"Are all Workplace Rights Created Equal, and Does *Weber* Shed Light on the Question?"

> … What if we take the justice in that phrase [access to justice] not as the vindication of rights and entitlements set out in the existing law and its best institutional practice, not as stable and determinate, but as itself a fluid, moving, and labile thing. I would argue that change in this zone of unvindicated and unremedied troubles is the hidden but truly dynamic dimension of access to justice.
>
> Let me put this another way: justice is the negation or correction of injustice. But there is not a fixed sum of injustice that is diminished by every achievement of justice. The sphere of perceived injustice expands dynamically with the growth of human knowledge, with advances in technical feasibility, and with rising expectations of amenity and safety. …
>
> … in a world of expanding capabilities and rising expectations, where claims of injustice proliferate, we cannot avoid the necessity of rationing justice. Justice is not free. It uses up resources – money, organization, and not least the limited supply of attention. And every expenditure of these involves corresponding opportunity costs.[1]

Introduction

Access to justice has a wide range of continually evolving meanings and approaches. Many of these meanings and approaches are directly connected with law – they include access to the substantive and procedural benefits conferred by law, access to effective legal enforcement institutions and processes, access to law-making institutions and processes, and access to legal services and legal representation. Access to justice can also include more social conceptions of justice, for example, access to employment; access to income security; access to housing; access to food. These social conceptions of justice may also involve or implicate law when individuals and groups seek to further these social justice goals through legislative change or through litigation. And access to justice is concerned not only with forms and structures, but also with how these forms and structures function in practice.

[1] Marc Galanter, "Access to Justice as a Moving Frontier" in Julia H. Bass, W.A. Bogart, and Frederick H. Zemans, *Access to Justice for a New Century: The Way Forward* (Toronto, Law Society of Upper Canada, 2005) 147 at 153-154, 155.

My goal in this paper is to explore the two key concerns generated by the Supreme Court of Canada's decision in *Weber v. Ontario* through an access to justice lens, with attention both to formal and concrete dimensions. The first key concern is described as the negative impact on the ability of individual, unionized employees to assert and pursue common law and *Charter* claims. This concern has been framed in access to justice terms, as a concern that the decision gives rise to a denial of access to justice for unionized employees because they are disadvantaged relative to non-unionized employees in relation to pursuing their individual legal rights.[2] In my view, the heart of this concern is the employee who does not receive union support for a grievance and cannot pursue a civil action against their employer. The second key concern is the negative impact on unions of having to assume responsibility for addressing common law, *Charter* and statute-based claims that connect with collective agreement issues. While this concern tends not to be characterized as an access to justice issue, it can certainly be analysed in those terms. In response to this concern, the question I explore is whether these additional responsibilities might create opportunities as well as burdens for unions, and whether these opportunities might outweigh the burdens.

My examination of these questions is informed by an overriding interest in the social value of unions, unionization and collective bargaining, and incorporating this social value in the analysis of issues raised by *Weber*. It is attentive to tensions between public and private dimensions of law and justice, and also reflects on the potential need for more empirical evidence about the experiences of unions and employees. In the first part of the paper, I set out my assumptions about the general social value of unions, unionization and collective bargaining. In the second, third and fourth parts, I explore the question of individual rights in relation to,

[2] Ray Brown and Brian Etherington, "*Weber v Ontario Hydro*: A Denial of Access to Justice for the Organized Employee" (1996) 4 CLELJ 183 [Brown & Etherington, "Denial of Access to Justice"].

respectively, the collective agreement, common law and the *Charter*, and statutory employment-related benefits and protections. In the fifth part, I consider the *Weber* implications for unions, looking at the question of burdens and potential opportunities if the collective agreement is the exclusive vehicle for enforcing all legal issues that connect with a collective agreement dispute. The paper concludes with some reflections on the tension between individual and collective interests inherent in the collective bargaining model and its implications for consideration of different approaches to establishing and enforcing workplace benefits and protections.

1. Unions, Unionization and Collective Bargaining further Access to Justice

My framework for analysis is defined by the view that unions, unionization and collective bargaining are social and legal vehicles that further access to justice for workers. This does not mean that unions are perfect, that individual employee needs and interests are always properly addressed, or that the duty of fair representation is appropriately calibrated to govern the union's control over the enforcement of collective agreement provisions. However, I believe that the role and future of unions is a factor that should be included in discussions about enforcement of workplace issues. Unions, unionization and collective bargaining are part of our current social context, but I do not think we can or should take them, and their beneficial impacts on workers, for granted. The overall rate of unionization in Canada declined by about 8% during the 1980s and 1990s, from 38% to 30%;[3] in 2014, the rate of unionization in Ontario was 27%.[4] It is said that the rate of unionization has remained relatively steady during the 2000s, however further decline is always possible. We may also ask whether there is potential for achieving higher rates

[3] Diane Galarneau and Thao Sohn, "Long Term Trends in Unionization" (Ottawa: Ministry of Industry, 2013) at 2; available on-line at http://www.statcan.gc.ca/pub/75-006-x/2013001/article/11878-eng.pdf.
[4] Published on the website of the Ontario Ministry of Labour, relying on Statistics Canada Table 282-0778: http://www.labour.gov.on.ca/english/lr/faqs/lr_faq1.php.

of unionization. If we want unions, unionization and collective bargaining to be part of the future, I think their role should be included in discussions about differing options for establishing and enforcing workplace benefits and protections.

I also want to suggest that unions, unionization and collective bargaining have both private and public dimensions. The contracts negotiated in collective bargaining relationships are considered private law because they are negotiated by the parties to those relationships and they apply directly only to the parties to those relationships.[5] However, many grievance arbitration decisions are publicly available, and full collective agreements are also sometimes publicly available.[6] If collective agreements and the arbitration decisions made under collective agreements are significant only to the parties to those agreements, there would be no purpose in making them available to the others. More significantly, while differences in the language and practice of collective agreements are always significant, there has developed a body of arbitral jurisprudence which, like the general common law, has a public dimension in its potential for application beyond the specific dispute and the specific collective agreement that results in a specific decision. This body of arbitral jurisprudence is arguably neither completely "private" nor completely "public", but rather a private-public combination or hybrid.

I suggest, then, that unions, unionization and collective bargaining have social benefits that are both private and public in nature, and that these benefits further access to justice for workers. For these reasons, I further suggest that our discussions about collective agreement administration and the interaction between collective agreement provisions and related common

[5] For a very helpful and interesting discussion of the historical roots of the "pluralist" approach to the collective bargaining relationship and collective agreement enforcement see Elizabeth Shilton, "Labour Arbitration and Public Rights: Would a Public Tribunal Model Work Better?" (forthcoming Queen's LJ) [Shilton, "Would a Public Tribunal Model Work Better?"].

[6] In Ontario, for example, the Ministry of Labour maintains a collective agreement library that is open to the public. Some unions also publish their collective agreements on their websites, e.g. the Ontario Public Service Employees Union.

law, *Charter* and statutory legal provisions should consider not only the potential impact on unions today and in the short-term, but also the potential impact on the future of unions, unionization and collective bargaining. In the remainder of this section of the paper, I briefly review the range of access to justice benefits that can flow from unions, unionization and collective bargaining when these institutions are functioning well.

a. Collective Agreement Benefits and Enforcement

Collective action is the defining quality of unions and unionization. The underlying premise is that collective action enables employees to increase their bargaining power and engage in negotiations for terms and conditions of employment on a more equal footing with the employer and thus achieve better terms and conditions of employment than can individual employees negotiating for themselves with the employer.[7] On the concrete benefits front, unionized employees generally enjoy better working conditions, better salaries, and greater job security than non-unionized employees in the same or similar sectors. While some employers may offer working conditions and salaries that are competitive with unionized employers in an effort to make it more difficult for a union to organize their workplace, these employers will generally not offer job security that is comparable to the job security generally provided under collective agreements.

Once these concrete benefits have been achieved through the collective bargaining process, unions are typically responsible for enforcing them through the collective agreement's

[7] This premise accepts that state-regulated collective bargaining can achieve beneficial outcomes for workers. There are more cynical points of view on state-regulated collective bargaining, which might argue that it produces few or no real beneficial impacts for workers. There are also other perspectives on the policy goals underpinning collective bargaining, which do not focus on the benefits to workers but rather on broader social and institutional goals, such as labour peace.

grievance and arbitration procedure.[8] Here again unionized employees are better positioned than non-unionized employees because they have access to the grievance arbitration enforcement process and to union representation throughout process. It is true that this union representation is not a simple advocacy relationship, because the union typically has carriage of the grievance and therefore significant control over whether a grievance will be settled and how a grievance will be presented if it goes forward to arbitration. It is also true that unions do not support every grievance, and they certainly do not take every grievance to arbitration. However, unless a union completely fails to fulfill its collective agreement administration responsibilities, unionized employees will generally have more ability to enforce their workplace benefits and protections than do non-unionized employees. Non-unionized employees bear the entire burden of enforcing the contractual agreement with their employer; more often than not they cannot afford legal services and will therefore have no representation if they choose to pursue legal action.

Collective agreement grievance procedures typically involve both informal and formal dispute resolution processes. The use of voluntary dispute resolution processes under collective agreements long pre-dated the widespread popularity of alternative dispute resolution as an access to justice strategy. Voluntary resolution processes are now a hallmark of access to justice, in part because they provide opportunities for the parties to engage directly in the resolution of disputes and to have more control over the outcome of disputes.

b. Access to Resources and Support for Other Employment-Related Issues

The collectivity that is formed through unionization, and resourced through union dues, also creates the potential for unions to assist workers with problems that are not covered by the collective agreement but that may intersect with the workplace. General examples of these types

[8] This enforcement role, and its regulation through the statutory duty of fair representation, is discussed in the next section of the paper.

of problems include employment insurance, long-term disability (where these problems are not subject to the grievance and arbitration procedure), and workplace health and safety. Other types of employment-related problems may be more specific to particular occupations. In professional occupations, such as health care professionals and teachers for example, employment and employability are subject to professional regulation as well as to employer decisions. Criminal and quasi-criminal law problems may also have an impact on employment and employability.

The union's conduct in providing such support and resources in these contexts is outside the scope of its legal obligations as collective bargaining agent and, therefore, not subject even to the minimal regulation provided by the statutory of duty of fair representation. However, its conduct is always subject to governance by the membership under the union's constitution.

c. Resources for Social and Legislative Changes

Unions also facilitate access to justice beyond the collective bargaining relationship, through their participation more broadly in activities addressed to social and political change. They seek to improve the lives of workers in the workplace and in other areas of society by engaging in activities directed to improving legislation, public enforcement processes, and government programs. Although the impact and benefits of these activities may extend beyond the bargaining unit, Canadian law has recognized these activities as a legitimate supplementary use of union dues:

> The integrity and status of unions as democracies would be jeopardized if the government's policy was, in effect, that unions can spend their funds as they choose according to majority vote provided the majority chooses to make expenditures the government thinks are in the interest of the union's membership. It is, therefore, for the union itself to decide, by majority vote, which causes or organizations it will support in the interests of favourably influencing the political, social and economic environment in which particular instances of collective bargaining and labour-management dispute resolution will take place. The old slogan that self-government

> entails the right to be wrong may be a good way of summing up the government's objective of fostering genuine and meaningful democracy in the workplace.[9]

Thus, unions and unionization engage in a wide range of access to justice activities both within and outside the collective bargaining relationship. This is the broad framework within which I now turn to examine the key issues raised by *Weber v. Ontario Hydro*.

2. Individual Rights in the Context of Collective Agreements

The collective action that is the defining feature of unions and unionization produces a unique legal construct, within which there are multiple social and legal relations. The union and the employer are the parties to the collective bargaining relationship and to the collective agreements that are negotiated within this relationship. The union is the bargaining agent for all employees in the bargaining unit; the employer has an employment relationship with all employees in the bargaining unit. The employment relationship between the employer and the employees is regulated by the collective agreement and any additional statutory obligations. The employer is not permitted to negotiate terms and conditions of employment directly with any individual employee or any groups of employees, and individual employees or groups of employees are likewise not permitted to negotiate terms and conditions of employment with the employer. The employees whose employment relationship and work is regulated by the collective agreement are not parties to this agreement but are bound by the agreement.

Many of the bargaining unit employees will be members of the union as well as members of the bargaining unit; however, unless union membership can be required as a condition of employment, a union will be the bargaining agent for at least some employees who do not become union members. In its representational capacity, the union has a statutory duty of fair

[9] *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 266, *per* La Forest J.

representation to all employees in the bargaining unit, including any employees who are not members of the union. The union also has a legal relationship with the employees who take out membership in the union; this legal relationship is typically governed either by the common law principles that apply to voluntary associations or by non-profit corporate law principles if the union is incorporated as a non-profit corporation.

What do individual employee rights under the collective agreement mean within this context? And is there a difference between what individual employee rights might mean under a collective agreement and what individual rights might mean under the common law, the *Charter* or legislation? I am cautious about the utility and the effects of rights discourse, in part because this discourse characterizes rights as "things" or "possessions", which people "have" or "own". This property-like characterization also suggests that being a "rights holder" is a passive state or status, which is by itself sufficient to produce results. I am, however, attracted to Anthony Woodiwiss's social relations formulation, that "…the term 'rights' refers to a legally enforceable set of expectations as to how others … should behave …".[10] This formulation emphasizes that rights are relational and that they are dynamic. They are relational because their concrete effect is determined by how people treat each other. They are dynamic because they do not implement themselves and require action through claims and responses to these claims. Thus, legal rights have social impact only if there are corresponding responsibilities and effective methods to ensure that these corresponding responsibilities are fulfilled. The articulation of expectations, whether by way of contract or common law or legislation, is an essential first step. But if those expectations are not fulfilled, and if there is no way of requiring them to be fulfilled, they have little or no concrete meaning for workers.

[10] Anthony Woodiwiss, *Human Rights* (London and New York: Routledge, 2005) at xi.

At a fundamental level, the needs and interests of the collective of employees in the bargaining unit are the raison d'étre for the union. Without individual employees coming together and choosing to be collectively represented by a union, there would be no union. And although the union is the party to the collective agreement, the terms and conditions of the collective agreement are primarily for the benefit of the employees. In this sense, it is reasonable to characterize collective agreement benefits as individual employee rights. This perspective underpins Bernie Adell's argument that individual employees should be able to pursue grievances on their own if the union will not support the employee:

> … whenever the law gives a substantive right to someone, as it does to an individual employee to enjoy the fruits of collective bargaining as contained in a collective agreement, it ought (in the absence of compelling reasons to the contrary) to provide a procedural means of enforcing that substantive right.[11]

In principle, a collective agreement can authorize individual employees to make their own decisions about whether to file a grievance, whether to accept a resolution during the grievance procedure, and whether to take a grievance to arbitration. In practice, however, although employees may be able to file grievances on their own under some collective agreements, collective agreements usually give the union the exclusive authority to decide whether to refer a grievance to arbitration and thus, inferentially, whether to resolve a grievance informally.[12] The union's conduct in exercising this exclusive authority is publicly governed by a statutory duty of fair representation, and privately by the membership and the union constitution. It is generally

[11] Bernard Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation", (1986) 11 Queen's LJ 251 at 255 (Adell, "Collective Agreements and Individual Rights"). Bora Laskin made a similar argument some years earlier in "Collective Bargaining and Individual Rights", (1962) 6 Canadian Bar Journal 278 at 287: "If collective bargaining is to be viewed as helping to fulfill an employee's claim to decent working conditions, then he should be given access to the machinery by which they may be vindicated if his bargaining agent chooses to refuse its support." [Laskin, "Collective Bargaining and Individual Rights".]
[12] Shilton, "Would a Public Tribunal Model Work Better?"

agreed that the duty of fair representation, as it has been interpreted and applied, sets a fairly low bar for unions, and union's decisions are rarely overturned by labour relations boards.

At the same time, since the benefits and protections that unions achieve in collective agreements are often, if not usually, better than those that employees would be able to negotiate on their own, it may be reasonable to suggest that employees have individual rights under collective agreements only by virtue of the collectivity that enables the achievement of those rights. This collective perspective does not diminish the fact that the benefits are ultimately intended for individual employees. It might mean, however, that there is a collective interest as well as an individual interest at stake in situations where there are different opinions about what the collective agreement provisions mean in concrete situations, or how they should be applied in concrete situations. There is also, of course, a collective interest in decisions about the allocation and expenditure of union resources on collective agreement enforcement. As Elizabeth Shilton discusses, this perspective on the relationship between individual and collective interests under collective agreements was an important element of the justification for unions having exclusive control over collective agreement administration and enforcement.[13]

I suggest that collective agreement benefits and protections are both individual and collective, in the ways described above. On the question of union control over enforcement and administration of collective agreement provisions, I understand the concerns Bernie Adell raised about this role – to which he attached the somewhat negative "gatekeeper" label. I also think it is reasonable for Adell to speculate that "… no union which does a reasonably conscientious and competent job of screening grievances should have much fear that its rejects would be warmly received by arbitrators."[14] On the other hand, I suggest that unions are not the only gatekeepers,

[13] *Ibid.*
[14] Adell, "Collective Agreements and Individual Rights" at 257.

and that other gatekeepers would appear if unions were to lose their gatekeeping role – gatekeepers such as access to information, access to advice, and access to support and representation. I also wonder whether enabling individual employees to pursue grievances on their own could, at least in some situations, have a negative impact on how a union carries out its enforcement role, by an creating incentive the for union to shift on to employees some of the responsibility it would otherwise have assumed. It may be useful to investigate whether empirical research could assess the potential impacts of enabling individual employees to pursue grievances where they cannot obtain union support and perhaps, also, where they do not agree with how the union is handling their grievance.

3. Common Law and *Charter* Claims in the Context of Collective Agreement Enforcement

> Legal analysis tends to proceed from the framing of questions which give rise to the creation of legal categories in pursuit of answers to these questions. In the process, the framing of questions is often given scant attention, and legal categories are taken for granted. Legal analysts often forget that the answer they obtain may depend a great deal on how the question is asked. It is an all too familiar habit to separate legal issues into discrete categories, ignoring the possibility of connection.[15]

The question that arises directly from *Weber v. Ontario Hydro* is as follows: If an employee has a workplace problem that can be addressed under the collective agreement but also raises common law and *Charter* claims, is that employee denied access to justice if they cannot bring a civil action against their employer instead of (or in addition to?) having the union pursue a grievance? On the face of the record, this appears to have been the factual context of the *Weber* case. A different access to justice question arises in relation to an employee who wishes

[15] Dianne Pothier, "Developments in Employment Law: The 1994-95 Term" (1996) 7 Sup. Ct. Law Rev. (2d) 293 at 293. *Weber v. Ontario Hydro* and *New Brunswick v. O'Leary* are two of the cases Pothier discusses in this piece.

to pursue a civil action against the employer because the union will not support a grievance. I will begin with the first question, and then consider the second question.

Common law and *Charter* claims were the two categories of individual rights at issue in *Weber*. The common law claims were tort claims alleging trespass, nuisance, deceit, and invasion of privacy; the *Charter* claims alleged violations of s. 7 and s. 8 rights. All of these claims related to Ontario Hydro's use of a private investigator to surveil Weber while he was on sick leave and receiving benefits under the employer's sick-leave plan. The Union filed three grievances relating to Ontario Hydro's surveillance, seeking the following remedies: an undertaking that the surveillance practice would be discontinued; an undertaking that absences from work would be monitored by Health Services as provided in the collective agreement; an order requiring Ontario Hydro pay damages to Weber, his family and his family for mental anguish and suffering; a rescission of the suspension with compensation; and full compensation for any damages caused by management's conduct. Several months after the grievances were filed, Weber commenced a civil action seeking damages in tort and under the *Charter* for invasion of privacy, a declaration of *Charter* infringement, and a permanent injunction prohibiting continued surveillance.

After the grievances were referred to arbitration, Ontario Hydro brought a motion to strike out Weber's statement of claim on the grounds that the civil action related to employer conduct under a collective agreement and Weber was bound by the collective agreement enforcement process. The court decisions do not record whether the Union provided Weber with legal resources to initiate his civil action; however, on the face of the record it appears that Union counsel represented Weber on the motion to strike his civil action and in the subsequent appeals from this motion. After Ontario Hydro brought its motion to strike the civil action, the Union

sought to adjourn the arbitration hearing pending the outcome of the employer's motion, but the arbitrator denied the Union's request. The grievances were ultimately settled after at least 12 days of hearing, at some point between the judge's decision on the motion to strike and the hearing before the Ontario Court of Appeal. It is impossible to assess the quality of the settlement because the public record does not include any information about its content. However, it does seem fair to say that the Union expended significant resources pursuing remedies for Weber. In this factual context, it is unlikely that Weber could have pursued his civil action even if the Supreme Court of Canada had adopted a concurrent or overlapping jurisdiction model instead of an exclusive jurisdiction model. It seems more likely that Ontario Hydro could have had the civil action dismissed on the ground of *res judicata*.

The Supreme Court of Canada's rejected concurrent or overlapping jurisdiction as alternatives to exclusive jurisdiction for arbitration based on two points of principle: (1) that disputes should be approached holistically and not carved into separate legal categories leading to separate enforcement processes, and (2) that as a matter of jurisprudence and policy, labour arbitration is the method for enforcing disputes arising under the collective agreement. The second principle has historically been non-contentious, where the choice is between labour arbitration and common law courts, and apart from questions about whether the model adequately protects the interests of individual employees.[16] It is the first principle that is arguably more controversial. An integrative approach to legal claims may require adjudicative bodies to deal with claims that are less familiar to them and that they believe are not suited to their adjudicative forum. Thus, for example, Brian Etherington prefers an "anti-Weber presumption", reflecting a view that collective agreements are contracts that "do not regulate

[16] I say historically, because questions are now being raised about whether the labour arbitration model continues to be the optimal model. See Shilton, "Would a Public Tribunal Model Work Better?"

every aspect of life at the workplace".[17] An "anti-Weber presumption" does not easily draw connections between collective agreement protections and other legal claims, and favours a presumption that common law claims are excluded from the collective agreement unless the parties expressly include them.[18]

The contrary position, towards which I lean, is that Weber's tort and *Charter* claims were not simply individual claims but claims that had a collective dimension as well, in the same way that collective agreement benefits and protections have both individual and collective dimensions. The union and the bargaining unit had an interest in how the employer managed the sick leave plan, and an interest in knowing whether employer surveillance was not only a violation of the collective agreement but also a violation of tort law and *Charter* law. If an arbitrator ruled that the employer's conduct violated tort and *Charter* law as well as the collective agreement, this ruling would arguably underscore for the bargaining unit the extent of the employer's wrongful conduct. Such a ruling would also make it possible for other bargaining unit employees to seek tort and *Charter* damages if they were subjected to similar conduct in the future. This analysis would entail a liberal approach to making connections between a workplace problem and the

[17] "*OPSEU v. Seneca College*: Deference as a Two-Edged Sword – A Missed Opportunity to Address the "Weber Gap" (2006-7) 13 CLELJ 301 at para. 3 [Etherington, "'Weber Gap'"]. Etherington attributes the "anti-Weber presumption" to Arbitrator Pamela Picher's decision in *Seneca College v. Ontario Public Service Employees Union* (2001), 102 L.A.C. (4th) 298 at paras. 40-42 [*OPSEU v. Seneca College*, Picher]; upheld (2006) 80 O.R. (3d) 1 (CA), rev'g 73 O.R. (3d) 185 (Div Ct).

[18] Arbitrator Picher also expressed concerns about the negative impact on the collective bargaining relationship of using the collective agreement enforcement process to address tort claims, because they often involve emotionally-charged, interpersonal conflicts - *ibid.* at paras. 43-46.. However, this concern does not arise only in relation to conflicts that might involve tort claims. Workplace harassment claims, whether sexual harassment or other forms of harassment, for example, are also often emotionally charged but not excluded from collective agreement enforcement for this reason. In my view, the focus on legal categories, and the effort to distinguish privately-negotiated contractual provisions from general common law, is at the heart of the anti-Weber presumption analysis. I am curious about whether unions would be open to exploring the potential for more restorative justice type approaches to workplace issues that involve conflicts among bargaining unit members.

collective agreement, at least where the adjudicative body being asked to make the connection is a labour arbitrator and not a court.[19]

I also question whether access to justice for unionized employees would in fact have been better served if the Supreme Court of Canada had adopted a model of concurrent or overlapping jurisdiction. I think it is most likely that unionized employees would have had to make a choice between pursuing a grievance and pursuing a civil action, in the same way that unionized employees in Ontario and British Columbia whose collective agreement issue has a human rights dimension generally have to make a choice between pursuing a grievance and pursuing a human rights application,[20] with the attendant risks of making the "wrong choice" and being left with no forum in which to advance their claim.[21] Would that have been a better result for unionized employees? I am not sure it would have been. In particular, I wonder whether such a result could have created an incentive for unions to encourage employees with possible grounds for a civil claim against the employer to pursue a civil action on their own, instead of pursuing a grievance. If that were the consequence, I suggest it is one that would generally not be in the best interests of either individual employees or the bargaining unit as whole.

Two outstanding concerns remain. The first concern is whether an employee is denied access to justice where their union supports a grievance but the employee does not like how the union processes the grievance, for example, because the union wants to impose a settlement the employee does not like or wants to present the case at arbitration in a way the employee does not

[19] Etherington expresses concern about cases where courts have struck out civil claims "in the face of a seemingly tenuous link between the claim and a collective agreement provision". "'Weber Gap'" at 19. I am not opposed to arbitrators finding links with collective agreement that may seem tenuous to them, since the drawing of links is always open to judgment and always reflects underlying values – in this instance, the value of access to workplace justice through collective agreement enforcement.
[20] Pickel, "Perspectives from a Statutory Tribunal".
[21] See also Elizabeth Shilton, "Choice, but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2013), 38 Queen's LJ 461 at paras. 51-61.

like. The second concern is the situation of the individual employee whose union will not take a grievance forward at all and who is also prevented from bringing a civil action because a court decides that their dispute is covered by the collective agreement. Both concerns are really about exclusive union control more than about exclusive arbitral jurisdiction over common law and *Charter* claims. This suggests that perhaps the collective agreement enforcement model is the more appropriate question on which to focus.

I remain troubled by the fact that exclusive collective agreement jurisdiction leaves no room for alternative options in appropriate circumstances. It is not clear, however, whether there is a way to achieve concurrent jurisdiction with real choice, without running into the policy imperatives against duplicative proceedings and case splitting that place employees at risk of losing all opportunity to have their claims addressed. And if it is not possible to achieve concurrent jurisdiction with real choice, does this have implications for the interaction between collective agreements and statutory rights?

4. Statutory Rights and Enforcement

The question of access to enforcement processes for statutory rights can raise similar access to justice concerns for unionized employees.[22] This question also raises issues about the distribution of public resources for enforcement and the ability of both unions and unionized employees to have access to these public resources. A union can support an employee's claim at a statutory tribunal at a lower cost because the union does not have to pay its share of the cost of the arbitrator or arbitration board. As a matter of principle, therefore, it is wrong for legislatures to preclude unions and unionized employees from accessing public enforcement resources, as

[22] See Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000-2001) 26 Queen's LJ 43.

has been done in Ontario and British Columbia in relation to employment standards legislation. Again, however, there may be a tension between arguments of principle and some of the realities of practice.

The earlier analysis of common law and *Charter* rights having collective as well as individual implications in the context of a collective agreement applies similarly to statutory rights in the context of a collective agreement. Employment-related legislation may in in fact confer benefits and protections on employees as individuals; but how these statutory provisions apply to a collective agreement, or to a workplace situation governed by a collective agreement, will often be significant for the bargaining unit as well as for the individual employee. When a unionized employee pursues a statutory benefit through a statutory enforcement process, they may take a position that has potentially beneficial implications for others in the bargaining unit or they may take a position that has potentially negative implication for others in the bargaining unit. In situations where an individual employee wishes to advance a position that is adverse in interest to the bargaining unit, they may well find themselves facing the union as an intervenor in their individual proceeding. This would be appropriate; this also suggests that unionized employees may simply never just be individual with individual rights. The union will always be in the background, if not the foreground, able to exercise what Bora Laskin described as "stand by rights".[23] It is beyond the scope of this discussion to canvass the wide range of statutory rights that can intersect with collective agreements. I focus on statutory human rights because this is a central issue, with the caveat that different analyses may apply to different statutory rights.

In my view, there is no question that unionized employees have had significantly greater access to justice for human rights issues under their collective agreements than either they or

[23] Laskin, "Collective Agreements and Individual Rights" at 291.

non-unionized employees had with the human rights commission statutory enforcement process. Unions have advanced a wide range of human rights claims under collective agreements, and a significant proportion of human rights jurisprudence developed through grievance arbitration.[24] The question is now more complicated in Ontario and British Columbia, where any employee can now file a human rights claim with a human rights tribunal. The current view is that statutory human rights tribunals and labour arbitrators have concurrent jurisdiction over human rights issues. However, as a matter of process the statutory tribunals retain discretion to defer their process to grievance arbitration. The tribunals also have statutory authority to dismiss an application if its substance has been appropriately dealt with in another proceeding.[25]

At this juncture, it seems most relevant to examine how unions and unionized employees are navigating the in-principle benefit of the concurrent jurisdiction model, which is to preserve the option for individual employees to take claims to the statutory tribunal, on their own or with the support of their union. In this regard, it will be particularly interesting to examine the results of empirical research on arbitrating human rights issues, to learn what concrete outcomes are being achieved for unionized employees at arbitration.[26]

5. Can Weber Create Benefits as well as Burdens for Unions?

Weber v. Ontario Hydro raised two key concerns from the union institutional perspective. The first was that unions would face the additional burden of having to consider whether an employee concern raised tort and *Charter* issues as well as collective agreement issues. The second was that a *Weber* approach could be employed to preclude unionized employees from

[24] See also Shilton, "Choice, no Choice" at paras. 65-67.
[25] For more discussion of this authority and how it is being exercised see Jo-Anne Pickel, "Perspectives from a Statutory Tribunal".
[26] Sara Slinn, "Arbitrating Human Rights Issues: Some Comparative Empirical Data".

access to statutory enforcement processes for statutory employment-related benefits and protections.[27] Both concerns involve the potential additional burdens on unions. The concern about access to statutory enforcement raises broader issues of public policy.

In principle, there is no dispute that *Weber* places additional burdens on unions if they are required to assume responsibility for considering whether employer conduct raises common and *Charter* issues as well as collective agreement issues. It is also true, however, that legal requirements are never static, and that unions and employers are continuously required to become familiar with new principles and processes. Unions and labour federations might also have looked for ways to pool the resources needed to respond to these new burdens. Twenty years post *Weber*, it would be interesting to know more about how unions have responded to the *Weber* call, and whether it has had a concrete impact – negative or positive – on how they carry out their collective agreement administration role. From the outside, it seems possible that any new burdens imposed by *Weber* might also have opened new doors to how collective agreements are negotiated and to how unions challenge employer conduct.

Empirical questions may similarly be asked about unions' experiences with statutory rights and statutory rights enforcement processes. We know that unions do not object in principle to relying on statutory rights in addressing collective agreement issues. What we want to know more about is whether, and if so how, unions and unionized employees in practice benefit from access to statutory enforcement processes. We may also want to know whether unions have experienced negative consequences as a result of being required in Ontario and British Columbia to address employment standards claims under the collective agreement enforcement process.

[27] Lewis N. Gottheil, "Defining the Scope of Arbitration: The Impact of *Weber*: a Union Perspective" (1999-2000) 1 Lab Arb YB 157.

6. Concluding Reflections on Access to Justice in Unionized Workplaces

The challenges of balancing individual and collective interests are a key issue for the collective agreement enforcement model. These challenges were known prior to *Weber*, but *Weber* increased their complexity by extending their impact to include situations where an individual employee's workplace problem may also give rise to other legal claims – common law, statutory or *Charter*. There is now twenty years of experience post-*Weber*, as well as experience with changes in some of the interactions between statutory rights and collective agreements. The twentieth anniversary of *Weber* provides an opportune occasion to bring energy to questions that have been percolating for some time now about collective agreement and employment-related workplace rights enforcement processes, provided that efforts to revisit these questions do not lose sight of potential implications for the wide range of social benefits achieved by unions, unionization and collective bargaining.