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TILTING AGAINST THE WINDMILL: 
THE INDIVIDUAL’S RIGHT TO 
ARBITRATION

CHRIS PALIARE*

Initially, the legislative sanction of trade unionism arose as a counter-vailing power to the corporation. Gross inequities which previously existed were progressively eliminated by unions with great victories won in raising the level of wages and improving working conditions. However, the growth of trade unionism has also seen the rise of a power-structure which in many ways mirrored the foe whose power it sought to contain. The elite of this now formalized structure jealously guards the power it presently enjoys. This power includes the right to bind all employees in the bargaining unit by a joint decision with management on any given issue. Since the union receives its mandate from a majority of the employees, it is assumed that this power will be exercised in the best interests of that majority, even at the expense of specific interests of a minority or a sole employee. The Supreme Courts of British Columbia and the United States, as well as American and Canadian writers, support this notion subject only to the condition that the union owes a duty of fair representation to each employee. This theory is based on the underlying premise that industrial peace could not be preserved if an individual employee was allowed to challenge the decision-making process. However, as a result of this employer-union joint action, the individual employee may find himself without a remedy.

Since the possibility of prejudice to an individual employee is greater in the administration rather than the negotiation of a collective agreement, the issue, then, is whether the union should have an unfettered right to process all grievances to a settlement satisfactory to the parties, but unsatisfactory to the individual grievor. At present where the relationship between employees and

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1 Porter, in his book, The Vertical Mosaic, comments that unions are accepted because of their power, rather than any contribution they make to social life. pp. 310-12.
3 Vaca v. Sipes (1967), 87 S.Ct. 903, 910, where White, J. stated: “Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”
their employer is governed by a collective agreement, the orderly settlement of disputes is generally provided for by a grievance procedure. This consists of three or four stages during which there is an attempt to resolve the problem. Failing a satisfactory solution or compromise, the parties can then resort to arbitration for a final and binding decision. However, the statutes and virtually all collective agreements state that the "parties" to the agreement are the company and the trade union, not the individual employees. Therefore, if the aggrieved employee is dissatisfied with the handling of his particular grievance during the grievance procedure and the union refuses to proceed to arbitration, access to this ultimate forum by the employee is precluded by the collective agreement and the statutes.

There are several reasons why an individual employee's grievance may be settled short of arbitration. First, the union itself may decide not to proceed because they believe that the grievance is unmeritorious. Secondly, the union and management, acting jointly under the grievance procedure machinery, may arrive at a solution which is beneficial to their own interests. This occurs when there is a "trade-off" of grievances; that is, the company agrees to allow certain grievances if the union correspondingly agrees to drop other unrelated grievances, regardless of their meritoriousness. Consequently, time, resources and money which might have been expended in arbitration are avoided. Thirdly, the union may decide not to proceed for their own policy reasons; examples of this extend from a small, poorly funded local which cannot afford to go to arbitration for a petty, although meritorious, claim, to representing a junior employee who has been treated unfairly in a seniority grievance. Fourthly, an individual employee may be the victim of personal animosity or discrimination by the persons entrusted with the carriage of his grievance. Finally, the grievance may have been abandoned as a result of negligent or incompetent handling.

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6 The Labour Relations Act, R.S.O. 1960, c.202 s.34(1) stipulates that every collective agreement shall provide for the final and binding settlement of disputes by arbitration. No mention is made of the necessity of providing for a multi-stage grievance procedure as a prelude to arbitration. However, it would be impractical and costly not to have a mechanism which would provide for the orderly settlement of disputes within the framework of the collective agreement.

7 This restrictive method of ultimately settling disputes by arbitration also applies in two other provinces of Canada besides Ontario: Quebec; R.S.Q. 1964, c.141, s. 88; Saskatchewan; R.S.S. 1965, c.287, as amended in 1966, c.83, ss.23, 23A and 23B.

This is not the situation where other statutes govern labour relations in Canada; R.S.C. 1952, c.152, s.19; Alberta: R.S.A. 1955, c.167, as amended in 1964, c.41, s.73; British Columbia: R.S.B.C. 1960, c.205, s.22; Manitoba: R.S.M. 1954, c.132, s.34; New Brunswick: R.S.N.B. 1952, c.124, s.18; Newfoundland: R.S.N. 1952, c.258, as amended in 1960, c.58, s.19; Nova Scotia: R.S.N.S. 1954, c.295, s.19; Prince Edward Island: S.P.E.I. 1962, c.18, s.23. These statutes provide that parties to a collective agreement settle their disputes by "arbitration or otherwise".

8 For example, The Labour Relations Act of Ontario, s.1(1) (c) states that a "collective agreement" is an agreement in writing between the employer and the trade union which represents the employees of the employer.
It appears that these various dispositions fall within the ambit of s. 32 and s. 34(1) of the *Ontario Labour Relations Act*, which state that the trade union is the exclusive bargaining agent of the employees and as a party to the collective agreement has the exclusive control of arbitration proceedings. Yet, none of the above resolutions to the grievance may be satisfactory to the aggrieved employee. If there are to be some limitations on the trade unions' decision-making power in these settlements, the remedy to be made available to the unsatisfied grievor must be considered.

Within the present context of industrial relations in Ontario there are three conceivable forums to which an aggrieved employee could bring his complaint — the Labour Board, the court or an arbitration hearing. Before considering what ought to be the avenue available to the employee, it is necessary to appreciate the present policy of these three forums with respect to this polemic problem. It will be seen that these forums do not provide meaningful redress to the employee because the remedies are either illusory or inconsistently applied.

**A The Labour Board**

If an allegation of a mishandled grievance arises before the Ontario Labour Relations Board any rights which an individual employee may appear to have are illusory due to the manner in which the Labour Relations Act of Ontario is drafted.

Section 65(4) of this Act gives the Labour Board the right to redress unfair labour practices (including the power of reinstatement) where a person has been dealt with contrary to the Act by "an employer or other persons or a trade union". The major flaw in this section is that the remedy is purely procedural, for the substantive right must be based on another section of the Act. Furthermore, the Board will not exercise its discretion under s. 65 if the complaint can be dealt with under the grievance machinery of the collective agreement. By respecting this alternate remedy or procedure which has been established by the parties to the agreement, the Labour Board is, in effect, insulating union-management decisions from complaints by

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10 At present, there is no statutory right of an individual employee in the private sector to carry forward his own grievance. Contrast this to the public sector where grievances with respect to disciplinary action resulting in discharge, suspension or a financial penalty may be referred to adjudication by the individual employee without the aegis of the bargaining agent if he is dissatisfied with the earlier decisions. *Public Service Staff Relations Act*, S.Can. 1966-67, c.72, s.91.


13 *National Showcase Co. Ltd.*, 61 C.L.L.C. par. 901.
individual employees. For example, an employee alleging wrongful dismissal has no relief under s. 65(4) if the union refuses to arbitrate, because the Board will not force the union to pursue the grievance, or order the establishment of an arbitration board. However, notwithstanding the above, there are some “exceptional circumstances” in which the Board, in the exercise of its discretion under s. 65(4), will inquire into a complaint: these include collusion between the union and employer, fraud, and the securing by the union itself of the dismissal of an employee contrary to the collective agreement.

In two recent applications under s. 65, the Boivin Case and the Collingwood Shipyard Case, the Labour Relations Board tacitly implied that one major criterion in deciding whether to exercise their discretion was the availability of an alternate forum in which the employee could seek redress for his unjust treatment. In the former case, the complainant, Boivin, a member in good standing of the Sudbury local of the union, decided to move to Hamilton. He obtained a travel permit from this local which upon filing with the Hamilton local, pursuant to the union constitution, transferred all his privileges of membership, except the right to vote. Subsequently he obtained employment in Hamilton under a collective agreement, part of which stated: “If non-members of Local Union 67 (Hamilton) are working and Local Union 67 members are unemployed, non-members of Local Union 67 will be replaced by members of Local Union 67, who are in good standing.”

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14 The Ontario Labour Board in Vera Elkington v. Wallace Barnes Co., 61 C.L.L.C. para. 16, 198, stated where the employees have chosen a bargaining agent to act on their behalf, they are bound by its decisions. The Labour Board, after noting the role of a trade union as a collective bargaining agent of the employees for the purpose of negotiating a collective agreement, went on to say: “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 the agreement, that is, the trade union and the employer”. (emphasis added)

In addition to insulating union-employer joint action from complaints by individuals, the Labour Relations Board has dismissed a s.65 complaint where it was a majority membership vote which deprived the complainants of their seniority rights under the collective agreement. Ocepek v. International Association of Machinists, Lodge No. 1031, [1967] O.L.R.B. March Monthly Reports 997. See, post note 27.


16 International Harvester, supra, note 12. However, the court in Beckett v. Sault Ste. Marie, [1968] 2 O.R. 653, dismissed an action where the parties agreed to submit the issues of status and rate of pay of the grievor-policewoman to arbitration.

17 National Showcase Co. Ltd., 61 C.L.L.C. par. 901; Frank Kuntz and Pitt Street Hotel Ltd. (King George Hotel), 63 C.L.L.C. par. 16,275.

18 Pitt Street Hotel Case, supra, note 17, where it was held that “exceptional circumstances” included collusion, but it was not proven in this case.


20 Id.

The union took the position that Boivin was not a member of the local union and, relying on the above-quoted provision, requested the employer to discharge the complainant in favour of a member in good standing. The employer complied with this request.

The Labour Relations Board found that there was no collusion between the trade-union and the employer but the case did fall within the “exceptional circumstances” which, in previous cases, the Board had stated would entitle an applicant to relief under s. 65. Their primary concern was that if the discretion under s. 65 was not exercised, the employee-applicant would be without a forum in which to express his complaint. The Board stated:

"Where the trade union has itself procured the discharge of an employee, it would be unreasonable (to say the least) to expect it then to carry that case through the arbitration process on the employee's behalf. . . . it was conceded by the representative of the respondents (the Hamilton local) that the complainant had no effective recourse, apart from that being now sought, for the wrong done him" (emphasis added)

In the Collingwood Shipyard Case, it appeared that the union was as equally adverse in interest toward the employee-applicants as had been the union in the Boivin case. However, in the instant case, the Labour Relations Board refused to exercise its discretion under s. 65 because not only was the alternate forum of arbitration available, but also the union was carrying these grievances to that forum. In addition to being members of the incumbent majority union, the complainants were also organizers of a defeated rival union. Clearly, the majority union and the complainants who had sought to oust it as the bargaining agent were adverse in interest. Yet, the Board dismissed the claim of reinstatement under s. 65 indicating that it was not prepared to assume that the majority union would fail to properly promote the interests of the aggrieved persons in the arbitration proceedings. Albeit that the potential for an unfair arbitration hearing existed, the fact that the aggrieved employees had access to an alternate forum proved to be the shortcoming in their s. 65 application. The Labour Board expressed concern that if it was to exercise its discretion under s. 65, and the arbitration board rendered a contrary decision, this would produce the anomalous result of having two conflicting decisions, both of which would be enforceable in the Supreme Court of Ontario. Thus, they deferred to the jurisdiction of the arbitration board but stated that should the union not press the arbitration proceedings to a conclusion, the Board might entertain an action under s. 65.

Clearly, an employee who is dissatisfied with his union’s handling of his grievance will have a difficult task lodging a successful s. 65 application. The “exceptional” circumstances are better described as “extraordinarily exceptional” as it would be understandably onerous for an individual employee to prove collusion with regard to a union-management joint action.

22 *Pitt Steel Hotel Case*, supra, note 17; *National Showcase Co. Ltd. Case*, supra, note 13; *Heist Industrial Services Case*, supra, note 15.

23 The Board found that the applicant had been dealt with contrary to the Act by the union and ordered them to pay loss of earnings and employment benefits to the employee. Unfortunately, the employer was not made a party to the application because the Board, in an *obiter* statement, indicated that reinstatement might have been in order had the employer been a party to the proceedings.

24 *The Labour Relations Act*, R.S.O. 1960, s. 34(9) and s. 65(5).
B The Court

Sections 34(1) of the Ontario Labour Relations Act and s. 3(3) of the Rights of Labour Act purport to prevent the judiciary from resolving any disputes which may arise during the currency of a collective agreement. Despite this legislation, in certain circumstances the courts have enforced rights established under a collective agreement which provided a grievance procedure for dispute settling. These rights are those which historically were enforceable by a common law action: (i) wrongful dismissal, and (ii) wage disputes.

On the other hand, the Courts generally have refused to hear matters which involve the interpretation of other articles of the collective agreement such as seniority or the scheduling of work. Yet, these matters also directly affect the employee and are latent sources of unfair representation. This refusal of the Courts to accept jurisdiction consistently in matters of employees' rights coupled with an inconsistency in decisions on those rights that are considered, demonstrate the unsuitability of this forum for an individual grievor.

(i) Wrongful dismissal

Two recent appellate decisions Crossman v. City of Peterborough and Peterborough Utilities Commission and Miramichi Hospital v. Woods, are examples of the Court's acceptance of jurisdiction for grievances alleging wrongful dismissal. In both cases, the discharged employee was allowed his common law remedy based on the "no dismissal without 'just cause'" pro-

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25 Supra, note 6.
26 R.S.O. 1960, c.354.
27 Bisson v. Brotherhood of Railway Carmen (1963) C.C.H. 15,469, was a seniority complaint which came before the Superior Court of Quebec. The court held that the employee was bound by the provisions of the collective agreement as to the disposition of his claim. Since the agreement provided that an employee's grievance could be dealt with only by arbitration, the plaintiff, by bringing a suit in court, had failed to follow the proper procedure to have his alleged grievance settled.

Also Murphy v. Robertson, (1941) 3 D.L.R. 30 (Man. C.A.). Further, a case with similar facts, Ocepek v. International Association of Machinists Lodge No. 1031, [1967] O.L.R.B. March Monthly Report 997 came before the Labour Board. A complaint under s. 65 alleging that the union had breached the collective agreement was dismissed. The issue turned not on a good-faith compromise by the union but rather that it was a majority membership vote which had deprived the complainants of their seniority rights under their collective agreement.

In the Report of the Federal Task Force on Labour Relations (H. D. Woods, Chairman), there is a recommendation for a special onus of fair representation on the part of the union where two bargaining units are merged into a single unit (par. 498, p.152).

28 Shank v. The K.V.P. Company, [1966] 2 O.R. 847 (H.C.), where Mr. Justice Brooke held that a dispute concerning the company's right to schedule employees was a matter that was to be decided in accordance with the terms of the collective agreement. No action would lie at common law and the dispute would have to be settled by arbitration.

vision of the collective agreement. Although the results of both cases were identical, the role played by the bargaining agent in each was significantly different. In *Crossman*, the employee brought his common law action only after the union had refused to arbitrate the matter; they agreed with the employer that the employee had been properly discharged. Since his bargaining agent controlled the access to arbitration, the employee had exhausted his individual rights under the collective agreement. On the other hand, in *Miramichi Hospital*, the “exclusive” bargaining agent was given no opportunity to settle the grievance on the employee’s behalf. Instead, the Court granted the plaintiff-employee his common law remedy as a complete alternative to invoking the grievance machinery under the collective agreement.

It is suggested that the principal flaw in the judicial reasoning of these two cases lies in allowing an employee to rely upon the substantive terms of the collective agreement while ignoring the procedural terms. However, in *Miramichi Hospital*, Mr. Justice Ritchie stated that to interpret the statute as restricting a discharged employee to the sole remedy of having his dismissal processed as a grievance under the collective agreement was untenable. His fear was that “an employee who had been wrongfully dismissed would be without remedy unless his dismissal was taken up by the union and carried by it to arbitration”.

What Ritchie, J.A. failed to realize was that in such a case, the employee, in fact, does have a remedy. It is not, however, an action against the employer for wrongful dismissal but rather against his union for breach of its duty to fairly represent all employees. This doctrine was first accepted by a Canadian court in a recent British Columbia Supreme Court decision, *Fisher*

31 In *Crossman, supra*, note 29, Laskin, J. A. stated at p.273 of his oral judgment: “In my view, the judgment of this Court should be that on the production of a copy of the governing collective agreement to this Court, and on this Court being satisfied that discharge may be for cause or just cause only, there will be judgment for the plaintiff for damages for wrongful dismissal based on the right to have six months’ notice, which was the term of notice I found appropriate by the trial Judge and which, in this case, I agree is proper.”

32 In an American case, *United States v. Voges* 124 F.Supp.543, 544 (E.D.N.Y. 1954), the court stated the crucial question of law was whether an individual employee in his individual capacity could circumvent the union’s refusal to arbitrate his dispute with the company in the absence of any showing of wrong conduct on the part of the union. The court held that he could not.

33 However, had the grievance proceeded to arbitration under the collective agreement and a final determination of the discharge been made by the arbitrator, the employee, if dissatisfied with the result, could not then have sought a judicial remedy.

34 Compare with *Cone v. Union Oil Co.* 129 Ca.App.2d 558, 564, 277 P. 2d 464, 468, where the court stated “the use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations”.

35 Adell, *supra*, note 5, at p. 357.

36 R.S.N.B. 1952, c.124, s. 18(3) which states: “Every party to and every person bound by the agreement and every person on whose behalf the agreement was entered into shall comply with the provisions for final settlement contained in the agreement and give effect thereto.”
v. Pemberton. The grievance arose in Fisher when the plaintiff was discharged for breach of a company rule against entering the plant when not on duty. The employer only discovered this misdemeanour when informed of it by an officer of the local union of which the plaintiff, Fisher, was a member. Somewhat surprisingly, the trial judge, Mr. Justice MacDonald, held that this disclosure was not a breach of any duty by the union officer, Spencer, for, he stated:

"Whatever may have been in Spencer's mind, this was not an instance of the making of an accusation simpliciter to the Company against a fellow member of the union. Just as much, if not more involved, was the inquiry of Spencer as spokesman for the union as to a matter in which the union had a legitimate and considerable interest, namely, how Fisher came to be in the mill that evening."

(emphasis added). It is difficult to believe that this was a mere "inquiry" by Spencer when, similar to the discharged employees in the Collingwood Shipyard Case, Fisher was also a vocal member of a rival union which was seeking to oust the incumbent union. As such, he posed at least some threat to the existence of Spencer's union as the bargaining agent in this plant. Furthermore, in the handling of Fisher's grievance subsequent to his discharge, the learned trial judge found as a fact that "all the union men who appeared on the plaintiff's behalf were hostile to him" (with one minor exception) and "a defence of the plaintiff was never put up". This hostile manner of handling Fisher's grievance was held to be a transgression of the union's duty to fairly represent all employees, even though Spencer's "inquiry" which led to the discharge was not a breach of that duty.

Regardless of the approach taken by the court, whether by allowing the employee to proceed against his employer for wrongful dismissal or against his union for breach of its duty of fair representation, the discharged employee's only remedy is monetary, as the court does not have the power to reinstate. The elimination of an employee may be worth the small price of a judgment to the employer and union who, together, view the employee as a "trouble maker".

In the institutional framework of Canadian industrial relations which is replete with safeguards against unfair labour practices, it is surprising and unfortunate that there is no mechanism whereby an individual employee in the above circumstances can take his grievance to an arbitration board which has the power of reinstatement.

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37 Supra, note 2.
38 Id., at pp. 542-3.
39 Supra, note 21.
40 Supra, note 2, at p. 546.
41 Blumrosen in his article, "The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship" (1963) 61 Mich. L. Rev. 1435, 1497, states: "... damages against the union do not reflect the wrong done to the employee. It consists of a breach of contract by the employer as well as a breach of the duty of fair representation by the union".
(ii) Wages Owing

As with wrongful dismissal the court has stated that the grievance machinery in a collective agreement does not act as a bar to an employee's common law action for undisputed wages owing.\(^\text{42}\) However, if there is some dispute as to the exact amount owing, this question must first be referred to arbitration for an interpretation of the collective agreement;\(^\text{45}\) only then will the court enforce the award. A problem may arise where the issues are not quite that clearly demarcated.

In *Adcock v. Algoma Steel Ltd.*,\(^\text{44}\) the plaintiff-employees claimed money was owed to them under the terms of the collective agreement, but their rights as individual employees conflicted with a union decision. The facts were that during the negotiation of a collective agreement, a wild-cat strike occurred during which the plaintiffs reported for work at various times as requested by the company. The collective agreement provided for reporting allowance, payable by the company to the employee unless, in the words of Paragraph 5.08 ss(2),

> "the lack of work results from an incident which occurred not more than one hour before the employee was scheduled to begin work . . . ."

When the new collective agreement was eventually signed, the negotiating committee of the local union purported to waive the right of these employees to their reporting allowances during the strike. In dismissing a motion by the defendant company (for judgment dismissing the plaintiffs' action) under Rule 224, Mr. Justice Grant isolated the issue to be decided at trial:\(^\text{46}\)

> "The rather unique question as to whether an employee whose right to prove his claim in grievance proceedings under a collective agreement has been thwarted by an agreement between the union and the employer may resort to the Courts for assistance against the latter, has been raised in these proceedings."

It is this writer's opinion that the court is not the proper forum for an employee to contest a *bona fide* union-employer joint decision which adversely affects his interests. It lacks both the industrial relations expertise, and the remedy of reinstatement for discharge cases possessed by an arbitrator or the Labour Relations Board. This lack of expertise was evident in the *Fisher*\(^\text{47}\) case, when the learned trial judge, MacDonald J., discussed the issue of damages after finding that the union had breached its duty of fair representation. He stated:


\(^{43}\) *Close v. Globe and Mail*, [1967] 1 O.R. 235 (C.A.); also, in *Hamilton Street Railway v. Northcott*, [1967] S.C.R. 3, 5-6, Judson, J. stated: "The collective agreement is not concerned with non-payment of wages. These may be sued for in the ordinary courts. If, however, the right to be paid depends upon the interpretation of the collective agreement, this is within the exclusive jurisdiction of a board of arbitration appointed under the agreement . . . ."


\(^{45}\) The case is to be tried in the summer of 1970.

\(^{46}\) *Supra*, note 44 at p. 652.

\(^{47}\) *Supra*, note 2.
"... regardless of the representations which the union might have made, Fisher would not have been reinstated at any stage in the grievance procedure up to and including stage 4. His only hope was an arbitration award in his favour. But in my opinion the prospects of getting one were negligible."48 (emphasis added)

This decision may have been the correct one but it appears to have been arrived at without regard to any relevant arbitration jurisprudence. Had an arbitrator, in fact, heard this action, he may have varied the severity of the discipline from discharge to a lengthy suspension. This discretionary remedy is not one available to the courts. The court does not have the discretion to impose an intermediary penalty nor is it able to refer the matter to a body with that discretion unless all the parties so agree.49 Therefore, it would appear necessary to enact legislation in order to allow an employee in the position of Fisher access to the internal machinery of the collective agreement.

C Arbitration Proceedings

An arbitration board gets its mandate only from the parties to the collective agreement. Since there are very few (if any) collective agreements which make the individual employee a party to the agreement, a dissatisfied grievor would be precluded from carrying his own grievance to arbitration. Therefore, the issue of an individual's rights under the grievance machinery of a collective agreement has not been considered by an arbitration board in Ontario.

However, two50 recent judicial decisions have injected an element of due process into arbitration hearings. The Supreme Court of Canada in the Hoogendoorn case held that where an employee's status was being affected by the hearing, he was entitled to be represented in his own right as distinct from being represented by the union which was taking a position adverse to his interests. This decision recognized that where the interests of the union differ from the expectations of the individual employee, these expectations must be given some measure of protection.51 However, the decision is quite narrow in scope, for it only allows an employee the right to intervene in an arbitration proceeding which could adversely affect him; it does not give him the right to initiate an arbitration where union-employer joint action has already adversely affected him and is settled short of arbitration.

Suggested Alternatives:

If the individual employee is to be given some degree of control over his own grievance, there must be policy considerations justifying a departure from

48 Id, at p. 547.
49 See Beckett Case, supra, note 16.
51 Professor Arthurs disagrees with the notion of allowing an individual the right to intervene into the disposition of grievances for:
"The union's ability to function as a broker between divergent employee interests, and its authority to speak on behalf of the group, are both undermined."
the present system. A basic premise in deciding what the policy ought to be is the maintenance of the integrity of the collective bargaining process; that is, any change must be accomplished within the framework of the system as it presently exists. The various alternatives and policy considerations of this issue have been comprehensively dealt with by Cox, Summers and Blumrosen, three American professors. It will be valuable to examine their views in determining the best solution to this problem within a Canadian context.

Professor Cox's philosophy is based on the premise that the union should be given the same power to affect an individual employee in the administration of a collective agreement as it has in the negotiation of the agreement. For him the weight of any grievance is to be measured in terms of the group interest. A meritorious claim of an individual may have to yield to the collective needs of all the employees on whose behalf the union bargains. This right of the union to act in the best interests of the majority is only qualified to the extent that the union owes a duty of fair representation to all employees.

There are no ready made standards of fairness but the union's obligation is to act in "good faith" toward the employee. Clearly, the duty is violated whenever the union's handling of a grievance is influenced by union membership or activities, discrimination or favouritism. While admitting that this standard is often difficult to apply, Professor Cox states that where, for example, a sum is plainly due, there should be no power to waive or compromise the claim for one group of employees in return for a concession which is to benefit a larger number. Furthermore, there must be a recognition of the relevancy of accepted norms and the expectations of the individual employees derived from past practices in judging "fairness". Professor Cox describes the decision-making process of the union in terms which allow the union to act in its own subjective self-interest while maintaining a standard of objective fairness. In analyzing this delicate balance he writes:

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52 Cox's approach can be derived from the following articles:—
Cox, "The Duty of Fair Representation" (1957), 2 Vill.L.Rev. 151.

53 Hughes Tool Co. v. N.L.R.B. 147 F.2d 69 (5th Cir.1945). Also, United Steelworkers of America, Local 2853 v. Welland-Vale Manufacturing Co. Ltd., [1943] 3 D.L.R. 786, 790. (Ont. Sup.Ct., Labour Court). Mr. Justice Gillanders stated: "If it [the union] provides a committee to service the grievances of employees, their service should be open and available to non-union employees who may wish to avail themselves of it in the same way as Union employees".


In Canada legislation has been passed which prevents unions from discriminating against a person on the basis of his race, colour, national origin, or religion, in their membership practices.

Fair Employment Practices Acts are almost uniform throughout Canada. See: Stats. Can. 1952-53, c.19, s.4(3)(4); R.S.B.C. 1960, c.137, s.4; R.S.M. 1954, c.81, s.4(3)(4); Stats. N.B. 1956, c.9, s.3(3)(4), and Stats. N.S. 1955, c.5, s.3(3)(4); slight variations may be found in the Ontario Human Rights Code, Stats. Ont. 1961-62, c.93, s.43; and the Saskatchewan Fair Employment Practices Act, Stats. Sask. 1956, c.69, s.5.

55 This was the precise issue in the Adcock v. Algoma Steel Case, supra, note 44.
"Where the interests of several groups conflict, . . . or individuals' claims endanger group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside arbiter."**56**

The collective agreement is considered by Professor Cox to be the type of agreement which contemplates a day-to-day administration and a wide variety of adjustments through a grievance procedure controlled by the company and the union. The rights under this agreement should depend initially on the interests the parties intend to create, while the law comes in to play only to determine whether the interests thus created give standing to sue. In most agreements the individual employee is not given this requisite standing to sue; rather, his action is against the union for a breach of its duty of fair representation.

The Cox philosophy of subordinating individual advantage to the promotion of the group interest was adopted by the United States Supreme Court in Vaca v. Sipes.**57** The Court stated that the union had a duty of fair representation in the administration of the collective agreement. However, the Court held that this duty was not breached merely because the jury in the court of first instance found that an employee had a meritorious claim even though this claim was not advanced to arbitration by the union. Clearly, the ability of an employee to prove a breach of the duty of fair representation by his union appears to be as ephemeral as the ability of an employee to prove collusion between his employer and his union as a basis for reinstatement under s. 65.**58**

The needs and desires of the parties to a collective agreement are, admittedly, best served by vesting exclusive control over the grievance procedure in the union. It produces definite answers which do not return to haunt either of the parties in the form of an individual grievance. Yet, the institutional desire not to have a large back-log of grievances often leads to a wholesale exchange of unrelated grievances which may result in individual injustices.

For Professor Summers**59** the question is whether the union by not processing a meritorious grievance has the power thereby to sanction management's violations of provisions in the collective agreement which directly

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56 Cox, supra, note 52 (1956) 69 Harv.L.Rev. 601, 626-27.
57 Supra, note 3. For a thorough analysis of this case, see Lewis, "Fair Representation in Grievance Administration", [1967] Supreme Court Review 81.
58 For a contrary opinion see, Carr, "The Development of the Duty of Fair Representation in Ontario" (1968), 6 Osgoode Hall L.J. 281, 293.
59 Summers' approach can be derived from the following articles: "Report on Individual Grievances. A.B.A. Report" (1955), 30 NW.L.Rev. 143;
Summers, "Individual Rights in Collective Agreements: A Preliminary Analysis" (1960) 9 Buff.L.Rev. 239;
Also, see Laskin, "Collective Bargaining and Individual Rights" (1963) 6 Can. Bar. Journ. 278 which advocates a similar approach in Canada.
benefit the individual. In such a case, all the employee seeks is access to some neutral tribunal where, along with the union and management, he shall have an opportunity to be heard. In short, the individual should be given the same rights to the arbitration of his grievance as the contract grants to the union for its policy grievance. Professor Summers’ views are best expressed by this passage:

“One of the functions of collective bargaining is to replace vagrant discretion with governing rules. The individual by his ability to insist that those general rules be observed, gains an assurance of fair and equal treatment and a sense of dignity and individual worth. If the union, by ad hoc settlement, can set aside the rule and bar the aggrieved individual from access to any neutral tribunal, these values are denied.”

Professor Blumrosen takes an intermediate position between the above two philosophies. He recognizes the right of the union and employer to settle most of the grievances which arise out of the administration of a collective agreement. This would protect them from frivolous claims. On the other hand, he feels that an employee should have control over the claims which are basic to the individual employment relationship. Blumrosen refers to these claims as “critical job interests”. Any action which destroys the employee’s claim to gainful employment is critical: these include cases of discharge, seniority and claims for compensation for work already performed. The employee’s claim against the union would be for failure to process a meritorious claim against the employer in connection with a critical job interest. However, it would be a complete defence on the part of the union or the employer, or both, to show that the claim was not meritorious. This is a position intermediate to Cox and Summers. On the one hand it is more demanding of the union than the bare duty of fair representation suggested by Cox. Yet, on the other, it does not espouse the extreme position of Summers which would allow the individual employee free access to the arbitration procedure.

The remedy suggested by Blumrosen is that there would first be a judicial determination as to the existence of a meritorious claim with respect to a critical job interest. He feels that the Court should provide a level of protection for individuals within the structure of the collective agreement. If the employee successfully convinced the court of the merit in his claim, then the court would order the union and employer to process the grievance by way of an arbitration hearing as prescribed by the collective agreement. Thus, Blumrosen recognizes that the individual has expectations rooted in a completed collective agreement which gives him more rights than he has in the union’s negotiation of a contract.

The Canadian Task Force on Labour Relations recommended that legislation be enacted which would guarantee a duty of fair representation

61 Blumrosen’s philosophy can be derived from the following articles: Blumrosen, “Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy” (1959), 13 Rutgers L.Rev. 631: supra, note 41, especially pp. 1482-1501.
by the union in the handling of rights acquired under a collective agreement. The aggrieved employee would bring his complaint to a Public Review Board (or the Canada Labour Relations Board). Then, the burden would be on the union to establish that it considered the rights and interests of the individual, as well as acting in good faith and in the interests of the bargaining unit as a whole. No guidance was given by the Task Force as to the resolution of conflicts which might occur between the rights of the individual and the interests of the bargaining unit. Since the recommendation is a view similar to that being proposed by Professor Cox, it would seem to be tacitly implied that the conflict should be resolved in favour of the group interest.

If this is to be the method of protecting individual rights in the processing of grievances in Canada, perhaps legislation setting out this doctrine would now be superfluous. The only difference between the legislative proposal and the recent Fisher decision is the type of body making the adjudication. It could be argued that a Public Review Board dealing strictly with labour problems would have greater expertise and, therefore, a decided advantage over the Court in drawing a fine line between delicately balanced interests. However, since the American cases (upon which the Fisher decision was predicated) indicate that a breach of the duty of fair representation only occurs when the union commits an act of bad faith, this "fine line" would be, in reality, a wide gulf. Surely, a Public Review Board trained in deciding subtle infringements of labour legislation would not be necessary to discover such an overt breach.

It is suggested that the fallacy of the Task Force's recommendation is in not delineating the ultimate remedy which would be given to an aggrieved employee who successfully proved to any adjudicative body that he had a legitimate complaint. A monetary award against the union for breach of its duty in a discharge grievance is a hollow victory for the employee who may have been reinstated had there been no breach and the grievance taken to arbitration. What the employee seeks is a recognition and enforcement of the rights he professes to have under the collective agreement, not the remedy of damages which is so rarely used in labour relations. However, it would not be efficacious for either a Public Review Board or a court to enforce rights under a collective agreement when the employer is not part of the action. Therein lies the core of the problem.

Conclusion

If there is to be any protection of individual rights in the administration of a collective agreement, it should be accomplished, to the extent possible, within the framework of present industrial relations. In general, there should be a continuation of the principle which allows the parties to the collective agreement the right to administer it according to their own internal method of self-government. However, it is evident from cases such as Fisher and

63 Supra, note 2.
64 Id. Also See, supra, note 44.
Boivin\textsuperscript{66} that the parties' resolution of a grievance may go far beyond any equitable or just result. The Task Force was partially correct in its recommendation that an employee should have a right to appeal a union-management joint settlement of his grievance to a neutral tribunal where he could bring an action against the union for breach of its duty of fair representation. However, this recommendation is both too broad and too narrow. From this recommendation it appears that an aggrieved employee has the right to complain about any type of grievance, regardless of how trivial or frivolous. It is suggested that limitations be placed upon this right. Only complaints which directly concern an employee's right to income under the terms of the collective agreement should be allowed to disturb the decision of the parties. This would mean adopting Blumrosen's recommendation of protecting "critical job interests";\textsuperscript{66} that is, cases of discharge or suspensions of greater than one month's duration, seniority claims which cause a lay-off and claims of compensation for work already completed. This is not a solution unknown to Canadian industrial relations, for the \textit{Public Service Staff Relations Act}\textsuperscript{67} presently allows an individual employee in the public sector the right to refer the above matters (except seniority) to arbitration.

On the other hand, the Task Force recommendation is too narrow in that it imposes a duty of mere fair representation upon the union in the handling of grievances. The judicial interpretations of this duty, both in Canada and the United States, are so restrictive as to protect the employee in only the most blatant of breaches. It is suggested that good-faith compromises and wholesale "trading-off" of grievances by the union not be allowed in cases of critical-job interests. The sole criterion should be the \textit{meritoriousness} of the grievance. The duty of the union, then, would be one of processing a meritorious claim against the employer in connection with a critical job interest.

The forum in which the employee could bring his claim against his union could be, as the Task Force recommended, a Public Review Board. Any legislation which is enacted should empower this Board to order an arbitration hearing where it is found that the union has breached its duty of processing a "meritorious claim in a critical job interest" grievance. This would have the effect of placing the employee's grievance before the ultimate forum of dispute resolution as specified by the collective agreement. There would be no right of appeal from the Public Review Board's decision.

There are no clear-cut indicia as to what is a "meritorious" grievance, just as there are no ready-made standards of fairness for deciding where there has been a breach of the duty of fair representation. Therefore, the Public Review Board should be allowed to develop a policy of what constitutes "meritoriousness". However, the standard should not be so high as to allow only claims which, on their face, appear to have a 100\% chance of success

\textsuperscript{66} \textit{Supra}, note 19.
\textsuperscript{66} \textit{Supra}, note 61.
\textsuperscript{67} \textit{Supra}, note 10.
at arbitration. This would place an undue burden on the aggrieved employee since not all grievances which are taken to arbitration by the union itself are assured a decision in their favour.

A problem may arise with the appointment of an arbitrator once an arbitration has been ordered. If the collective agreement calls for arbitrations to be decided by one of an established panel of arbitrators, he may have a bias toward the union-management decision. Whether or not these are terms of the collective agreement, it is suggested that the employee and his counsel together with the company select an arbitrator. Where they are unable to agree, the Public Review Board will select one for them. It is further suggested that the arbitrator sit as a sole umpire rather than as chairman of a tripartite board.

It is suggested that the costs of the arbitration proceeding be borne by the parties to the collective agreement in their usual manner. This would merely put the company in the same position it would have been in had the union not breached its duty to process "meritorious critical job interest" grievances. The union, of course, would be required to pay the costs of counsel for the employee. The above would only result after a successful application by the employee to the Public Review Board where the costs of the employee again would be borne by the bargaining agent. However, if the application to the Public Review Board was unsuccessful, the employee would bear his own expenses only. It is this writer's opinion that the threat of an unsuccessful application to the Public Review Board and the attendant costs will act as a deterrent and screening device to prevent frivolous, unwarranted applications.

If the individual employee is to be given this new form of protection, procedural safeguards also must be enacted in order to prevent undue prejudice to an employer. All collective agreements contain specified time limits which must be complied with as part of the grievance procedure. In most cases where an employee will lodge a complaint, these time limits will have expired. It is submitted that the parties who created these time limits should not be allowed to use them as a bar to a complaint against their joint action by an individual employee. It is suggested that from the time the employee is made aware (or should have been aware) that his "critical job interest" grievance will not be carried any further by the union, he be given a maximum of seven days in which to notify the company and the union of his desire to carry his own grievance. This should be sufficient time for the aggrieved employee to seek legal advice and arrive at a decision as to whether he wants to proceed with his grievance.

It is further suggested that the Company, at this time, be allowed the option of proceeding under the remaining stage(s) of the internal grievance procedure. This would be essential in order not to prejudice a company which
had been willing to continue with the grievance procedure when the union itself decided not to pursue the grievance. However, if either the only stage of the grievance procedure left is arbitration, or the grievance eventually proceeds to arbitration, the issue is to be decided by a sole umpire and his method of selection should be the same as if the individual employee had proceeded by way of application to the Public Review Board.

I would conclude that the above recommended changes are necessary if the important aspects of an individual's job security are to be maintained within the structure of present collective bargaining. These recommendations have attempted to work within the policy of promoting the settlement of disputes through the grievance and arbitration channels established by the employer and the bargaining agent. The minor monetary and institutional costs which may result from enacting legislation to encompass these recommendations are far outweighed by the benefit to an employee of the knowledge that there is an appeal procedure from a union-management decision which adversely affects his "meritorious critical job interest" grievance.