
Re Hoogendoorn and Greening Metal Products et al.

Roderick G. Ferguson

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Commentary

Citation Information

Ferguson, Roderick G.. "Re Hoogendoorn and Greening Metal Products et al.." *Osgoode Hall Law Journal* 6.1 (1968) : 113-124.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol6/iss1/5>

This Commentary is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Re Hoogendoorn and Greening Metal Products et al.

LABOUR RELATIONS — COLLECTIVE AGREEMENT — ARBITRATION — RIGHTS OF INDIVIDUAL EMPLOYEE — NATURAL JUSTICE.*

Ever since the present industrial relations legislation was implemented some thirty years ago in the United States and substantially copied in Ontario some ten years later, the question as to the extent of individual rights under a collective bargaining agreement has been intensely debated. An authoritative answer has recently been handed down by the Supreme Court of Canada. *Re Hoogendoorn and Greening Metal Products et al.*,¹ (the *Hoogendoorn Case*), deals with the rather neat due process problem presented when a union takes a grievance to arbitration, the outcome of which may affect the interests of an individual employee which are opposed to the interests of the union.

Dirk Hoogendoorn began working for the Greening Company in September 1955. In June 1962, Local 6266, United Steelworkers of America was certified as bargaining agent for the employees of the Company, which was previously unorganized. In December 1962 a collective agreement was entered into which provided for a dues check-off, evidently non-compulsory. A subsequent agreement in March 1965, provided for compulsory deduction of union dues. The 1965 agreement was amended when it was discovered that the wording did not cover existing employees. The amended agreement specified that employees were to sign and deliver to the company, authorizations for deduction as a condition of their continued employment.²

Hoogendoorn, a member of the Christian Labour Association of Canada, in accordance with the principles of that organization, viewed the Steelworkers Union unfavourably, and consequently, for "religious and political reasons" he refused to authorize deductions of dues for the Union. After numerous skirmishes, not here relevant, the Union ultimately resorted to a wildcat strike to force the Company either to fire Hoogendoorn or to have him sign an authorization. The wildcat strike was settled upon agreement between the Company and the Union to take the matter to arbitration.

* Roderick G. Ferguson, B.A. (Waterloo), LL.B. (Osgoode).

¹ Trial, (Grant J.)—[1966] 2 O.R. 746, Appeal (Laskin, Schroeder, Wells, J.J.A.) [1967] 1 O.R. 712, Supreme Court of Canada, 65 D.L.R. (2d) 641 (Hall, Spence, Ritchie, Judson and Cartwright J.J.).

² Article V, Sec. 5.02. The section reads as follows:

As a condition of their continued employment, all present employees shall, on or before the 15th day of September 1965, and all future employees shall, within 30 days following their employment be required to execute and deliver to the Company, an authorization for deduction of their union dues or an amount equivalent to the regular monthly dues paid by members, as the case may be. Such authorization may be revoked by any employee by giving written notice to the Company and the Union within the 30 day period prior to the termination date of the contract.

After agreeing to submit the matter to a sole arbitrator rather than the Board of Arbitration specified in the collective agreement, the Union submitted the following grievance agreement to the arbitrator, County Court Judge G. H. F. Moore:

It is the Union contention that on March 18, 1966, the Company did violate Article V, Section 5.02 of the Current Collective Agreement as amended on September 1st, 1965.

The arbitrator found that the Company was in violation of Section 5.02 and required the Company

. . . to notify the employee Hoogendoorn in writing forthwith by registered mail, that he must execute and deliver to the Company a proper authorization form for deduction of his union dues or an amount equivalent to the regular monthly dues paid by members as the case may be (enclosing such form) within seven (7) days from the date of the post-mark date on the envelope containing the notice or be discharged from his employment. If Mr. Hoogendoorn fails to comply then I direct that the Company exercise its powers as an employer and discharge him.

Hoogendoorn was not notified of this proceeding, nor was he present at it, nor was he consulted about it.³

A motion by way of certiorari in the High Court by Hoogendoorn, to have the arbitration award quashed, was dismissed.⁴ Hoogendoorn's argument, that he was entitled to notice (and the right to intervene) since his interest could not be properly represented by the Union, was rejected. Grant J. based his decision on the nature of the grievance, which he found was a "policy grievance." The trial judge reasoned that the issue before the arbitrator was whether or not the company was in breach of the agreement in failing to require employees to submit authorizations; Hoogendoorn's actions were not at issue. Grant J. thought it important in this respect that Hoogendoorn did not lose his job by virtue of the award, and would not have standing until the company discharged him.⁵

³ The facts were not in dispute. I have derived this summary of the facts chiefly from the judgment of Hall J.

⁴ [1966] 2 O.R. 746.

⁵ Grant J. would have dismissed the motion on the alternate ground that the grievance procedure was not resorted to by Hoogendoorn before bringing his motion in the Courts. This is curious reasoning and it is unfortunate that it is not mentioned again either in the Court of Appeal or Supreme Court. It is obvious that the Union would not take up Hoogendoorn's grievance and it would seem unjust to dismiss his motion perhaps because he made no formal request of the Union to do so: the law does not demand the performance of fruitless duties. If Grant J. means that Hoogendoorn should have taken the grievance himself (the collective agreement gave employees the right to "present individual grievances to management"), the same reasoning would apply in light of the arbitration award. It is possible Grant J. thought this right would include the right to take the grievance to arbitration. If so, he is overlooking that this is very much an open question, see below footnote 39. Laskin J.A. states views on Appeal, opposed to allowing individuals to take their grievances to arbitration themselves: [1967] 1 O.R. at 722, 724 and 726. The Supreme Court did not mention the point.

In the Court of Appeal,⁶ the majority (Laskin and Schroeder J.J.A.) were in favour of dismissing Hoogendoorn's appeal. Wells J.A. delivered a strong dissent.

Wells J.A. thought the arbitration award should be quashed because the Union was the only agency representing Hoogendoorn, and was at the same time seeking his dismissal. The arbitration, Wells J.A. agreed, involved in form, the interpretation of the agreement,

... but when one penetrates beyond the terms of the procedure, one sees that the union in fact was not prepared to look after Hoogendoorn's discharge from the company and desired his discharge unless he agreed to the check-off of the union dues from his pay.⁷

And later Wells J.A. asserted,

On the facts it [the proceeding] was aimed entirely at Hoogendoorn.⁸

Laskin J.A. on the other hand did not view the arbitration in that light; he found that the proceedings were

... to resolve any doubt of the meaning and operative effect of Art. 5.02 of the amended collective agreement and, particularly, to determine who had the duty to administer it.⁹

The arbitrator's finding amounted to,

... imposing a duty on the company to direct an employee to sign a dues deduction authorization form or face disciplinary action by way of discharge.¹⁰

Laskin J.A. also pointed out that further action would be required before Hoogendoorn would be fired; Hoogendoorn's discharge was not the result of the award.

Grant J. and Laskin J.A. were apparently attempting to establish that the threat to the jobs of Hoogendoorn and others who refused to abide by Article 5.02, was created by the collective agreement containing that section, and not by the arbitration proceedings. To put it shortly, Hoogendoorn had no economic security to be threatened once the collective agreement was made.

Laskin J.A. declared that the grievance here was a "policy grievance", and defined what he meant by that term; first it is a method

... to avoid multiplicity of proceedings and a possible clogging of the grievance adjustment machinery and to avoid undue expense as well ... Not all may benefit equally; and some may be adversely affected; but the virtue of the policy grievance is that it is an extension of the administration of the bargain by the parties who concluded it, and the award therein becomes, in effect, a clarifying term of the agreement ...¹¹

Secondly, the policy grievance is a means of redressing

⁶ [1967] 1 O.R. 712.

⁷ [1967] 1 O.R. at 715.

⁸ *Id.*, at 716.

⁹ *Id.*, at 721.

¹⁰ *Id.*

¹¹ *Id.*, at 725.

. . . an alleged violation of a promise or term in the agreement running in favour of the Union itself from the company . . .¹²

It is the latter type of policy grievance that the union was pursuing in this case, Laskin J.A. pointed out.

In light of the above reasoning, the Court of Appeal severed that part of the arbitrator's award which ordered the dismissal of Hoogendoorn if he did not deliver an authorization, since this went beyond the issues raised in the arbitration proceedings.

The next development relevant to the *Hoogendoorn* case curiously enough, is the decision of the Court of Appeal in another case, *Re Bradley et al. and Ottawa Professional Fire Fighters Association et al.*¹³ Laskin J.A. again wrote the decision, a decision which enabled him to further explain the views he adopted in his *Hoogendoorn* judgment.

In the *Bradley* case, six junior men had been promoted and the union felt, in perfectly good faith, that according to the requirements of the collective agreement, six senior men should have received the promotion. The matter was carried through to arbitration on behalf of the latter, but the six junior men were not notified of the proceedings, nor that their promotions were in jeopardy. Laskin J.A. held that this case was readily distinguishable from *Hoogendoorn*. Here the arbitrator went beyond the interpretation of the agreement and found that those promoted should not have been; here was a specific finding with reference to those whose jobs were in question; they should have received notice.

Laskin J.A. stated:

. . . The common law has been specially sensitive to deprivation of property or contractual advantages in proceedings of an adjudicative character without previous notice thereof to persons likely to be directly affected,¹⁴ unless there is clear statutory exclusion of such notice.

The union had tried to argue, in the light of *Hoogendoorn*, that since the six junior employees should not have been promoted, they had no rights in need of protection. Laskin J.A. called this argument "ex post facto reasoning."

But, is it not similar "ex post facto reasoning" in Hoogendoorn's case? Why could the court find the rights of the employees in *Bradley* to be in jeopardy and not find Hoogendoorn's rights to be similarly threatened? Bradley and the others had received promotions alleged to be in contravention of the agreement; Hoogendoorn had retained a job in contravention of the agreement. What is the difference?

Note especially this paragraph in the *Bradley* decision:

Judge Short in his award stated at the outset that 'the grievance concerns solely the proper interpretation to be placed upon Section 12.01'. He went on to construe this provision, and it is conceded that if he had concluded his award after giving his construction, it would not have been open to Bradley and the *certiorari* applicants to challenge it. The arbitration

¹² *Id.*

¹³ [1967] 2 O.R. 311 (the *Bradley* case).

¹⁴ *Id.*, at 317.

would then have amounted to a declaratory proceeding by which the Association and the city would have resolved their differences as to the proper meaning of Art. 12.01; and how that meaning would affect promotions already made on those to be made would be a matter for further consideration and determination. If the arbitrator had proceeded in this manner the case would be within the principle examined by this court in *Re Hoogendoorn and Greening Metal Products and Screening Equipment Co. et al.* [1967] 1 O.R. 712, 62 D.L.R. (2d) 167.¹⁵

The distinction is an elusive one, if it exists at all. Looking at it in another way, why could the court not let the interpretation part of the award stand, and excise the offending particular findings and directions as it did in *Hoogendoorn's* case?¹⁶ It would be a poor protection if individual rights could be so easily avoided by merely refraining from having the arbitrator apply his decision. To my mind the only distinction is that this would be an example of Laskin J.A.'s first type of policy grievance, whereas in *Hoogendoorn* it was an example of the second. Should the individual be excluded from intervening in an arbitration on the ground only that the issue concerns a right flowing to the union itself?

The Supreme Court of Canada handed down its decision in *Hoogendoorn's* case after the Court of Appeal decided *Bradley*. The majority of the Supreme Court were in favour of allowing the appeal and quashing the arbitrator's award. Judson J. speaking for himself and Ritchie J., would have dismissed the appeal, agreeing with Laskin J.A. in the Court of Appeal decision in the case:

I agree with the majority judgment [in the Court of Appeal]. The scheme of the Labour Relations Act is to provide for a bargaining agent which is given power to conclude an agreement with an employer, on behalf of the employees. No ratification or consent by the employees or any of them is required before a lawful agreement can be concluded and the bargaining agent is given specific authority by the Act to make the kind of agreement represented by Art. 5.02 in the instant case. No individual employee is entitled as of right to be present during bargaining or at the conclusion of such an agreement. To require that notice and the right to be present be given to each employee on any occasion when a provision in a collective agreement having general application to all employees was being interpreted would be to destroy the principle of the bargaining agent and to violate the purpose of the act.¹⁷

Judson also pointed out that *Hoogendoorn's* rights were not in fact in issue at the arbitration. He seemed to adopt the distinction drawn by Laskin J.A. in the *Bradley* case to distinguish that case from the latter's decision in *Hoogendoorn*.¹⁸

Hall J. for himself and Spence J. neither accepted nor rejected the concept of the "policy grievance." At any rate, Hall J. certainly did not classify the proceedings in this case as an arbitration of a policy grievance, but he did find that "the proceeding was aimed entirely at securing *Hoogendoorn's* dismissal."¹⁹ Hall J. was content to repeat Wells J.A.'s disposal of the "policy grievance" argument:²⁰

¹⁵ *Id.*, at 313-314.

¹⁶ [1967] 1 O.R., at 730.

¹⁷ 65 D.L.R. 2d, at 644.

¹⁸ *Id.*, at 646.

¹⁹ *Id.*, at 648.

²⁰ *Id.*

In my opinion, there might be some weight to this point of view if the proceedings before the learned arbitrator had proceeded as an impersonal interpretation of the agreement without reference to any individual. One has only to look at the learned arbitrator's reasons, however, to realize that this was not the case. He dealt exclusively with Hoogendoorn's case and any reference to general principles as unrelated to Hoogendoorn, in my opinion, was coincidental.²¹

Later in his judgment, considering the paragraph from Laskin's judgment in the *Bradley* case which I have reproduced above,²² Hall J. found the two cases indistinguishable. Having failed to find a distinction between the two cases, he decided that the *Bradley* result was the better of the two, again for reasons which he found in Wells J.A.'s judgment, which in turn was based on the reasoning of the Privy Council in *University of Ceylon v. Fernando*.²³ Thus Hall J. ignores Laskin J.A.'s warning against using United Kingdom case law on natural justice because of the absence in the United Kingdom cases of the collective bargaining legislation which has to be considered in these Ontario cases.²⁴

The fifth member of the Court, Cartwright J. agreed with the Laskin-Judson approach on the scheme of the Labour Relations Act but agreed with the reasons and conclusions of Hall J. purely because he found as a fact that the arbitration was an inquiry into the single question whether or not the employer was bound to discharge the applicant.²⁵ Cartwright thus impliedly finds that the grievance was neither one of interpretation only, nor one of general application, the types of "policy grievance" in which Judson J. would bar intervention by an individual.

The problems that arise with regard to individual rights under collective bargaining agreements arise due to the paradox inherent in collective bargaining itself. The rationale of collective bargaining is that the workers bargaining individually have no rights, and being employed at will, are subject to management's mercy except for the rare cases where an individual employment contract exists. To protect these individuals' rights, the legislature has deemed it wise to encourage a system whereby those rights are entrusted to collective institutions, unions, if the majority in a 'bargaining unit' so desire. That legislation has even gone so far, for example, as to allow the collective organizations to bar from employment those who are not members.²⁷

Individual rights in many ways and in all stages of the collective bargaining procedure may be submerged in what is hoped to be a "better" arrangement for the body of workers as a whole. When a

²¹ [1967] 1 O.R. at 716.

²² *Supra*, note 14.

²³ (1960) 1 All E.R. 631.

²⁴ See [1967] 1 O.R., at 731.

²⁵ 65 D.L.R. 2d, at 642.

²⁶ *Le Syndicat Catholique des Employées de Magasins de Quebec Inc. v. La Compagnie Paquet Ltee* [1959] S.C.R. 206.

²⁷ *Labour Relations Act*, R.S.O. 1960, c. 202, s. 35(4).

contract is made, the law says that all workers will be bound by it,²⁸ whether they agree with its terms or not. There is no appeal, unless a sufficient number of workers move to have the union decertified, if this procedure can be called an 'appeal'.

The union, however, is bound by a duty to treat all employees fairly when it bargains. The so-called "duty of fair representation" has often been declared by the Supreme Court of the United States²⁹ and has been mentioned by our Supreme Court.³⁰

In the *Wallace Barnes*³¹ decision, the Ontario Labour Relations Board summarized its view of the scheme of the Labour Relations Act:

. . . when it is considered that the trade union is the exclusive bargaining agent of all employees in the bargaining unit (whether members or not), that the collective agreement is binding upon the employees in the bargaining unit (whether members or not), that the collective agreement must provide for the final and binding settlement of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement and finally, that such settlement (by arbitration) is binding on the employees affected, it is clear that the legislature intended that in order to gain the advantages of collective bargaining, employees must be prepared to surrender rights which they might otherwise have.

Thus, in order to secure the benefits of collective bargaining, the employees act through a collective bargaining agent, that is, a trade union. The trade union is the bargaining agent for the employees for the purpose of negotiating a collective agreement covering their working terms and conditions. The trade union is also their bargaining agent with respect to the administration of the collective agreement and when disputes arise involving the interpretation or alleged violation of the agreement, these are matters for the parties to that agreement, that is, the trade union and the employer. The ultimate decision, whether it be by negotiation or through arbitration, is binding not only on the parties but on the employees as well. . . .³²

There has never been an assault on the union's exclusive conduct of negotiation of a collective agreement, yet in *Hoogendoorn* and *Bradley* the courts have allowed an assault on the union's administration of the agreement. Is not the administration of the agreement just as exclusive a bargaining right as the negotiation of it?

It had been thought to be clear in Canada that *resort* to arbitration should be only at the instigation of the parties to the collective agreement. This policy is evident from as far back as the *Corporation of the City of Toronto* case,³³ where it was pointed out that harmony in industrial relations would not be achieved by allowing every grievance real or fancied to be pursued to its ultimate conclusion.

²⁸ *Id.*, s. 37.

²⁹ e.g., *Humphrey v. Moore* 375 U.S. 335, *Conley v. Gibson* 355 U.S. 41, *Syres v. Oil Workers* 350 U.S. 892, *Tunstall v. Brotherhood of Locomotive Firemen* 323 U.S. 210, *Steele v. L. & N.R.R.* 323 U.S. 192.

³⁰ *O.C.A.W. Local 16-601 v. Imperial Oil* [1963] S.C.R. 584, 593 per Martland J.

³¹ *Vera Elkington and the Wallace Barnes Co. Ltd.* 61 C.L.L.C. 928.

³² *Id.*, at 930-931.

³³ *The Corporation of the City of Toronto Case* (1947) D.L.S. 7-1289, adopted by the O.L.R.B. in *Wallace Barnes* 61 C.L.L.C. at 931; see also *Nabess and Lynn Lake Base Metal Workers Federal Union v. Sherrit Gordon Mines and Laskin's* discussion of this case in 6 CAN. B.J. 278.

The same conclusion has been reached by Professor Archibald Cox in his classic treatment of the individual rights question³⁴ and by the United States Supreme Court in the recent case of *Vaca v. Sipes*.³⁵ This was a case where the union refused to take a discharge grievance to arbitration. The United States Supreme Court declared:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the collective bargaining agreement.³⁶

In its reasons the *Vaca* court lists several beneficial results of this view: frivolous grievances are filtered out before the more expensive arbitration procedure, consistent results will be obtained, greater emphasis will be placed on major collective bargaining problems.

And finally, the settlement process furthers the interests of the union as statutory agent and as co-author of the bargaining agreement in representing the employees in the enforcement of that agreement. . . .³⁷

Several detrimental results were also enumerated if individuals were to be allowed to force arbitration of his grievance:

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employers' confidence in the unions' authority and returning the individual grievance to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.³⁸

To protect individual rights, Professor Cox, and the Supreme Court of the United States put reliance on the doctrine of the duty of fair representation. If this duty were breached, the individual would have a right of action against the union, and the company (if the latter were acting collusively).

In light of Laskin J.A.'s views in this regard,³⁹ and the fact that Judson, Ritchie and Cartwright J.J. agreed with his interpretation of the scheme of the Labour Relations Act, it would appear that the individual will not be allowed to process his own grievance to the point of arbitration. Why then should his position be different if he is faced with hostile union action rather than the union's mere refusal to act? If the union is to have exclusive right to process grievances, why should that exclusive right yield to the presence of the individual grievor just because an arbitration is already underway? Logically, there should be no difference. If arbitration is an extension of collective bargaining, then no matter what the issues are, should not the exclusive rights of the bargaining agent remain exclusive? Further-

³⁴ *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601.

³⁵ 386 U.S. 171. This case in effect adopts the Cox view in the individual rights debate, even referring to his article above.

³⁶ *Id.*, at 192.

³⁷ *Id.*

³⁸ *Id.*

³⁹ [1967] 1 O.R. at 722, 724, 726 and also 6 CAN. B.J. 278.

more, the wider purpose of the grievance procedure does not suddenly change when arbitration begins. This wider purpose was expressed in the United States case, *Ostrofsky v. United Steelworkers*:

In the handling of grievances, as in the negotiation of the terms of an agreement, the interests of all employees are involved. The principal purpose of the grievance procedure is not to provide a framework within which individual desires and complaints can be taken up with the employer; rather, it is to provide a framework within which the employees may bargain collectively to determine how the general principles of the agreement are to be applied to day-to-day problems.⁴⁰

It could be argued that there is a difference between the action and inaction situations. The difference may be that grievance procedure is a continuation of collective bargaining but only up to the point of arbitration, at which point it becomes "adjudication". The same objections to individuals participating in the grievance procedure or other steps in the collective bargaining process might not apply to intervention in the "adjudication".

Prof. Laskin, before his appointment to the bench, writing in support of individual rights under collective agreements, had observed:

If the union takes the issue to arbitration under the prescribed procedure, is there any reason why the dissident employees should be denied the opportunity to intervene? When one considers that the general run of labour relations legislation makes an arbitration award binding on employees as well as on Union and employer, it would be inordinate obstinacy to push the formal position that the arbitration clauses concern the Union and employer alone. Collective agreements as well as labour relations legislation have little to say about procedure in labour-management arbitration. Conduct of the cases is left to the arbitration tribunal and it would be a shocking dereliction of *adjudicative* duty to deny an application by an interested party to intervene.⁴¹

Laskin J.A. again used the term "adjudication" in the *Bradley* decision.⁴² However, the fact that he described arbitration of policy grievances as an 'extension of the administration of the bargain' in *Hoogendoorn*⁴³ would indicate that he has not attached a narrow or technical connotation to the term in the context of arbitration.

The action-inaction distinction does make sense in one way, in that arbitration is no longer *collective bargaining*. The power of decision is out of the hands of the parties; they are no longer negotiating. But what if in the midst of an arbitration the parties do suddenly agree, is the arbitrator to prevent this? Perhaps now all interests before the arbitrator would have to agree before the arbitrator would allow a settlement.

If such a distinction were to be made in order to defend individual intervention in arbitration, the distinction could be used to help prevent the exclusive bargaining rights of the union being undermined in the initiation of grievances and in the negotiation of the collective agreement itself.

⁴⁰ 171 F. Supp. 782, 793.

⁴¹ 6 CAN. B.J. 278, 288.

⁴² [1967] 2 O.R. at 317, see *supra*.

⁴³ [1967] 1 O.R. at 725, see *supra*.

If individuals were denied the right to intervene, they would be forced to rely on the doctrine of the duty of fair representation to protect themselves. One weakness of this concept is that, besides the much greater expense and delay of a court action, courts have a strong hesitancy to order reinstatement.⁴⁴ Reinstatement is the remedy most valuable to the grievor and it is a remedy that arbitration tribunals have no fear in using. Another weakness of the protection given by the fair representation doctrine is that breach of the duty is very difficult to establish.⁴⁵

Clyde W. Summers, a strong advocate of an individual rights approach to the problem of rights under collective agreements⁴⁶ believes most of the practical objections to allowing the individual to process his own grievances to the arbitration stage are absent when the individual seeks merely to intervene in arbitration already underway. Summers notes that,

. . . the collective agreement parties' freedom to agree is not circumscribed, for the arbitration manifests their inability to agree. They are not drawn unwillingly into the procedure nor saddled with a wholly uninvited burden. At most, the costs may be increased a fraction by the addition of the intervenor. Selection of the arbitrator poses little problem for the intervening individual will normally be bound by the collective parties' choice.⁴⁷

Thus, why not allow intervention especially in light of the fact that the duty of fair representation remedy is so inadequate?

But there remain many objections to intervention. Professor H. W. Arthurs has pointed out the most important objection in these words:

The unions' ability to function as a broker between divergent employee interests, and its authority to speak on behalf of the group, are both undermined.⁴⁸

Professor Arthurs notes also that even as a protection of individual rights, intervention is only operative in cases which go to arbitration; the individual right is not protected if the grievance in which he opposes the union is settled prior to arbitration. We would have the anomalous position that an individual would have the right to be heard only in the fortuitous circumstances that the employer and union could not agree.

⁴⁴ See Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L.R. 362, 410n.

⁴⁵ In *Vaca v. Sipes* 386 U.S. 171 the U.S. Supreme Court canvasses the law on this subject.

⁴⁶ Summers would allow individuals to press grievances themselves even to arbitration (at their own expense and with the right of the Union to also participate). See, *Individual Rights in Collective Agreements—A Preliminary Analysis*, in STEIN (ed.) NEW YORK UNIVERSITY 12TH ANNUAL CONFERENCE ON LABOUR 63 and *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L.R. 362. Laskin advocates a somewhat similar approach in 6 CAN. B.J. 278.

⁴⁷ 37 N.Y.U.L.R. at 405.

⁴⁸ *Developing Industrial Citizenship: A Challenge for Canada's Second Century*, 45 CAN. B. REV. 786 at 805.

It would seem that the natural justice cases try to ensure that the official or tribunal with decision-making power has an opportunity of hearing both sides of the issue to be decided. Thus in the labour grievance case natural justice would require that the decision-making power be exercised only after hearing all sides of an issue. Who holds decision-making power in the labour relations grievance? Until arbitration, it is jointly held by the parties to the agreement and is exercised by the use of negotiation, compromise, and all the tools connected with negotiation. Ultimately consensus is reached and a decision is made. Only when this process fails and a decision is still not made due to the parties' failure to agree, is resort made to arbitration. If the arbitrator is now to be required to hear all sides, as a result of the *Hoogendoorn* decision, why should the same principle not apply to the usual holders of the decision-making power, the parties? The answer is, according to the *Vaca v. Sipes* reasoning, that collective bargaining as established by the Labour Relations Act, would be frustrated, thus negating the presumption of a requirement of fairness to the individual, (although there is some protection for victimized individuals through the breach of duty of fair representation action).

A more appropriate question would be: if the natural justice doctrine is not applicable to the handling of labour grievances at the pre-arbitration stage, what is the logic in applying it when the decision-making power is assigned by the parties to a single decision-maker? The lack of logic is especially apparent when the parties may continue to hold decision-making power in that they may still reach a decision by settlement even after arbitration begins.

If the natural justice principle is to be applied to labour arbitration, it is usually thought necessary to limit it in some way. No one has ever thought that individuals should be allowed to intervene unless their status or some property right is in danger of being affected. Anti-union sentiment for example would not be sufficient to entitle an individual to intervene.

Summers would limit the right to intervene by a 'direct-result test'.

The right to intervene need be extended only to those directly affected by the outcome of the case. Those who are indirectly affected by the decision as a precedent have no greater claim to being a party to an arbitration than to any other legal proceeding. Repercussions may reach remote employees, but that does not make their interest sufficient to require intervention. Indeed, it is the primary concern of the union to urge these more widespread and remote consequences before the arbitrator. The need is only that those immediately and tangibly affected by the specific case be allowed full opportunity to be heard. Though the line may be hard to define, it is less difficult to draw in practice.⁴⁹

This seems to have been implicitly adopted by all the judges in the case. Where there is a difference of view among the judges deciding the *Hoogendoorn* case, it is about a further requirement before intervention would be allowed, namely whether the proceedings *spe-*

⁴⁹ 37 N.Y.U.L.R. at 407.

cifically affect the individual. Laskin J.A. would go so far as to allow the arbitrator to use the specific facts of a case as background to interpretation and deny intervention as long as the arbitrator did not make particular determinations.⁵⁰ Judson J. seems to accept this view, Hall J. and apparently Cartwright J. do not.

If the direct result test were used, any submission to arbitration could be drafted so skillfully that individuals would be refused the right to intervene because their interests would not be 'particularly determined'. Hall J. would allow the individual the right to intervene, no matter in what form the issue was drawn, if in fact the proceeding is 'aimed entirely' at him.⁵¹ This seems also to be the conclusion of Cartwright J. where he states:

The reason that I differ from the result at which he Judson J. arrives is that I am unable to regard the arbitration which was held as anything other than an inquiry as to a single question, that is whether or not the employer was bound to discharge the appellant.⁵²

All the judges, including Wells J.A. and Hall J. admit the concept of the 'policy grievance', but as a result of this case there cannot be many instances where an individual would be barred from intervening because the issue before the arbitrator is a 'policy grievance'. The notion is, to all intents and purposes, a dead letter.

It will be interesting to see what effect this result will have on the conduct of labour arbitrations. There is bound to be some confusion at first, but probably the snags can be sorted out without too much difficulty. Hopefully, this inroad on the unions' exclusive bargaining rights can be restricted to the arbitration proceeding and not to bargaining itself either at the negotiation of the agreement or at grievance handling preliminary to arbitration. If problems arise which threaten to inundate the usefulness of arbitration, the legislature may have to be called to the rescue.

RODERICK G. FERGUSON.