relevant labour code. Because Brunet could point to no clear provision in either the agreement or the Québec *Labour Code* granting the right to process grievances individually, Pigeon J. simply assumed that no such right existed.[18]

The result of *Brunet* is that considerations such as the importance of the job interest at stake or the willingness of the employee to bear costs have become totally extraneous to the issue. Courts are spared the difficult task of sifting through the competing claims and facts of each case; they can rely strictly on the wording of the collective agreement. Moreover, if the collective agreement is vague, any ambiguity will presumably be resolved neatly in favour of the union's absolute right to control the arbitration procedure.

For those who distrust their union's ability to represent their interests fairly or competently, *Brunet* appears to be an extremely harsh decision.

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[14] [1977] 2 S.C.R. 537, 548 [hereinafter *Brunet*].
[15] [1976] 1 S.C.R. 718, (1975) 54 D.L.R. (3d) 1.
[16] [1959] S.C.R. 206, 212, (1959) 18 D.L.R. (2d) 346.
[17] See *Brunet*, *supra*, note 14, 549.
[18] *Ibid.*, 548.

Pigeon J. did indicate, however, that his decision might have differed had the union acted in bad faith.[19] Since *Brunet* came before the Supreme Court as a question of jurisdiction, we can assume Pigeon J. meant that the ordinary courts could decide an issue arising from the alleged breach of a collective agreement, provided that the plaintiff prove the union's bad faith. This "bad faith exception" is an extremely narrow one, especially since the presumption of good faith places a heavy evidentiary burden on the employee. It also fails to provide any assistance to those who complain of simple negligence or imprudence.

Although it has closed the door firmly on the individual's right to arbitrate, the Supreme Court has shown itself more liberal when considering the individual's right to participate in an arbitration undertaken on his behalf. The leading case, *Hoogendoorn* v. *Greening Metal Products & Screening Equipment Co.*, held that it would be a breach of natural justice to deny the right to be heard to any individual directly interested in an arbitration proceeding.[20] When is an individual directly interested? The majority in *Hoogendoorn* did not suggest that the right to participate existed only in individual or group grievances; it would seem that the individual may have the right to be heard even in a policy grievance, as long as his interests are affected by the outcome of the arbitration award.[21] For example, a dispute concerning the contracting-out of certain bargaining unit work will normally be resolved by way of a policy grievance. Yet, under *Hoogendoorn*, the worker whose job will disappear if the employer is allowed to contract-out should be given the right to participate in the arbitration of the grievance.

The dissenting opinion of Judson J. is based on a rigid distinction between policy and individual grievances. Because he could not show that the grievance was an individual one, the plaintiff in this case had no right to participate.[22] Unfortunately, Québec cases following *Hoogendoorn* seem to have adopted Mr Justice Judson's somewhat mechanical approach, and have not allowed employees affected by the outcome of the arbitration to participate in what has been classified as a policy complaint.[23] A union eager to avoid the effects of *Hoogendoorn* would be well advised to dress up disputes as policy grievances — a relatively easy task given the problems arbitrators and

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[19] *Ibid.*, 548 and 552.

[20] [1968] S.C.R. 30, 39-40, (1968) 65 D.L.R. (2d) 641 [hereinafter *Hoogendorn*; cited to S.C.R.]. See also *Re Bradley and Ottawa Professional Fire Fighters Association* [1967] 2 O.R. 311, (1967) 63 D.L.R. (2d) 376 (C.A.).

[21] *Ibid.*, *passim*.

[22] *Ibid.*, 34.

[23] See, *e.g.*, *Blanchette* v. *Beaubien* [1975] R.D.T. 43 (Qué. C.A.); *Guay* v. *Lalancette* [1977] C.S. 725; *The Danby Corp.* v. *Clément* [1978] C.S. 746.

courts have encountered in trying to pin down the exact nature of the policy grievance.[24]

The right to participate in arbitration is, of course, a cold comfort to those whose claims the union has dismissed peremptorily as frivolous or hopeless. In light of the decision in *Brunet*, Hoogendoorn's union should simply have refused to arbitrate his claim altogether. It appears that Hoogendoorn's claim was hopeless, the union at all times was acting *bona fide*, and a decision not to arbitrate would likely have been unimpeachable. In a sense, *Hoogendoorn* can be rationalized as simply one more case affirming the duty to follow the rules of natural justice during a hearing, even though such a hearing need not have been held at all.[25] Nonetheless, it seems somewhat odd that the individual should have stronger rights if the union does act than if the union fails to act altogether.

Brunet notwithstanding, it should be noted that certain rights remain directly enforceable by the employee. These rights all involve some pecuniary claim, although, as Mr Justice Pigeon pointed out in *Brunet*, not all pecuniary claims are *ipso facto* enforceable individually.[26] The Supreme Court decision in *Hamilton Street Railway* v. *Northcott*[27] indicates that the unionized employee can ask a court to enforce an arbitration award in his favour, even though this will require the court to calculate the amount of the award: Lower level courts have also affirmed repeatedly that the unionized worker has a right to proceed directly against his employer for unpaid wages.[28] It is not clear what other pecuniary claims fall within this exception to the general rule that the union controls the enforcement procedure for rights arising from a collective agreement.

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[24] See E. Palmer, *Collective Agreement Arbitration in Canada* (1978), 139 and *Supplement 1980* (1981) 30; *Re Canadian Broadcasting Corporation and Association of Broadcast Employees and Technicians* (1973) 4 L.A.C. (2d) 263.

[25] See, *e.g.*, *R.* v. *Johnson* [1979] 2 W.W.R. 571 (Sask. C.A.); *Re Clauson and Superintendent of Motor-Vehicles* (1977) 82 D.L.R. (3d) 656 (B.C. Co. Ct). See also *dicta* of the minority in *Martineau & Butters* v. *Matsqui Institution Inmate Disciplinary Board* [1978] 1 S.C.R. 118, (1977) 74 D.L.R. (3d) 1.

[26] *Brunet*, *supra*, note 14, 542.

[27] [1967] S.C.R. 3, (1966) 58 D.L.R. (2d) 708.

[28] See, *e.g.*, *Grottoli* v. *Lock & Son Ltd* [1963] 2 O.R. 254, (1963) 39 D.L.R. (2d) 128 (H.C.) [hereinafter *Grottoli*]; *L'Association des policiers de Giffard* v. *La Cité de Giffard* [1968] B.R. 863; *Arsenault* v. *Ville de Louisville* [1977] C.P. 285. See also *St Pierre* v. *Le Syndicat des fonctionnaires provinciaux du Québec Inc.* [1979] C.P. 67 [hereinafter *St Pierre*], where the employee claimed compensation for lost wages from his union. The union had blocked the plaintiff's access to his office during the course of an illegal strike; the employer refused to pay wages for that period and the plaintiff then sued his union for the lost wages. The union raised as a defence that the plaintiff could only recover the wages through the mechanism set out in the collective agreement. Interestingly, the Court held that the union was a third party

Nor is it clear to what extent a court will be allowed to interpret a collective agreement as part of a claim for unpaid wages. Of Mr Justice McRuer's judgment in *Grottoli* v. *Lock & Son Ltd*,[29] Pigeon J. had this to say:

> All that was decided... was that nothing prevents an employee from bringing an action to recover unpaid wages. It is now well established that this is true only in so far as it is simply a matter of unpaid wages. If there is in fact a dispute over the interpretation or application of the collective agreement, the provision requiring arbitration is a bar to such action and must be dismissed.[30]

It appears, then, that the courts may settle straightforward, but not disputed, cases. But what if one of the parties decides to dispute the perfectly obvious? Furthermore, if there were no dispute, would the employee be asking a court of law to order the payment of back wages? Is the employee whose union refuses to represent him in a claim for back wages effectively without direct recourse against his employer? Surely, the jurisdiction of the court to hear a claim for unpaid wages does not hang on the mere existence of a dispute, however misguided or even frivolous that dispute may be. Let us assume, then, that the court has at the very least the jurisdiction to determine the *prima facie* validity of the dispute; this would entail an examination of the terms of the collective agreement. It may well be that such an examination raises complicated and perplexing questions of law, best decided by an arbitrator. On the other hand, the merit of the employee's claim may be readily apparent on the face of the collective agreement. Whatever the case, the court is now engaged in interpreting the collective agreement, if only to conclude that it raises questions beyond the court's competence or that it explicitly spells out the individual's rights. Yet *Brunet* tells us that in no circumstances does the court have jurisdiction to interpret a collective agreement. We cannot assume that the court has the power to consider even the *prima facie* validity of a dispute. If we follow *Brunet* to its logical limits, we discover that all the earlier jurisprudence on the individual's right to claim back wages was wrong and that, in truth, the court has no jurisdiction whatsoever to entertain such complaints.[31]

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to that agreement for the purposes of the suit in delict, and so could not rely on the terms of the agreement to bar the plaintiff's claim. The Court stated at 73: "Il appert à la Cour...que l'intimé n'était que le représentant des fonctionnaires et que, comme entité distincte, il n'a pas acquis, notamment en ce qui concerne les salariés, d'autre droit que celui d'agir comme représentant des fonctionnaires. Un syndicat ne saurait réclamer pour son *bénéfice personnel* un avantage dû à *un de ses membres* en vertu de la convention. ...Dans un conflit où il n'agirait pas comme représentant desdits employés, mais bien pour son propre compte, la convention collective devra être considérée comme *res inter alios acta*."

[29] *Ibid.*

[30] *Brunet*, *supra*, note 14, 551-2.

[31] In his article, *Rights Under a Labor Agreement*, *supra*, note 11, Archibald Cox provides a more rational basis for distinguishing personal claims from claims that can only be pursued by the union. According to Cox, we must ask whether the employee could reasonably have

We are left only with arbitration awards, which the individual can enforce directly against his employer because the dispute that gave rise to his claim has been settled. Even here it could be argued, albeit weakly, that the individual is statutorily barred from pursuing judicial enforcement. Section 93 of the Québec *Labour Code* reads as follows:

> 93. The award shall have the effect of a collective agreement signed by the parties.
> It may be executed under the authority of a court of competent jurisdiction at the suit of a party who shall not be obliged to implead the person for whose benefit he is acting.[32]

It may be that s. 93 subrogates the union in the employee's rights, with the effect that the individual himself cannot ask for judicial enforcement. More likely, however, s. 93 should be compared with s. 69, which has been read to create no subrogation whatsoever:

> 69. A certified association may exercise all the recourses which the collective agreement grants to each employee whom it represents without being required to prove that the interested party has assigned his claim.[33]

In *Arsenault* v. *Ville de Louisville*[34] the Court held that, because s. 69 uses no imperative or specific language to create a legal subrogation, we must assume the employee himself remains master of his own rights — at least in so far as those rights have been settled by arbitration. Section 69 is permissive only: the union *may* pursue the recourses otherwise available to the individual employee, but it may do so only if the employee wishes the union to act on his behalf. If he does not so wish, the employee keeps his right to enforce personally. The Court concluded that the individual's right to enforce is so sacrosanct that it lives on, even after the union has ostensibly settled the matter. Thus, an employer who has paid a union the amount of an arbitration

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expected to be paid the sum claimed. If so, he may sue the employer directly. But if his claim arises from a difficult and contorted reading of the collective agrcement, the union alone can pursue the claim. In short, the issue is one of reliance interests: the court can award damages for the loss of reasonably expected benefits, not for the loss of an unforeseeable windfall. Cox gives an example of such a windfall at 606-7: a carpenter is called on Labour Day to do maintenance work on a high roof; he works from 7:00 A.M. until 7:00 P.M. to do the job. Under the collective agreement, the normal workday extends from 8:00 A.M. to 5:00 P.M. All work in excess of eight hours a day, as well as work done outside the normal scheduled workday, is paid at double time. Work performed at great heights is to be paid at double time; finally, work performed on statutory holidays is also paid at double time. The carpenter's normal hourly pay is $2.00, yet he could argue that he is owed $8.00 for each hour between 8:00 A.M. and 5:00 P.M. and $16.00 for each hour worked before 8:00 A.M. and after 5:00 P.M.

[32] R.S.Q. 1977, c. C-27, s. 93. [The English text is cited throughout. However, the French text will be cited when it is critical to an understanding of a tribunal decision.].

[33] R.S.Q. 1977, c. C-27, s. 69.

[34] *Supra*, note 28.

award may subsequently find himself liable to the employee for the same amount. This conclusion is not entirely justifiable in the light of s. 93, which suggests that a court order in favour of the union would protect the employer from the subsequent suit of the individual employee. If the union can obtain a court order, one effect of which is to bar any subsequent action by the employee, it would seem likely that the union could also settle the matter informally but irrevocably. Nonetheless, the Court in *Arsenault* was probably right in pointing to the permissive nature of s. 69 and, by analogy, s. 93: both allow the union to enforce an individual's recourses, but neither denies to the individual a concurrent right to enforce.

The principle articulated in *Brunet* has been embraced warmly by Québec courts.[35] In particular, special mention should be made of the recent Court of Appeal decision in *Hotte* v. *Bombardier Ltée*,[36] which effectively makes the individual more dependent than ever upon his union. The union had taken Hotte's grievance to arbitration, but the award was not in his favour. He thereupon proceeded to the Superior Court, without the assistance of his union, for a writ of evocation. Evocation is available, according to art. 846 of the *Code of Civil Procedure*, only at the demand of one of the parties to the case evoked. Hotte was not, and indeed could not be, according to the collective agreement, a party to the arbitration proceedings and so his application was dismissed.[37] This simple, but neat, solution accords perfectly with the conclusions of *Brunet*, a decision to which Mr Justice Melançon does not refer. If the individual has no right to see his grievance arbitrated, why should he have any right to ask for evocation of an unfavourable arbitration award?

On the other hand, one unfortunate effect of *Hotte* may be that *Hoogendoorn* has only limited applicability in Québec. If there is a duty to arbitrate according to the dictates of natural justice, that duty is most properly enforced by way of evocation. But if the only person who might care to see *Hoogendoorn* applied — the individual employee — is not a party to the arbitration then, under *Hotte*, evocation is not available. In short, the Québec employee may find that he has a right, but no remedy.[38]

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[35] See, *e.g.*, *The Danby Corp.* v. *Clément*, *supra*, note 23; *Dayon* v. *Cournoyer* [1974] C.S. 316; *Gagné* v. *Association des pompiers de Montréal Inc.* , C.A. (Montréal, 500-09-001, 106-772) 20 February 1978; *Venditelli* v. *La cité de Westmount* [1980] C.A. 49.

[36] [1981] C.A. 376 [hereinafter *Hotte*].

[37] *Ibid.*, 383.

[38] This is not strictly accurate. The individual may yet have a remedy in injunction, possibly a writ of *mandamus*, or even a declaratory motion. His most assured remedy is likely an injunction. *Mandamus*, according to art. 844 of the Québec *Code of Civil Procedure*, depends upon the existence of "a duty or an act which is not of a purely private nature"; it is not at all clear whether an arbitrator is under such a duty. On the other hand, art. 453 *C.C.P.* makes a declaratory motion depend on a "right, power or obligation which he [the applicant] may have

In fairness, it should be added that the Court in *Hotte* never indicated that the complainant was bereft of all remedy. Melançon J.A. pointed out carefully that other, more appropriate, remedies may exist at law but he failed to name those remedies. Presumably he had in mind a direct recourse against the union. According to Melançon J.A., Hotte's complaint is based ultimately on the union's failure to act on his behalf; let Hotte, then, make out a case if he can against the union in, say, a writ of *mandamus*.[39]

As long as one agrees with the result of *Brunet*, recourse against the union does indeed seem like a logical way of proceeding. The underlying assumption of the case can be put simply: We cannot allow the individual to proceed against his employer, because that would destroy the integrity of a system of labour law built on the existence of two parties, the union and the employer. The individual can in no circumstances hope to bypass the union, which is vested with the exclusive authority to represent his interests. If he could, the solidarity so necessary for effective union action might be jeopardized. The courts are not interested in the importance of the job interest at stake, nor in whether the individual agrees to pay for his own arbitration, for the collective agreement serves as conclusive evidence of the individual's rights.

But no union should be able to shield itself behind a collective agreement if its failure to arbitrate is capricious or negligent. The absolute power to control the arbitration procedure should be tempered by a duty to act fairly and responsibly. Canadian courts have decided that fairness can be best achieved not by opening up the arbitration procedure to the individual, but by creating more powerful recourses against the union. Thus, Québec courts have imposed on unions the duty to represent fairly the interests of all the members in the bargaining unit.[40] Legislatures have followed suit and have imposed

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under a contract, will or any other written instrument". One would have to argue, therefore, that the right to participate, as enunciated in *Hoogendoorn*, *supra*, note 20, is a right under a written instrument (*i.e.* the collective agreement).

[39] The classic Québec case on the availability of *mandamus* to review union decisions is *Seafarer's International Union of North America (Canadian District)* v. *Stern* [1961] S.C.R. 682, (1961) 29 D.L.R. (2d) 29 [hereinafter *Stern*].

[40] See *Brais* v. *Association des contremaîtres de la C.E.C.M.*, C.S. (Montréal 500-813-850) 29 May 1972; *Boisvert* v. *Syndicat national des employés de garage de Québec Inc.*, C.S. (Québec 200-05-001 802-763) 4 September 1980. See also the discussion of the unreported *Herder* and *Hamilton* cases in *L'Administration de Pilotage des Laurentides et la Guilde de la marine marchande du Canada* v. *Gagnon* [1981] C.A. 431. All of these cases find inspiration in the leading American decision of *Vaca* v. *Sipes* 386 U.S. 171 (1967), which was first accepted by a Canadian court in *Fisher* v. *Pemberton* (1969) 8 D.L.R. (3d) 521, (1969) 72 W.W.R. 575 (B.C.S.C.).

similar statutory duties.[41]

Cases such as *Brunet* might have been used to resolve the competing interests of the employee and his union in controlling the collective agreement enforcement procedure. They were not used and, in the end, the task of resolving these interests has been shifted to another forum, another cause of action.[42] The union's power to control the enforcement procedure is controlled by the duty to represent fairly. In the name of fair representation, therefore, courts and labour boards have been permitted to chip away at the monolith of union power created by labour relations law and confirmed by *Brunet*. In these suits or complaints brought against the union, courts and boards can engage in the kind of flexible and subtle analysis that could not be undertaken in *Brunet*. How effective that analysis is, depends largely on how we define the scope of the duty to represent fairly.

Even though Québec and Canadian legislation now provides for a statutory duty of fair representation, some employees might have preferred to pursue their rights before the Superior Court. Under the Québec *Labour Code*, the only remedy available to a complainant is arbitration. The Tribunal du Travail has no jurisdiction to award costs or damages for lost wages: See *Boutin* v. *Le Syndicat international des travailleurs en électricité* [1979] T.T. 91, 96-7; *Rivest* v. *Association internationale des pompiers, section locale 1121* [1980] T.T. 276. The Superior Court, however, can order full compensation for any damage suffered. *Cf. Canada Labour Code*, R.S.C. 1970, c. L-1 as am. S.C. 1972, s. 1 adding s. 189, which allows the Canada Labour Relations Board to fashion remedies as it deems appropriate. For examples of the types of awards the Board has made, see *Massicotte and Teamsters Union, Local 938* [1980] 1 Can. L.R.B.R. 427, *cert. denied* in *Teamsters Union, Local 938 and Massicotte* (1980) 34 N.R. 611 (F.C.A.), *aff'd* (1982) 134 D.L.R. (3d) 385 (S.C.C.); *Cameron and Canadian Brotherhood of Railway, Transport and General Workers* [1981] 1 Can. L.R.B.R. 273, *cert. denied* in *Re Via Rail Canada Inc. and Cameron* (1981) 125 D.L.R. (3d) 254 (F.C.A.).

[41] *Canada Labour Code*, R.S.C. 1970, c. L-1 as am. S.C. 1977-78, c. 27, s. 49 adding s. 136.1; Québec *Labour Code*, R.S.Q. 1964, c. 141 as am. S.Q. 1977, c. 41, s. 28 adding subs. 38(b) now consolidated R.S.Q. 1977, c. C-27, s. 47.2.

[42] An alternative approach may be found in the classic works of three American authors: Cox, *supra*, note 11; Summers, *supra*, note 11 and *Union Powers and Workers' Rights* (1951) 49 Mich. L. Rev. 805; and Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority versus Employee Autonomy* (1959) 13 Rutgers L. Rev. 631 and *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship* (1963) 61 Mich. L. Rev. 1435. Of the three, Cox seems the least prepared to erode the union's absolute power to administer the collective agreement. Even he, however, accepts that certain so-called property rights remain vested in the individual and can be pursued in the ordinary courts. By contrast, Summers maintains that the individual should always be permitted to act on his own behalf when a union withholds its support. Blumrosen adopts the middle ground. For him, the individual can himself enforce any claim that involves a critical job interest: *e.g.*, dismissals, severe disciplinary sanctions, seniority grievances, and unpaid wages.

II. The Duty of Fair Representation

A. *Preconditions Under the Québec Labour Code: Discharge or Disciplinary Sanction*

Even the most cursory examination of the statutory duty of fair representation imposed by the Canada and Québec *Labour Codes* will reveal a fundamental difference in approach. Section 136.1 of the *Canada Labour Code* provides for a positive duty in the following terms:

> Where a trade union is the bargaining agent for a bargaining unit, the trade union and every representative of the trade union shall represent, fairly and without discrimination, all employees in the bargaining unit.[43]

Section 47.2 of the Québec *Labour Code*, however, speaks in negative terms:

> A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it, whether or not they are members.[44]

Notwithstanding certain *dicta* in a Canada Labour Relations Board decision,[45] the effect of this difference in phrasing may be more apparent than real. What distinguishes the duty of fair representation under the Québec *Labour Code* is not merely the wording of the statutory provision *per se*; it is the three sections that follow s. 47.2:

> 47.3. If an employee who has been the subject of dismissal or of a disciplinary sanction believes that the certified association is, in that respect, violating section 47.2, he shall, if he wishes to invoke this section, submit a written complaint to the Minister within six months. The Minister shall appoint an investigator who shall endeavour to settle the dispute to the satisfaction of the interested parties and of the certified association.
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> 47.4 If no settlement has been reached within fifteen days of the appointment of the investigator or if the association does not carry out the agreement, the employee shall, if he wishes to invoke section 47.2, apply to the Court within the fifteen ensuing days to request that his claim be referred to arbitration.
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> 47.5 If the Court considers that the association has violated section 47.2, it may authorize the employee to submit his claim to an arbitrator appointed by the Minister for decision in the manner provided for in the collective aggreement, as in the case of a grievance. Sections 100 to 101.10 apply *mutatis mutandis*. The association shall pay the employee's costs.
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> The Court may, in addition, make any other order it considers necessary in the circumstances.[46]

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[43] R.S.C. 1970, c. L-1 as am. S.C. 1977-78, c. 27, s. 49.

[44] R.S.Q. 1977, c. C-27, s. 47.2.

[45] *Laplante and Cartage and Miscellaneous Employee's Union, Local 931* [1981] 3 Can. L.R.B.R. 52 [hereinafter *Laplante*].

[46] R.S.Q. 1977, c. C-27, ss 47.3-47.5.

If the complaint does not concern a dismissal or a disciplinary sanction, the employee may yet have recourse to s. 47.2, but in that case s. 144 alone determines the penalty: the union may suffer a fine of $100 to $500 for its failure to represent adequately the employee's best interests. This penalty is derisory, if not meaningless, to most employees. It is highly unlikely that a worker who, for example, has suffered from the lackadaisical treatment of his claim to seniority will be much consoled by the imposition of a $500 fine. Such a fine may spur the union to act more equitably or competently in future, but does not solve the immediate problem: does the worker have a valid claim to seniority? What the worker wants is arbitration. Yet the gateway to arbitration is through s. 47.3 *et seq*. The worker must not only make out a case that the union acted improperly; he must also show that the union's impropriety occurred in the context of a dismissal or a disciplinary sanction.[47] We may note in passing that any disciplinary sanction, no matter how trivial, may give rise to s. 47.3 liability. This result is bizarre, especially because the section excludes from its scope certain job interests that are surely more critical than those involved in a minor disciplinary sanction. It would appear that a worker could conceivably use s. 47.3 *et seq*. to force the arbitration of a verbal reprimand, even though he can never hope to do so with regard to a seniority dispute.

Since a meaningful remedy for a breach of s. 47.2 is available only under s. 47.3, the meaning of the term "un renvoi ou une sanction disciplinaire" has become crucial.[48] An initial grammatical difficulty as to whether the adjective "disciplinaire" modifies the noun "renvoi" has been resolved in favour of a reading that gives the broadest meaning possible to "renvoi". Briefly, a dismissal is any action that deprives the employee of his job; it need not be disciplinary in nature, and can result from events such as the non-renewal of a contract,[49] a layoff or even a transfer from one work place to another.[50]

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[47] In other words, the Québec *Code* has incorporated a somewhat twisted version of Blumrosen's methodology: only two critical job interests — dismissal and discipline — have been singled out for special protection. For the rest, the individual must apparently submit himself to the union's will.

[48] The French version of s. 47.3 of the Québec *Labour Code*, R.S.Q. 1977 c. C-27 is as follows:

> 47.3 Si un salarié qui a subi un renvoi ou une sanction disciplinaire croit que l'association accréditée viole à cette occasion l'article 47.2, il doit, s'il veut se prévaloir de cet article, porter plainte par écrit au ministre dans les six mois. Le ministre nomme un enquêteur qui tente de régler la plainte à la satisfaction de l'intéressé et de l'association accréditée.

[49] See *Bordeleau* v. *Syndicat des professeurs du Collège du Nord-Ouest* [1979] T.T. 133. The holding in this case may, however, hang on the crucial fact that Bordeleau's contract was to be renewed automatically, unless the employer gave prior notice. In light of *Procureur général du Québec* v. *Tribunal du Travail* [1978] C.A. 103, there may be no dismissal, within the meaning of s. 47.3, if the collective agreement stipulated that the term of employment was of limited duration with no obligation on the part of the employer to renew.

[50] See *Guénette* v. *L'Union des chauffeurs de camions, hommes d'entrepôts et autres*

More problematic is the meaning of the term "sanction disciplinaire". At first blush, s. 47.3 does not appear to restrict disciplinary sanctions to those imposed by an employer; it may also cover union disciplinary sanctions such as expulsion or suspension. The success of an argument in favour of the individual's right to arbitrate intra-union disputes depends largely on the effect of s. 47.5. It is this section which empowers the Tribunal du Travail to order the arbitration of the individual's claim, in the event that a union has mismanaged a dismissal or disciplinary sanction. Whereas the French version of s. 47.5 speaks of arbitration "selon la convention collective, comme s'il s'agissait d'un grief", the English version refers to "the manner provided for in the collective agreement, as in the case of a grievance". The French version seems to suggest that the individual's claim must arise from a dispute concerning the application or meaning of that collective agreement. On the other hand, the English version points to an alternative, if somewhat strained, interpretation. Perhaps it is only the *manner*, and not the *substance*, of the arbitration that must be determined by reference to the collective agreement. If this interpretation is correct, an intra-union dispute, which normally arises from a disagreement over the terms of the union's constitution, can be arbitrated by virtue of s. 47.5. Support for this interpretation can be found in the draftman's apparently careful distinction between claims under s. 47.5 and grievances under the collective agreement. If a s. 47.5 claim is substantively the same as a grievance (which, by definition, is a dispute concerning the meaning and effect of a collective agreement), then why was it necessary to add that a claim must be settled "as in the case of a grievance"? Seemingly, a claim is something broader than a grievance, something that need not concern rights arising from the collective agreement.

This argument is quixotic and was peremptorily rejected in *Imbeau* v. *Syndicat des professeurs du Collège de Maisonneuve*,[51] the first case to consider the meaning of disciplinary sanctions as used in s. 47.3. The complainant, Imbeau, and eight fellow teachers at the Collège de Maisonneuve had refused to participate in what they rightly thought to be an illegal strike. The union retaliated in much the same way as Dickens' United Aggregate Tribunal might have done — it promptly expelled the nine teachers.[52] An intra-union dispute is best resolved in proceedings less adversa-

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ouvriers, local 106 [1979] T.T. 409. It might be noted that the English version of s. 47.3 does not pose the same problem as the French version: s. 47.3 applies if there has been a "dismissal or... a disciplinary sanction", and so it is clear that the dismissal need not be punitive.

[51] [1979] T.T. 340 [hereinafter *Imbeau*].

[52] If Imbeau had also been dismissed, as a result of a closed or union shop agreement, s. 47.3 might have been available. The union would in that case have acted in bad faith with regard to his dismissal. The problem here, however, is that arbitration would not serve as a particularly

rial, not to mention less time-consuming and costly, than those of the courts. Indeed, arbitration would appear to be the most appropriate way of settling such disputes. Arbitration is expeditious, informal and conciliatory.[53] Small wonder, then, that Imbeau turned to the Tribunal du Travail, asking it to use its powers under s. 47.5 to appoint an arbitrator. His application was, however, rejected for the simple reason that s. 47.5 cannot be stretched to protect individuals in intra-union disputes.

Judge Auclair began by stressing that s. 47.5 must be read with ss 47.2 through 47.4; that is, before the Tribunal du Travail can nominate an arbitrator to settle a claim, it must appear that the union acted improperly with regard to a dismissal or a disciplinary sanction. Nothing in s. 47.5 expressly stipulates that the claim submitted to the arbitrator arises from the collective agreement. However,

> ce même article précise que la réclamation du salarié peut être soumise à un arbitre pour décision selon la convention collective. Cette mention indique bien que le législateur voit

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helpful remedy. The arbitration will presumably concern the dismissal, not the expulsion, and that should be unimpeachable as long as the employer acted within the limits of the collective agreement. The employer could have resisted the union's demand of dismissal by invoking s. 63 of the Québec *Labour Code*, R.S.Q. 1977, c. C-27. The employer is not bound, under a closed or union shop agreement, to dismiss an expelled or suspended union member unless that member had been employed (*i.e. semble* hired) contrary to a term of the collective agreement or the member participated, at the behest of the employer, in activities against the union. There is no reported decision to date on this section. Reference may be had to the Ontario Labour Relations Board decision on a similar section of the relevant Ontario legislation in *Walker and McNally Freight-Ways* (1964) 64 (3) C.L.L.C., para. 16,011, which suggests that the section was intended to protect the individual from dismissal for exercising a right under the *Act*. Thus, participation in the election campaign of an unsuccessful candidate for the local presidency cannot be used to ask for the dismissal of an employee. Notice however, that s. 63 of the Québec *Labour Code* cannot be invoked by the employee himself; it is the employer who is not bound to dismiss and thus presumably it is the employer alone who has standing under s. 63. Nonetheless, an arbitrator who is asked to consider a dismissal pursuant to a closed shop agreement may impose on an employer the obligation to verify the union's *bona fides* before dismissing an expelled or suspended union member: see, *e.g.*, *Re International Ass'n of Machinists* (1958) 8 L.A.C. 116 *per* Laskin; *Re Toronto Printing Pressmen & Assistants' Union No. 10* (1958) 8 L.A.C. 251 *per* Laskin.

[53] For some examples of the types of remedies that might be available in the ordinary courts, see *Stern*, *supra*, note 39 (*mandamus* to set aside the union's decision to suspend and fine a member); *St Pierre*, *supra*, note 28 (action in damages to recover wages lost for a period during which the union's illegal strike barred the plaintiff's access to his work); *Allard* v. *Congrès du Travail du Canada* [1976] R.D.T. 533 (interlocutory injunction ordering the union to desist in its attempts to bar a vote of the membership on a motion to withdraw an application for certification); *La Fraternité unie des charpentiers menuisiers, local 134* v. *Le Syndicat national de la construction Hauterive* [1977] C.S. 1008 (direct action in nullity of a union resolution to charge preferential membership dues for former F.T.Q., but not C.S.N., members).

> la convention collective ou ce qui tient lieu légalement, comme la source de la réclamation. Un arbitre ne peut décider selon la convention une réclamation qui n'en découle pas.[54]

Accordingly, if the claim to be arbitrated must arise from the collective agreement, so must the disciplinary sanction to which that claim relates. Because the only party who can discipline for breaches of the collective agreement is the employer, the discipline of which s. 47.3 speaks must be imposed by the employer.[55] Why is it, then, that s. 47.5 seems to distinguish between claims and grievances? The answer that *Imbeau* suggests is logical, although somewhat contrived. A grievance concerns a dispute between the employer and the union. But if an employee has had to resort to s. 47.2 *et seq.*, it is quite obvious that the union wants to dissociate itself from the dispute. A s. 47.5 claim, therefore, concerns only the employee and his employer. In other words, the difference between the two terms lies in the parties to the dispute, not in the substantive issues involved.[56]

To the reasons given in *Imbeau* for rejecting the complainant's application, we may add one other. However suitable in the abstract arbitration may be as a way to settle intra-union disputes, arbitration in accordance with the terms of a collective agreement is hardly a satisfactory way of so doing. It would likely be impossible in most cases to adapt to intra-union disputes a procedure meant to accommodate the interests of employer and union in collective agreement disputes.

B. *Preconditions Under the Canada Labour Code: Intra-Union Disputes*

There can be little doubt that s. 136.1 of the *Canada Labour Code* has a far broader scope than does the duty of fair representation under the Québec *Labour Code*.[57] The Canada *Code* sets no express limits to the type of job interests protected, leaving it to the Canada Labour Relations Board to decide on the facts of each case whether the union acted properly given the job interest at stake. Matters such as seniority claims, payment for work done,

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[54] *Imbeau, supra*, note 51, 344.

[55] *Ibid.*, 344-5. Judge Auclair seems to forget that s. 47.2 can stand alone, provided that the complainant is seeking a remedy under s. 144 and not arbitration. There is nothing in s. 47.2, if read separately from ss 47.2-47.5, that leads us inexorably to the conclusion reached in *Imbeau*. It would seem, therefore, that a union member can still invoke s. 47.2 and s. 144 if he has been improperly expelled from his union. *Imbeau* simply precludes the use of arbitration to settle the differences between union and member.

[56] *Ibid.*, 345.

[57] R.S.C. 1970, c. L-1 as am. S.C. 1977-78, c. 27, s. 49.

work schedules, and job descriptions can all conceivably form the substance of a s. 136.1 complaint. Moreover, the Board has jurisdiction to hear complaints arising from the union's alleged conduct during collective bargaining,[58] the processing of an unfair labour practice,[59] mid-contract negotiations,[60] or any other action the union has undertaken on behalf of bargaining unit members.[61]

Yet the Canada Labour Relations Board may have gone even further than the Tribunal du Travail in excluding internal union affairs from the scope of the statutory duty of fair representation. According to the Board, internal affairs include the appeal mechanism provided for in the union's constitution and by-laws — a mechanism which can normally be used to force a reconsideration of the union's decision concerning a grievance. If, therefore, a member decides first to appeal internally a refusal to arbitrate his grievance, he may find himself forever barred from invoking s. 136.1 of the *Code*. The few Labour Board decisions on point are regrettably difficult to follow, and their reasoning is not entirely convincing.[62] Suffice it to note that the Board will scrutinize the internal mechanisms of the union only

> to the extent they relate directly to and form part of the bargained relationship between the union and employer and if they are accessible to all employees in the bargaining unit... .[63]

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[58] There is no Canada Labour Relations Board decision specifically on this point, but reference may be had to *Group of Seagram's Employees and Distillery, Brewery, Winery, Soft Drink & Allied Workers, Local 604* [1978] 1 Can. L.R.B.R. 375 (B.C.L.R.B.); *Group of Employees of the Board of School Trustees of School District No. 39* [1981] 1 Can. L.R.B.R. 267 (B.C.L.R.B.); *Cook and International Woodworkers of America, Local 1-184* [1981] 1 Can. L.R.B.R. 413 (Sask. L.R.B.).

[59] Again, there is no Canada Labour Relations Board decision on point, but see *Hebert-Vaillant and Canadian Union of Public Employees, Local 2327* [1981] 2 Can. L.R.B.R. 449.

[60] See *Larmour and Brotherhood of Locomotive Engineers* [1980] 3 Can. L.R.B.R. 407 [hereinafter *Larmour*].

[61] The statutory duty does not, however, extend beyond the employer-union-employee relationship created by labour relations legislation. See, *e.g.*, *Morgan and Registered Psychiatric Nurses' Association of British Columbia* [1980] 1 Can. L.R.B.R. 441 (B.C.L.R.B.) (no duty to represent bargaining unit member in coroner's inquest); *Wood* v. *Napanese Industries Ltd* [1972] O.L.R.B. Rep. 353 (no duty to represent before Workman's Compensation Board).

[62] See *Lochner and Canadian Brotherhood of Railway, Transport and General Workers* [1980] 1 Can. L.R.B.R. 149 [hereinafter *Lochner*]; *Huggins and Canadian Brotherhood of Railway, Transport and General Workers* [1980] 1 Can. L.R.B.R. 364 [hereinafter *Huggins*]. For a similar result in Ontario, see *Britnell and International Union of Electrical Workers, Local 523* [1974] 1 Can. L.R.B.R. 319 (O.L.R.B.). But see *Pap and International Union of Electrical Workers, Local 523* [1974] 1 Can. L.R.B.R. 74 (O.L.R.B.).

[63] *Lochner, ibid.*, 156.

Because union members alone have access to the internal union appeal mechanism, the Board will limit its examination to the fairness of first instance decisions and not intervene in appeal decisions.

Despite the carefully written reasons for judgment in cases such as *Lochner* or *Huggins*,[64] the basis of this distinction between appeal and first instance decisions remains obscure and puzzling. We can perhaps understand why a labour relations board might hesitate to use s. 136.1 to interfere in an intra-union dispute such as that involved in *Imbeau*. In that case, the dispute had nothing to do with the employer-employee relationship. But in *Lochner* and *Huggins*, the Board was asked to review the fairness of an appeal decision on a union's refusal to process a member's grievance. Such an appeal, like a first instance decision, "relate[s] directly to and form[s] part of the bargained relationship between the union and employer".[65] It decides once and for all whether the union will undertake to pursue rights claimed by the individual under the collective agreement. It is true that only union members have access to the internal appeal mechanism, but this in itself should not serve to justify the rejection of a s. 136.1 complaint. The appeal procedure may be as corrupt or inadequate as the procedure followed at first instance. It seems reasonable to expect, therefore, that the individual should have recourse to s. 136.1 to remedy what he believes to be a dereliction of the union's duty to represent his interests in the observance of the collective agreement.

Be that as it may, the Board's reluctance to interfere in such cases may yet be vindicated on constitutional grounds. An examination of the fairness of the appeal mechanism, which the union's constitution and by-laws has brought into being, may usurp the provinces' jurisdiction over property and civil rights.[66] In addition, the Canada Labour Relations Board has suggested

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[64] *Lochner, ibid.*; and *Huggins, supra*, note 62.

[65] *Lochner, ibid.*, 156.

[66] It should be noted that subss 185(e)-(h) of the *Canada Labour Code* R.S.C. 1970, c. L-1 as am. S.C. 1972, c. 18, s. 1 raise similar constitutional problems. These four subsections all deal with internal union affairs, more specifically certain unfair union practices as against union members. Their constitutionality has been discussed in *Abbott and International Longshoremen's Association, Local 1953* [1978] 1 Can. L.R.B.R. 305; *Matus and International Longshoremen's Union, Local 502* [1980] 2 Can. L.R.B.R. 21; and *International Longshoremen's and Warehousemen's Union, Local 502 and Matus* [1981] 1 Can. L.R.B.R. 115. The conclusion of these cases is that, although it cannot purport to regulate internal affairs of the union's constitution, Parliament *can* regulate the *effects* of improper union activity. For example, the Board can sanction a union for improperly expelling a member, but it cannot declare void the clause in the constitution that allowed the union to expel as it did.

The Federal Court of Appeal has confirmed recently the constitutionality of s. 185 in *International Longshoremen's and Warehousemen's Union, Local 502* v. *Matus* (1981) 40 N.R. 541 and *International Longshoremen's and Warehousemen's Union, Local 502* v. *Matus (No. 2)* (1981) 40 N.R. 594, (consolidated in (1981) 129 D.L.R. (3d) 616). See especially, the

that other, more appropriate provisions — namely, subss 185(e), (f), (g), and (h) of the *Code*[67] — apply to complaints about the internal working of a union. For example, facts such as those in the *Imbeau* case could have given rise to an application under subs. 185(h).[68] Unfortunately for Imbeau, his case had to be brought under the Québec *Labour Code*, which contains no comparable provisions.

C. *The Duty of Fair Representation and Non-Members of the Bargaining Unit*

Before considering the substantive content of the duty of fair representation, one final issue should be noted. Both s. 47.2 of the Québec *Code* and s. 136.1 of the Canada *Code* impose a duty of fair representation on the union in favour of *all* employees in the bargaining unit, whether or not they are union members. What happens, then, if the issue that the individual wishes to arbitrate is precisely his status as a member of the bargaining unit? Is the individual, whose status as a bargaining unit member is in doubt, automatically barred from invoking ss 47.2 or 136.1? Two recent Tribunal du Travail decisions indicate that the answer is not simple, at least not under the Québec *Code*.

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decision of Urie J., at 549 of the first of these interlocking appeals, which suggests that Parliament can legislate regarding the internal rules of a union as long as these rules affect the availability of work on a federal work or undertaking.

It might be noted that the ordinary courts of Québec have also assumed jurisdiction over disputes involving unions and members employed on a federal work. In *Association internationale des débardeurs, local 375* v. *Chénard* [1981] C.A. 427, for example, it was apparently never even suggested to the Court of Appeal that there might be some jurisdictional problem in awarding damages against a union whose members were almost exclusively employed on a federal work. This case is, of course, in line with *Stern, supra*, note 39 and, more generally, *Bell Telephone Co. of Canada* v. *Harding Communications Ltd* [1979] 1 S.C.R. 395, (1978) 92 D.L.R. (3d) 213.

[67] R.S.C. 1970, c. L-1 as am. S.C. 1972, c. 18, s. 1.

[68] But a complaint about the union appeal mechanism cannot be brought under s. 185. Moreover, to judge from the decision in *Solly and Communications Workers of Canada, Local 49* [1981] 2 Can. L.R.B.R. 245 [hereinafter *Solly*], the Canada Labour Relations Board intends to reserve s. 185 for extreme abuses of union power. In *Solly*, the union had refused Solly's application for membership because all evidence seemed to indicate his violent hostility to the union. Solly applied to the Board under s. 136.1 as well as subss 185(f) and (g). The Board rejected the application because, in its view, a union has the right to reject objectionable candidates. What made Solly particularly objectionable was his activities as a strikebreaker. This sufficed, said the Board, to justify the union's decision. It also appears that complaints about the union appeal mechanism are not possible under s. 185 nor under s. 136.1 of the *Canada Labour Code*.

In *Perry* v. *Syndicat Québécois de l'Imprimerie*,[69] the Tribunal refused to order arbitration under s. 47.5 because in its view the complainant had no arbitrable claim under the collective agreement:

> [L]e présent recours n'a pas d'objet si la réclamation du salarié est manifestement irrécevable en vertu de la convention collective en vigueur, puisque le Tribunal ne peut qu'autoriser le salarié à soumettre sa réclamation à un arbitre "pour décision selon la convention collective" (art. 47.5). Il n'y a certainement pas lieu de déférer à l'arbitrage une réclamation qui serait non arbitrable en vertu de la convention collective.[70]

Once more, then, the success of a s. 47.3 complaint was seen to hinge upon the existence of an arbitrable claim under the collective agreement. Having established this principle, the Tribunal disposed of Perry's application by deciding, first, that he was not an employee as defined by the collective agreement and, second, that he could not have an arbitrable claim with respect to a collective agreement by which he was not bound. In brief, the court suggests that a claim of employee status is arbitrable only if the employee has such status. This is a somewhat surprising suggestion, especially since it allows the court to usurp the role of the arbitrator and to decide on the very issue that it is supposed to refer onward. The Judge was himself aware of this problem, but came to the following conclusion:

> Certes, il s'agit là d'une question préjudicielle dont un arbitre de grief pourrait être saisi. Mais cela n'empêche pas, à mon avis, que le Tribunal ne puisse et ne doive en disposer, s'il le peut, c'est-à-dire s'il est saisi de tous les éléments nécessaires à cette fin, sans pour autant usurper la juridiction de l'arbitre de grief. Il s'agit ici d'un recours manifestement exceptionnel ayant pour but la correction d'un déni de justice lorsqu'un salarié est privé d'un droit d'arbitrage par suite de mauvaise foi . . . de son syndicat dans le traitement de son renvoi. . . . *Ces dispositions du Code n'ont pas pour objet de créer un droit d'arbitrage qui n'aurait jamais autrement existé.*[71]

This conclusion does not, however, dispel the lurking suspicion that the Tribunal had indeed stepped into the arbitrator's shoes. According to all the earlier jurisprudence on s. 47.2 *et seq.*,[72] the Tribunal has the competence to determine the *prima facie* validity of the employee's claim only to the extent that this validity is relevant to the issue of union representation — that is, if the claim seems valid, the Tribunal will consider the union to have been all the more remiss in not arbitrating. The problem raised in *Perry* was handled in a completely different, and more satisfactory, manner in the earlier case of *Maurice* v. *Local d'union 301, Montréal et Québec de l'union canadienne des travailleurs unis des brasseries*.[73] The union in that case had rejected the

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[69] [1981] T.T. 107 [hereinafter *Perry*].
[70] *Ibid.*, 115.
[71] *Ibid.*, 116 [emphasis in original].
[72] See cases cited, *infra*, note 102.
[73] [1979] T.T. 82.

complainant's claim on the basis that he had not worked the necessary six months to give him status under the collective agreement. It apparently never occurred to the Tribunal to sift through the evidence and make a conclusive determination of the employee's status. Instead, the Tribunal concerned itself only with the union's conduct and, after deciding that the inquiry into the employee's status had been far too cursorily completed, ordered the arbitration of the complainant's claim.[74]

The decision in *Perry* points to another complex problem: the employee's status under the certificate of accreditation. Even if we decide that a claim is arbitrable under a collective agreement, it remains to be decided whether the employee is covered by the certification. For example, an employee who works as a "general helper" may rightfully believe that he has an arbitrable grievance under a collective agreement made to apply to "all employees". Yet the certificate by virtue of which this agreement was concluded may refer to "toolmakers, lead hands, inspectors, tool designers, draftsmen, floorclerks, and planners".[75] Does the employee have recourse to the statutory duty of fair representation in the event that the union capriciously refuses to process that grievance? Under the Québec *Labour Code*, the short answer to this question is — no. According to Judge Lesage in *Boivin* v. *Association internationale des machinistes et des travailleurs de l'aéroastronautique, Local 987*,[76] the Tribunal du Travail could only assume jurisdiction over such matters if the *Code* gave legal status to voluntarily recognized unions. Under the Québec *Code*, only certification can vest a union with sole authority to represent the members of a bargaining unit. Because s. 47.2 applies only in favour of those "salariés compris dans une unité de négociation qu'elle [l'association] représente", the absence of a certificate covering the employee is, according to Judge Lesage, fatal to such an employee's claim.[77]

We may have hoped that the Tribunal would read s. 47.2 liberally so as to encompass both legally and voluntarily recognized associations, especially since the type of facts that arose in the *Boivin* case are probably commonplace. As the composition of a work force changes, the certificate may become outdated, no longer serving as an accurate description of the types of jobs performed by bargaining unit members. The individual whose s. 47.3 application has been refused because he does not fall within the certificate can only protect himself by seeking certification for a new association. Because the employer has already shown himself willing to bargain, it should be a

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[74] *Ibid.*, 85.

[75] These are the facts of *Boivin* v. *Association internationale des machinistes et des travailleurs de l'aéroastronautique, local 987* [1981] T.T. 149.

[76] *Ibid.*

[77] *Ibid.*, 151-2.

fairly simple matter to obtain a certificate[78] and then negotiate for a new collective agreement. But if, as is likely, the employee's complaint concerns a discharge, certification of a separate association is no remedy at all: the worker will have lost his status as an employee and so cannot apply for certification. A more efficacious remedy might lie in the amendment of the existing certificate. Yet such an amendment would have prospective effects only, and any union impropriety which occurred before the amendment was obtained will remain unimpeachable.

By contrast, the *Canada Labour Code* does give legal status to voluntarily recognized unions[79] and it is not surprising that the Labour Relations Board has enforced the duty of fair representation with regard to recognized and certified unions alike.[80] Section 107 makes recognition depend upon the existence of a collective agreement concluded by the union on behalf of the employees in the bargaining unit. The issue before the Board, therefore, is whether the employee who applies under s. 136.1 falls within the scope of the collective agreement. This returns us to the question raised in *Perry*:[81] Does the Board have jurisdiction to decide finally on employee status or does that matter rightfully fall within the arbitrator's jurisdiction? The answer that the *Canada Labour Code* provides is much simpler than that of the Québec *Labour Code*. Even though subs. 189(a) of the Canada *Code* confers a far broader remedial jurisdiction than does s. 47.5 of the Québec *Code*, the Canada Labour Relations Board apparently cannot arbitrate a claim itself. But the recent Supreme Court decision in *Teamsters Union, Local 938* v. *Massicotte*[82] has affirmed that para. 118(p)(vii) of the *Code* gives the Board final jurisdiction to determine who properly belongs within a voluntarily recognized bargaining unit. Thus the Board does not usurp the arbitrator's role when it considers the scope of a collective agreement and the status of a particular employee.

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[78] Following the procedure set out in the Québec *Labour Code*, R.S.Q. 1977, c. C-27, ss 25 and 26. The conditions for certification are established by s. 28 of the *Code*.

[79] See the definition of "bargaining agent" in *Canada Labour Code*, R.S.C. 1970, c. L-1, subs. 107(1) as am. S.C. 1972, c. 18, s. 1.

[80] It should be noted that the French version of s. 136.1 is written in the following terms: "Lorsqu'un syndicat est accrédité à titre d'agent négotiateur d'une unité de négotiation...". See *Canada Labour Code*, R.S.C. 1970 c. L-1 as am. S.C. 1977-78, c. 27, s. 49. Recognized associations do *not* seem to be covered. It was decided in *Massicotte and Teamsters Union, Local 938*, *supra*, note 40, that the English version of s. 136.1 mirrors most clearly Parliament's intent in legislating the duty of fair representation; that version therefore prevails.

[81] *Supra*, note 69.

[82] *Supra*, note 40.

III. Scope of the Duty of Fair Representation

Any discussion of the statutory duty of fair representation should properly begin with a brief look at *Rayonier Canada (B.C.) Ltd and International Woodworkers of America, Local 1-21 and Ross Anderson*,[83] a Paul Weiler decision that has provided the inspiration for most of the fair representation cases decided under the *Canada Labour Code*. The importance of this case lies not so much in its holding as in its consideration of the policy issues that are involved in setting the parameters of the duty of fair representation. Weiler never attempts to define the precise nature of fair representation; instead, he provides a list of criteria that we should weigh before intervening in union actions.

The issue that the British Columbia Labour Relations Board was specifically asked to address in *Rayonier* concerned the unionized worker's right to arbitration: does the worker have an absolute right to insist on the arbitration of his grievance, or does the union retain some discretion to veto what it believes are frivolous or unmeritorious claims? Weiler pitches the issue at a slightly higher level of abstraction: Who ultimately controls the administration of the collective agreement? For Weiler, the question — when rephrased in this way — almost suggests its own answer. The administration of a collective agreement is merely an extension of the bargaining process and, because this process was meant to confer primarily a group benefit, it seems clear that the group interests in such administration should prevail over individual interests.[84] It follows that the union should have exclusive authority to identify what group interests merit attention.[85] Weiler finds support in the writings of Archibald Cox who suggested that certain institutional interests would also be better served if the union were vested with the power to control the administration of the collective agreement.[86] Among these, Weiler mentions the union's interest in saving precious time, money and energy, as well as in enhancing its credibility with management. Most important for him is, however, the union's interest in resolving the type of intra-union conflict that typically arises in, for example, seniority claims. According to Weiler, such a conflict usually stems from a clause in the collective agreement which has been left purposely vague. It is expected that the parties will hammer out some compromise during the life of the collective agreement and thus the union should be given as much latitude as possible to negotiate on behalf of all.[87]

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[83] [1975] 2 Can. L.R.B.R. 196 (B.C.L.R.B.) [hereinafter *Rayonier*]. See also P. Weiler, *Reconcilable Differences[:] New Directions in Canadian Labour Law* (1980) 132-9 for a subsequent reassessment of the *Rayonier* decision.

[84] *Rayonier, ibid.*, 202.

[85] *Ibid.*, 203-4.

[86] *Ibid.*, 204.

[87] *Ibid.*, 203-4.

In sum, unless pressing and exceptional circumstances require it to give special weight to individual interests, a labour relations board should not interfere with union decisions. The mere fact that the union refused to go ahead with arbitration is not conclusive evidence of a breach of the duty of fair representation; the individual must also adduce facts that show the refusal was improper. Weiler suggests that a board should take into account the following factors: the significance of the grievance to the individual, the validity of the grievance, the care with which the union made its decision not to arbitrate, the union's previous practice when confronted with similar grievances, the individual's expectations in seeing the grievance arbitrated, and the weight of the institutional interests that prompted the refusal to arbitrate.[88]

Since the time of the *Rayonier* judgment, Weiler has modified his earlier views and now claims that discharge cases should give rise to an absolute right to arbitrate, provided that the employee himself agrees to support the costs.[89] Among the reasons he gives for this change of heart, the most compelling arises from recent developments in labour standards legislation. Under s. 61.5 of the *Canada Labour Code*, for example, the non-unionized worker who believes he has been unjustly dismissed from his job may apply for the arbitration of the dismissal. If the non-unionized worker may arbitrate his discharge, how can we maintain that the unionized worker should have any lesser right?[90] Some three years after the enactment of s. 136.1, the Canada Labour Relations Board made clear its position concerning the right to arbitrate in the two *Haley and Canadian Airline Employees' Association and Eastern Provincial Airways (1963) Ltd*[91] decisions. The Board considered Weiler's new stance, yet followed the decision in *Rayonier*. Its reasons for so doing are not entirely cogent, let alone convincing.

First of all, the Board insisted that certain institutional interests must be protected by allowing the union to screen out truly hopeless cases.[92] This insistence, of course, begs the question. What Weiler argues is that institutional costs are small when set against the cost to the employee who loses his job; that a discharge grievance, however hopeless, is so crucial to the employee that for once, institutional interests assume a secondary importance. Moreover, the Board ignored Weiler's suggestion that the right to arbitrate be made subject to an agreement by the aggrieved employee to pay for his and the union's share of the arbitration costs.

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[88] *Ibid.*, 204.

[89] See Weiler, *supra*, note 83, 137-9.

[90] *Ibid.*, 139, fn.

[91] [1980] 3 Can. L.R.B.R. 501 [hereinafter *Haley No. 1*]; [1981] 2 Can. L.R.B.R. 121 [hereinafter *Haley No. 2*].

[92] *Haley No. 2*, *ibid.*, 129.

Secondly, the Board thought that a mandatory duty to arbitrate dismissal would give rise to a flood of arbitration. Of particular concern to the Board was arbitration in a system of progressive discipline, where any sanction imposed on an employee can escalate into his eventual dismissal. If not arbitrated, the sanctions become *res judicata* and are not open to review by the arbitrator who adjudicates on the dismissal. It follows that a union, if bound to arbitrate a discharge, would be well advised to arbitrate every disciplinary sanction. Otherwise, it might eventually be saddled with the task of defending the indefensible — a record of employment that the arbitrator must take as conclusive evidence of the employee's poor work habits.[93]

This argument, apart from its *in terrorem* aspect, is somewhat questionable. Systems of progressive discipline already provide a strong incentive to arbitrate. Most unions would contest any disciplinary sanctions that could escalate into discharge, simply to keep the employee's record clean. In any case, we can probably trust unions to arbitrate only meritorious disciplinary grievances: the employee's record is just as much tainted by an adverse arbitrator's award as it would be by a failure to arbitrate altogether.

The Board further suggested that "the grievance procedure is a source of information and education for all parties" and if "arbitration were inevitable then there would be no need for the employer to disclose the facts it has marshalled in support of the dismissal until the arbitration hearing".[94] This reason for allowing unions to pick and choose among discharge grievances is hardly credible. Most collective agreements require the parties to submit to a multi-step grievance procedure before turning to arbitration and one would imagine that all relevant information would emerge during that procedure.

Arbitration has also become a very costly procedure and the Board objected to any union expenditure that would be disproportionate to the amount in dues normally collected from bargaining unit members.[95] Again, however, the Board ignored the option of making the individual pay his way. If the union were made to pay for successful cases, the price would not be too high. The union is, after all, charged with promoting the rights of workers and the success of the arbitration surely indicates the existence of a right that merited union support.

The Board also feared the effect of compulsory arbitration on the time delays typically stipulated in a collective agreement. If the union knows it must, in the end, arbitrate, it could blithely disregard those delays.[96] Yet

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[93] *Ibid.*
[94] *Ibid.*
[95] *Ibid.*, 129-30.
[96] *Ibid.*, 130.

arbitrators can always award damages if the union negligently or intentionally delays the processing of a grievance and if the employer suffers loss as a result.

The Board's final reason is, without a doubt, the most telling. If arbitration is made mandatory,

> then with what standard must [the union] perform? If it can afford counsel must it retain counsel? If cost is no factor to the union in going to arbitration then may it be a factor in the preparation and conduct of the proceeding? ...If the focus of union activity is transplanted from the grievance procedure to the arbitration hearing then the focus of the duty to fairly represent will necessarily follow in the individual's view.[97]

In other words, to insist on the arbitration of all discharge grievances does not automatically solve the problem of erratic union conduct. All we have done by insisting on arbitration is to change the arena; the opportunities for improper behaviour remain the same. The Board overlooked, however, one crucial factor: cases such as *Hoogendoorn*[98] allow the aggrieved individual to take an active part in the arbitration. This participation in a hearing before a presumably impartial arbitrator would, one hopes, cancel out the effect of shoddy union representation.

The reasoning in the Plenary Board decision in *Haley No. 2* masks what is probably the only real justification for refusing to recognize mandatory arbitration. In the end, this decision turns on a particular vision of the role of the Canadian trade union movement and of the institutional interests that must be protected. The Board's view of that role was perhaps best summarized in the first *Haley* decision:

> For us the competing policy considerations canvassed at length in the literature and the numerous decisions by Canadian labour relations boards can be focused in one question. What is the role or character of unions contemplated by the Code? If they are to be viewed as one of the big three, big business, big government and big unions, then the role and scope of protection of the individual through the duty of fair representation from even innocent mistakes causing harsh consequences would lie in favour of extensive protection. If unions are to be viewed as voluntary, underfinanced, understaffed, extremely democratic, participatory entities acting as the extension of basic tenets of our free society many errors must be excused. The reality no doubt lies between the extremes and each union, local or international, sits at a different place on the spectrum. ...Our view is that in 1978 when Parliament enacted the duty of fair representation it must be taken to have viewed unions as participatory entities which, although vested with exclusive bargaining authority for certain units of employees, must also act as the instruments to foster, preserve and further the laudable purposes expressed in the Preamble. They do this in a social and economic context where a lack of funding, education, staffing and participation is a real, every day fact of life.[99]

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[97] *Ibid.*

[98] *Supra*, note 20.

[99] *Haley No. 1*, *supra*, note 91, 509.

The Board's main concern in this passage was to demonstrate that unions should not be held responsible, at least not under s. 136.1 of the *Canada Labour Code*, for simple negligence. But the passage also serves to explain why the Board has so adamantly refused to impose a duty to arbitrate. If they remain as weak and beleaguered as the Board assumes them to be, unions should be allowed to husband their resources. As one member of the Board so aptly stated, the "parsimonious and rigid administration" [100] of funds will make the union strong. The same rationale presumably holds true for the administration of talent, loyalty and whatever else is needed to put the union on a battle footing. As a result, the institutional costs of arbitrating each and every grievance are simply too high, even when the grievance concerns the discharge of a bargaining unit member.

Cases decided under the Québec *Labour Code* are to the same effect. After an initial flirtation with the notion of compulsory arbitration,[101] the Tribunal du Travail has steadfastly favoured the union's discretion to veto the arbitration of grievances.[102] Since the reasons for this are largely the same as those offered by the Canada Labour Relations Board, we need not rehearse them. Suffice it to say that the net effect of the jurisprudence under the Canada and Québec *Codes*, coupled with the holding in the *Brunet* case, is to cut off entirely any individual access to the arbitration procedure. The unionized worker can neither ask a court to by-pass the enforcement procedure set out in the collective agreement, nor force the union to go through that procedure on his behalf.[103]

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[100] *Cloutier and Cartage and Miscellaneous Employees' Union, Local 931* [1981] 2 Can. L.R.B.R. 335, 342 [hereinafter *Cloutier*].

[101] See *Courchesne* v. *Le Syndicat des travailleurs de la corporation de batteries CEGELEC (C.B.C.) de Louisville (C.S.N.)* [1978] T.T. 328 [hereinafter *Courchesne*].

[102] *Boulay* v. *La Fraternité des policiers de la communauté urbaine de Montréal Inc.* [1978] T.T. 319; *Bibeau* v. *La Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 2533* [1978] T.T. 131; *Drolet* v. *Syndicat des employés du Supermarché Roy Inc.* [1979] T.T. 221 [hereinafter *Drolet*]; *Godin* v. *La Fraternité unie des charpentiers et menuisiers d'Amérique, local 2533* [1979] T.T. 157; *Boutin* v. *Le syndicat international des travailleurs en électricité* [1979] T.T. 91 [hereinafter *Boutin*]; *Hubert* v. *Syndicat (unité) des policiers pompiers de la Ville de Nicolet* [1980] T.T. 302 [hereinafter *Hubert*]; *Jacques* v. *Travailleurs canadiens de l'alimentation, local P-551* [1981] T.T. 85 [hereinafter *Jacques*]; *Leduc* v. *Syndicat international des travailleurs unis de l'automobile de l'aéronautique, de l'astronautique et des instruments aratoires d'Amérique, section locale 1163* [1981] T.T. 93 [hereinafter *Leduc*].

[103] It is interesting to note that E. Palmer, in *Responsible Decision-making in Democratic Trade Unions* (1969) 172-3 (Woods Task Force on Labour Relations, Study No. 11), made the following recommendation:

> Obviously, to obtain a speedy, inexpensive and orderly system of dispute settlement, the arbitration process must be strengthened. In so doing, however, more extensive rights must be given to individuals during this process.

A. *Toward a Standard of Fair Behaviour*

In sum, to establish a contravention of the statutory duty of fair representation, the complainant must prove something more than merely a refusal to arbitrate. Under the Québec *Labour Code*, this requires proof of bad faith, arbitrariness, discrimination, or serious negligence.[104] To define the precise nature of negligent, arbitrary or discriminatory behaviour is a notoriously difficult undertaking, and it is not surprising that the Tribunal du Travail has not tried to do so. The approach is largely casuistic; much depends on factors such as the complainant's own behaviour, the merits of the complaint, the union's good intentions and so on. Regrettably, we have no coherent judgment such as the *Rayonier* case to set some limits to the relevant factors the Tribunal may consider. The compilation of such a list would be easier under the Québec *Labour Code* than under any other provincial labour code, simply because the reach of the duty of fair representation is for all practical purposes so much more restricted. The legislature has already indicated that only dismissal and disciplinary sanctions are serious enough to warrant intervention. It has also defined the context in which the duty arises: the administration of the collective agreement. Despite these differences between the Québec and other provincial codes, there seems to be good reason to use *Rayonier* as a guidepost. For even under the Québec *Code*, factors such as the *prima facie* validity of the claim or previous practice with respect to such claims remain highly relevant.

The Tribunal du Travail believes itself to be without jurisdiction to decide on the actual validity of the claim. The Tribunal's main concern is with the fairness of the union's conduct; for this purpose, it suffices that the Tribunal consider the *prima facie* validity of the claim only.[105] The Tribunal asks what kind of inquiry was necessary given the nature of the claim, and then decides whether the union pursued an appropriate course of action. As a result, the Tribunal's examination of the facts bears primarily upon the procedure followed by the union. What would happen if the normal procedure, as required by the collective agreement or the union's constitution and practice, seems to be inadequate? There is no clear answer to this question, but it appears that fairness is ultimately determined by practice; the union has no obligation to go beyond what its constitution or collective agreement requires of it. In fact, the Tribunal du Travail has attempted to do nothing

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Initially, therefore, the union should be given the right to meet its responsibilities, given by certification, to sift out wholly frivolous grievances that would clog the grievance procedure. When an individual is unhappy with the disposition he should be able to pursue to arbitration those matters which are personal to him.

[104] See R.S.Q. 1977, c. C-27, s. 47.2.

[105] See the cases cited *supra*, note 102.

more than infuse "normal procedure" with some content. It is not enough, for example, to hold an inquiry; the inquiry must also be serious [106] and directed to the issues at hand.[107] A union clearly violates s. 47.2 if it decides to drop a grievance, not because it is unmeritorious, but because the complainant fanatically supports a rival union.[108] The Tribunal has even shown itself willing to look behind a vote of the general membership taken to ratify a decision not to arbitrate.[109]

One factor that figures consistently in the Québec jurisprudence is the applicant's own behaviour when dealing with his union.[110] As one might expect, the Tribunal has found it difficult to sympathize with the worker who changes his mind at the last minute and decides to arbitrate, who refuses to take the time to fill out a grievance form or who fails altogether to inform the union of his cause for complaint. Nonetheless, apart from these cases involving what might loosely be described as contributory negligence, the Tribunal initially tended to intervene quite readily. The highwater decision is probably *Guérard* v. *Travailleurs canadiens de l'alimentation, Local 748*,[111] a 1980 judgment of Judge Morin, who apparently placed on the union the burden of showing that its decision was taken properly:

> Les faits soumis par le requérant que l'intimé n'a pas jugé bon éclairer ou contredire, démontrent qu'il y a eu, sinon discrimination, du moins négligence grave de la part de l'intimé. Il n'a pas prouvé qu'il ait fait enquête sur les allégations du requérant. Il faut donc les prendre pour avérées.[112]

In other words, the complainant need only allege the inadequacy of the union's conduct and then the burden of proof shifts to the union. In the absence of positive proof that the union acted properly, the application must succeed. If this judgment is correct, it may be easier to obtain a remedy under s. 47.3 *et seq.* than the words of that provision themselves indicate. A mere allegation that the union refused to arbitrate will not suffice, but if that allegation is coupled with the further allegation of improper behaviour, the success of the application will hang on the force of the *union's* and not the applicant's proof.

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[106] See *Boutin*, *supra*, note 102.

[107] See *Legault* v. *Syndicat des travailleurs amalgamés du vêtement et du textile, local 644* [1979] T.T. 375.

[108] *Ibid.*

[109] See *Rivest* v. *Association internationale des pompiers, section locale 1121* [1980] T.T. 276.

[110] See, *e.g.*, *Boutin*, *supra*, note 102; *Drolet*, *supra*, note 102; *Jacques*, *supra*, note 102; *Gendron* v. *Syndicat international des travailleurs de la boulangerie, confiserie et du tabac, local 335* [1980] T.T. 192.

[111] [1980] T.T. 420.

[112] *Ibid.*, 424.

Since the *Guérard* decision, however, the Tribunal has retreated from its earlier position.[113] Recent cases have generally involved allegations of serious negligence; that is, the union did pursue the complainant's grievance in good faith, but then made a mistake in some procedural matter. Typical of this line of jurisprudence is the "missed time delay" case: the union representative makes a fairly elementary mistake in counting the delay for the bringing of a grievance and so informs the employee that his right to arbitration has lapsed. To judge from the jurisprudence, an inability to count is not necessarily serious negligence,[114] but the following errors may well be: not knowing that dismissals can be contested by grievances, that grievances should be submitted in writing and to the employer or that delays exist for the bringing of a grievance.[115] We may note that all these errors are not merely serious; they are egregious. And, if this list of errors reflects truly the Tribunal's understanding of the standard of care required under s. 47.2, then it would appear that the duty of fair representation will be breached but rarely.

The attitude implicit in this recent jurisprudence is mirrored in the cases decided under the *Canada Labour Code*. Although s. 136.1 does not refer expressly to negligence as a ground for complaint, the Canada Labour Relations Board has decided that union negligence may be a breach of the duty of fair representation.[116] Like the Tribunal du Travail, the Board has further decided that the standard of care imposed on the union should not be pitched at too high a level. Only gross negligence, and not simple mistakes such as the inadvertent missing of a delay, suffices to bring a complaint under s. 136.1 of the *Code*. This unwillingness to impose any higher duty of care stems in part from the Board's vision of itself as the protector of a still weak, if not fledgling, union movement. It also stems from a belief that union members, when dissatisfied, can and should shop for better services elsewhere:

> Union members get the leadership they select or neglect to actively select. The leaders are not analogous to lawyers paid to service clients but more like legislators selected to service a constituency. They will make errors and mistakes through ignorance, lack of training or experience, or lack of resources. . . .
>
> The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.[117]

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[113] See *Jacques*, *supra*, note 102; *Leduc*, *supra*, note 102.

[114] See *Jacques*, *ibid.*

[115] See *Leduc*, *supra*, note 102, 97.

[116] See *e.g.*, *Haley No. 1*, *supra*, note 91; *Haley No. 2*, *supra*, note 91; *Cameron and Canadian Brotherhood of Railway, Transport and General Workers* [1981] 1 Can. L.R.B.R. 273.

[117] *Haley No. 2*, *ibid.*, 131.

This type of statement seems almost to draw inspiration from the maxim *volenti non fit injuria*: the union member chooses his representative and so must live with the consequences until such time as he either changes the people in office or chooses a new union.

We can understand the Board's reluctance to hold unions liable for simple negligence. What is more troublesome, however, is the Board's suggestion that liability is to be measured according to a subjective standard. The Board's understanding of the legislative and the administrative process seems regressive. It overlooks the growing legal concern with the unfettered exercise of power, governmental or otherwise. The development of administrative law reflects this concern. In Canada, as in England, it appears that no level of governmental decision-making is immune from judicial scrutiny.[118] Even that bastion of liberal *laissez-faire*, corporate law, has moved toward a greater protection of minority interests. When reviewing the exercise of power, the courts do not ask whether the power holder was "mature, wise, sensitive, competent, effectual or suited for [his] job".[119] Nor, for that matter, will a court seized of a constitutional challenge exonerate parliamentarians who lack these qualities. In law, the standard of behaviour is *ex hypothesi* objective. Legislation does not become constitutional, nor decisions fair, simply because the actors were well meaning, albeit dull-witted. This objective standard of behaviour is exacted not only from parliamentarians but also from low level civil servants. If, therefore, a transport commissioner who issues licences must behave in a scrupulously proper manner, it is difficult to accept that a union — which is vested with sweeping powers to control an individual's livelihood — should be held to any lesser standard of behaviour. One would imagine, then, that legislation to create a duty of fair representation similarly sets objective standards. It seems a contradiction of terms to suggest that in some circumstances the right to fair representation in fact entails no more than a duty to suffer incompetence.

Nevertheless, the Canada Labour Relations Board has decided to vary the standard of fairness according to the sophistication and clout of the union in question. Notwithstanding the opinion expressed in the *Haley* case about Parliament's intention when enacting s. 136.1, the Board clearly recognizes that some unions are less in need of protection than others. For example, one Board member took note of the "fighting spirit" of the Teamsters, a union that

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[118] See cases such as *Roncarelli* v. *Duplessis* [1959] S.C.R. 121, (1959) 16 D.L.R. (2d) 689; *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311, (1978) 88 D.L.R. (3d) 671; *R.* v. *Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, [1972] 2 All E.R. 589 (C.A.).

[119] *Haley No. 2*, *supra*, note 91, 131.

is "well established, seasoned, [and] experienced".[120] The standard of care placed on the Teamsters was accordingly higher than that which might be placed on a small, home-grown and weak union.

The *Canada Labour Code* is broader in scope than the Québec *Labour Code* and raises certain additional problems in setting the standard of care required of unions. The first of these problems concerns the relevance of the job interest at stake. For the Board, the importance of the job interest cannot serve as conclusive evidence of a breach of s. 136.1 of the *Code*, but does remain highly relevant. The more important the job interest, the higher the duty of care placed on the union. A more perplexing problem concerns the standard of care imposed on the union in situations other than that of collective agreement administration. To date, the Canada Labour Relations Board has had only one occasion to consider this problem, in *Larmour*, which concerned the fairness of mid-contract negotiations conducted by the union and the employer.[121] The holding reveals clearly the Board's view that collective agreement negotiations import a lower standard of care than does collective agreement administration. The justification for this approach apparently flows from the very nature of bargaining. When the union sits at the bargaining table, it must have the latitude to engage freely in the give-and-take of negotiations, as well as to reconcile the competing interests of various members of the bargaining unit with what the employer is willing to offer.

A more subtle and sophisticated justification appears in the works of Alfred Blumrosen, who distinguishes negotiations from administration on the basis of the type of expectations raised.[122] In collective bargaining, the employee's expectations are generalized, rooted merely in hopes for improved working conditions. By contrast, expectations in collective agreement administration are created by the agreement itself and tend to be more specific, more objectively rooted. Moreover, negotiations have a broad

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[120] *Cloutier, supra*, note 100, 341. The Board has, in effect, created an exception to the general rule that legal liability does not vary according to the level of sophistication. In determining legal liability, courts will but rarely give credence to subjective factors such as age, level of education, or mental capacity. Like the insane or the prodigal, however, unions have been singled out for special protection. Arguably, such protection is as justifiable in the context of union-member relationships as comparable protection would be in the employer-union relationship. Clearly, lack of sophistication is no defence in an unfair labour practice complaint against an employer; why then should a union be shielded by a similar lack of sophistication? Perhaps, the onus should be placed on the union to become sophisticated. Legislation can, after all, serve as an educator. In this case, it is left to the union to learn how to conduct its affairs fairly and competently.

[121] *Larmour, supra*, note 60.

[122] Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, supra*, note 42, 1476.

impact on all bargaining unit members, whereas administration normally affects no more than a handful of individuals. Finally, the consequences of a breakdown in negotiations are far graver than those of a breakdown in the administration: the former may trigger a strike, while the latter can at most lead to the forced arbitration of the grievance.[123] For these reasons, we must give the union room to manoeuvre in bargaining and bar employees from delaying or endangering the process.

This summary account of Blumrosen's analysis requires qualification. First, we should recognize that even bargaining may be rooted in settled expectations. At the very least, the employees expect no dilution of the rights enjoyed previously. Also, the issues considered at the bargaining table are often those which were first mooted during the administration of the previous agreement. Indeed, many unsettled grievances usually hang over the negotiations and it is expected that they will be dealt with at the bargaining table in a manner at least as favourable as would have been possible under the expired agreement. For example, a discharged employee who hoped to be reinstated may be justifiably disgruntled to see his unsettled grievance bought off with money during the negotiations.

Whereas negotiations are more firmly rooted in settled expectations than Blumrosen would have us believe, administration is often less firmly rooted in such expectations. In the end, Blumrosen's analysis appears to rest on a distinction between rights disputes and interests disputes, a distinction which is more apparent than real. This distinction is most often referred to in debates about an arbitrator's competence to hear matters that involve more than the mere enforcement of the collective agreement. It is argued that only the union and the employer can handle such matters, because the resolution of the dispute will lead to the creation of new rights not hitherto enjoyed. The arbitrator, by contrast, has no jurisdiction to create new rights and so must limit himself to enforcement of rights already enjoyed under the collective agreement. In short, interest disputes are more properly the subject of bargaining, while rights disputes are the subject of arbitration.

This allocation of decision-making power is, however, highly artificial and fails to reflect accurately the reality of the arbitrator's role. Arbitrators do, and often must, resolve interest disputes within the course of a hearing. A dispute arises because the collective agreement is itself vague. The arbitrator must then fill in the gaps and in so doing may increase or dilute the rights already in existence. The facts of the *Rayonier* case[124] provide a ready example of the function of an arbitrator. At the heart of the case was a seniority dispute, a claim that a senior employee had lost his standing because

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[123] *Ibid.*

[124] *Supra*, note 83.

certain formalities, as required by the collective agreement, had not been met. The language of the collective agreement did seem to lend some support to the complainant's claim, but the success of his grievance would have entailed great hardship for many other employees in the plant. It also would have brought an end to a long-established policy of the union and the employer to ignore the strict letter of the collective agreement in certain circumstances. No writing had ever formalized that policy, yet it is likely that an arbitrator would have invoked the doctrine of equitable estoppel to give it effect.[125] In other words, an arbitrator would have gone well beyond the terms of the collective agreement so as to resolve the dispute, creating a right from what had hitherto been a privilege.

The union in *Rayonier* did not seek the arbitration of the complainant's grievance; nor did the British Columbia Labour Relations Board impeach this decision. The collective agreement — which supposedly embraces the full range of bargained-for and agreed-upon rights — provided no clear cut solution to the complainant's grievance. The real issue here was not only the rights of the individual as determined by the collective agreement, but also the interests of all employees in formalizing a particular system of seniority ranking. In short, the union had to deal with an interest dispute, similar to the type of dispute that normally arises at the bargaining table. The same can be said even of simple disciplinary grievances, where the arbitrator's award may add flesh to the bare bones of the collective agreement and will likely set a significant, if not dangerous, precedent for all future cases of the same sort. In the interests of the entire unit, then, the union has considerable freedom to seek out a settlement in such a way as to avoid arbitration.

If the type of dispute that arises during the administration of the collective agreement is in essence no different from the type of dispute settled at the bargaining table, then there is little logic in distinguishing between the standard of conduct required of the union in each situation. A more logical distinction can be drawn according to the degree to which individual interests or settled expectations are affected by the union's conduct. Thus, the standard of conduct during bargaining or administering remains more or less the same. In both situations, the union will suffer few limits to its power to settle disputes. When, however, a union tampers with the perceived rights or the interests of the individual employee, the Board should carefully supervise the union's decision to do so. For example, we would expect a union to take as much care in negotiating away seniority rights or accepting monetary compensation for unsettled grievances, as in refusing to arbitrate a discharge. In all three cases, the union should be able to justify its decision on the basis of collective interests. If it cannot, then s. 136.1 of the *Code* has been breached.

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[125] See Weiler, *supra*, note 83, 134.

Of course, in asserting that a union has failed in its duty to represent fairly, an individual must not be allowed to abuse s. 47.2 *et seq.* of the Québec *Code* and s. 136.1 of the Canada *Code*. A straightforward example of such abuse can be found in the Canada Labour Relations Board decision in *Laplante*.[126] The applicant in that case did not truly care whether the arbitration he sought would result in his reinstatement. What he wanted was some documentary proof that he had suffered an industrial accident, which he could then use to obtain workmen's compensation. The Board viewed the application as a dubious invocation of s. 136.1:

> To allow such a complaint would amount to a gross distortion of Parliament's intention, permitting an individual to manipulate the system to his own advantage and to impose upon the parties, as a last straw, the cost and labour of arbitration proceedings. Such would be a mockery of a recourse and remedy incorporated into the Code... .[127]

More problematic are the cases of union-employee collusion. For example, in the Tribunal du Travail judgment in *Courchesne*[128] we find a union advising its member to apply under s. 47.5 of the *Code*. The collective agreement set out time limits for the processing of grievances, but these had expired. The presidency of the local changed hands and the new president, in the hope of repairing the damage done by his predecessor, suggested that s. 47.5 be used to get around the time delays. The Tribunal du Travail apparently did not consider the collusion to be relevant, and found for the applicant.

The opportunity to address this issue arose before the Canada Labour Relations Board in the first *Haley* case.[129] The results of this case are hardly more satisfying than those of the *Courchesne* decision. The Board merely indicated that, in cases where collusion is in evidence, the employer will be allowed to take a more active role in the proceedings. Collusion will not be an absolute bar to the application of s. 136.1 of the Canada *Code*; at best, it may tip the balance in favour of the employer if the Board is asked to exercise its discretion in extending time delays.[130] The Board's decision is probably

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[126] *Supra*, note 45.

[127] *Ibid.*, 58.

[128] *Supra*, note 101.

[129] *Haley No. 1*, *supra*, note 91.

[130] *Ibid.*, 505. This decision is somewhat surprising, especially in light of the considerable warmth with which the Plenary Review Board, in deciding on the same case, protested against the flouting of those procedural requirements set out in the collective agreement. In fact, no better argument against the holding in the first *Haley* decision can be made than that presented in *Haley No. 2*, *supra*, note 91, 130:

> [I]f arbitration is mandatory why should a union concern itself with procedural requirements to get to arbitration? Time limits would work only one way in favour of the union and against the employer. Other procedural requirements in collective agreements could be ignored. What would be the deterrent to this when the employer knows it must face arbitration on the merits eventually?

correct, but overlooks the most compelling argument in its favour. The argument presented by the employer in *Haley No. 1* stems from a desire to penalize the union for collusion. Yet it would appear that arbitration is a more appropriate forum for a consideration of the effects of collusion. An arbitrator has the power to order compensation for losses suffered by an employer as a result of the union's failure to follow stipulated procedure. In that way, the union is penalized, but the individual's claim is heard. But if the Board purported to penalize the union by refusing arbitration, it is not the union that suffers; it is the individual.

Conclusion

Since the Supreme Court decision in *Brunet*, it has become clear that a worker who feels himself harmed because of his union's incompetence or indifference cannot personally pursue his interests against his employer. This rule has been somewhat relaxed to enable the worker to enforce certain monetary claims on his own. When union sponsorship is needed to bring a claim arising from a collective agreement, the worker may also have a right to partieipate in the proceedings. Yet the scope of these exceptions to the general rule is ill-defined and in the end the worker is better advised to proceed against his union, forcing it to act on his behalf.

In Québec, recourse against the union has ostensibly become easier since the promulgation of s. 136.1 of the *Canada Labour Code* [131] and s. 47.2 *et seq.* of the Québec *Labour Code*.[132] Even these statutory provisions, however, fail to give full protection against abuses of union power. Section 136.1 of the Canada *Code* is undoubtedly the broader of the two provisions, imposing a general duty to represent the interests of bargaining unit members fairly. The Canada Labour Relations Board has, however, diluted the force of this section in a number of ways. First, the case law suggests that s. 136.1 can never be used to review internal union affairs, even if such affairs concern the existing rights of a union member under the collective agreement. Secondly, the intensity of the duty varies, according to the nature of the task the union is asked to perform. For example, the union need be less concerned about the specific interests of each member during collective bargaining than it need be while administering the collective agreement. In practice, this approach means that only a failure to arbitrate grievances will normally give rise to a successful application under s. 136.1. Thirdly, the duty of fair representation

Much the same could be said about allowing unions to acquiesce in their own negligence: if the union knows it can always arbitrate a grievance by confessing to negligence, why should it bother about procedural requirements at all?

[131] R.S.C. 1970, c. L-1, as am. S.C. 1977-78, c. 27, s. 49.

[132] R.S.Q. 1977, c. C-27.

only protects against gross negligence and other blatant abuses of union power. The gravity of the union's fault is, moreover, to be measured in light of the union's sophistication and the importance of the job interest at stake. Only critical job interests such as discharge or disciplinary sanctions will warrant the Board's intervention, and even then the union may yet exonerate itself by pleading its lack of sophistication. Finally, the Board has adamantly refused to read into s. 136.1 an absolute right to arbitration, even for such critical job interests as discharge.

These glosses on the duty of fair representation make s. 136.1 look very much like s. 47.2 *et seq.* of the Québec *Labour Code*. According to s. 47.2, the duty imposed on unions only protects against bad faith, discrimination, arbitrary actions, or serious negligence. Again, the *Code* itself does not limit the applicability of s. 47.2 to any particular facet of the worker-union relationship, but s. 47.3 *et seq.* allow the Tribunal du Travail to order arbitration only if the employee has been discharged or disciplined. As a result, the duty of fair representation is ordinarily invoked only when a highly critical job interest has been jeopardized by the shoddy management of a grievance. In addition, the Tribunal du Travail has followed the Canada Labour Relations Board in refusing to recognize an absolute right to arbitrate. Finally, for the purposes of a s. 47.5 order to arbitrate, the applicant must allege a breach of a collective agreement as the basis of his claim: arbitration cannot be ordered to regulate purely internal union affairs which have no bearing on the collective bargaining process.

In short, it would seem that the duty of fair representation only serves to control the quality of union representation in the grievance procedure. The union must apparently act in a most cavalier fashion before a worker has legal cause to complain. This cautious and non-interventionist approach, which resembles the methodology advanced by Archibald Cox, is not always pursued consistently. The Québec *Code* in particular appears to have been drafted haphazardly. For example, the legislator shows some concern about opening the floodgates to frivolous or vexatious claims by setting strict limits to the types of contract disputes which fall within the scope of s. 47.3 *et seq.* Yet even minor disciplinary sanctions may serve as justification for a judicial order to arbitrate. As a result, the *Code* fails to provide for the arbitration of serious claims such as those concerning seniority disputes, but allows for the arbitration of even the most trivial of disciplinary disputes.

Why a labour tribunal or legislator may want to adopt a cautious approach can be briefly explained: it is argued that unions should be allowed to decide once and for all which interests must be sacrificed, so as to save precious time, energy and money. Implicit in this argument is a particular perception of the Canadian trade union movement. Labour rights exist, it is said, only in so far as unions have the strength to assert those rights. Strength,

in turn, depends upon union solidarity — the joining together of many workers into a cohesive unit to pursue common goals. If unionism in Canada is perceived as a relatively weak movement, it follows that unions should be able to silence internal dissent of minority groups. Only in truly exceptional cases should the law intervene to protect those minority interests. It should be noted that this reluctance concerns only the worker's interests in his employment. If the union trifles with the free exercise of rights otherwise acquired, such as political or religious rights, the law readily intervenes. When, however, a worker tries to pursue personally an interest he has under his collective agreement, legislators and labour tribunals balk. Those rights that flow from the collective bargaining relationship are not considered to be individual rights; they remain collective rights, enforceable through the offices of the union. At best, the individual has no more than an interest in seeing that an advantageous collective agreement is negotiated and then enforced.

Yet more than one hundred and ten years have passed since the enactment of the first Canadian labour relations laws. Even though certain industries have proved to be extremely resistant to unionization, the social and economic importance of the trade union movement has become fairly well established. Because of this, a less cautious approach to the quality of union representation may now be warranted.

The major difficulty that faces the legislator lies in reconciling the competing interests of the union and the individual worker. Of course, the law constantly engages in a process of crystallizing intrinsically conflicting interests into rights and duties. This process occurred first with proprietary, and then with contractual and economic interests; today, this process has begun to occur with human and fundamental rights. The effect of such a crystallization of rights is inevitably to fetter the discretion of the powerful, and at times even to erode the strength of the majority. The recent evolution in corporate law provides an excellent example of such an erosion. Increasingly, minority shareholders have been allowed to undercut the right of the majority to decide on the fate of the company. At times a two-third majority, rather than a simple majority, is needed to ratify managerial decisions; minorities who may be peculiarly affected by a fundamental change in the corporate structure are usually given a power of veto; specially-designed remedies allow a minority shareholder to take suit on behalf of the company, even when the majority refuses to support the suit; and, as a final gesture of dissent, a minority shareholder may demand that the company buy out his holding. In effect, the shareholder's interest in the corporation has been transformed into a right, albeit limited, to control the affairs of the company, and this transformation has occurred at the expense of the majority rights. Certain business advantages may, as a result, have been lost. Yet the legislator has decided that the loss of such advantages is small in comparison to the loss to a minority shareholder who is prejudiced by a change in the corporate structure.

The interests of labour have also been crystallized into rights, but in this case the rights are primarily held by the collectivity and not the individual worker. Despite the interests of capital in maintaining a quiescent labour force, unions have been allowed to exact certain standards and conditions of employment. Unionization has, however, generated a new conflict of interest — that between the individual and his union — and it remains to be seen how that conflict will be resolved. To judge from the law on the duty of fair representation, it would appear that the individual must continue to rely on his union to guarantee his job interests. Oddly enough, the recent trend in labour standards legislation seems to point in a different direction. Certain benefits, which used to flow from unionization alone, are now so thoroughly accepted that they have become statutory rights, exercisable even by the non-unionized worker. Thus, we have legislation on minimum wage, hours of work, health and safety requirements, and most recently the right to arbitrate dismissals. The law has begun to provide for the direct enforcement of certain labour rights, the enjoyment of which does not depend on unionization.

If the non-unionized worker now has certain limited statutory rights in his employment, it seems paradoxical that the unionized worker has no absolute right to insist on the performance of a collective agreement. It is true that the unionized worker generally benefits from an agreement that is far more generous than any statutory regime of employment rights, but this should be irrelevant. More justifiable is the fear that industrial harmony would be destroyed if a union were held strictly accountable to every worker it represents. At the very least, such accountability would lead to endless arbitration. Nonetheless, some compromise other than that devised by the Tribunal du Travail and the Canada Labour Relations Board is desirable. For example, the worker could be granted an absolute right to arbitrate on the condition that he pay the costs of any claim that failed or was of little moment. The possibility of paying costs should serve to deter the litigiously-minded from pressing vexatious or unmeritorious claims.

But neither the Tribunal du Travail nor the Canada Labour Relations Board has been willing to go this far. For the moment, then, the crystallization of individual labour rights among unionized workers has been arrested. In the interest of strength through solidarity, the union retains sole power to create and control the unionized worker's interests in the collective bargaining process. Labour law today resembles corporate law of half a century ago: the sole obligation of those who control the power structure is no more than a vaguely expressed fiduciary duty. One might have hoped that the statutory duty of fair representation would be used to reconcile the protection of individual interests with the preservation of institutional strength. Regrettably, the Tribunal du Travail and the Canada Labour Relations Board have failed to respond adequately to the challenge.