

WEBER AND ALMOST EVERYTHING AFTER: 20 YEARS LATER - ITS IMPACT ON CHARTER, COMMON LAW AND INDIVIDUAL STATUTORY RIGHTS CLAIMS.

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INTRODUCTION

In *Weber v. Ontario Hydro*¹ the Supreme Court of Canada revisited the issue of judicial deference to labour arbitration as a forum of original jurisdiction for the resolution of disputes between organized employees and their employer. The Court denied Mr. Weber access to the courts to pursue claims against his employer based on the common law and alleged violations of the *Canadian Charter of Rights and Freedoms*. The Court adopted a model of exclusive jurisdiction for arbitration over employment disputes arising under a collective bargaining relationship which went far beyond the Court's previous calls for judicial deference and even encompassed employee claims for redress based on violation of their most fundamental individual rights under the *Charter*.

There has already been a great deal written² about the implications of *Weber* and

¹ [1995] 2 S.C.R. 969; (1995), 12 C.C.E.L. (2d) 1 (S.C.C.) (hereinafter *Weber*). See also the companion decision of *New Brunswick v. O'Leary* (1995), 125 D.L.R. (4th) 609 (S.C.C.) released the same day to find exclusive arbitral jurisdiction over a claim by the employer against an bargaining unit employee for damages for negligence.

² See Brown and Etherington, "*Weber v. Ontario Hydro*: A Denial of Access to Justice for the Organized Employee?" (1996), 4 CLELJ 183; Mullan, "Tribunals and Courts - The Contemporary Terrain: Lessons from Human Rights Regimes"(1999), 24 Queen's L.J. 643; Adell, "Jurisdictional Overlap Between Arbitration and Other Forums: an Update"(2000), 8 C.L.E.L.J. 179; Carter, "Looking at *Weber* Five Years Later: Is It Time for a New Approach?" (2000), 8C.L.E.L.J. 231"; and MacDowell, "Labour Arbitration - The New Labour Court? (2000), 8 C.L.E.L.J. 121"; Surdykowski, "The Limits of Grievance Arbitration: *Weber* and *Pilon* in Perspective," [1999-2000] 1 Lab. Arb. Y. 67; M. Picher, "Defining the Scope of Labour Arbitration: The Impact of *Weber* - An Arbitrator's Perspective", [1999-2000] 1 Lab. Arb. Y. 99; Gottheil, "Defining the Scope of Arbitration: The Impact of *Weber* - A Union Perspective", [1999-2000] 1 Lab. Arb. Y. 157; Durnford, "Defining the Scope of Arbitration: The Impact of *Weber* - A Management Perspective", [1999-2000] 1 Lab. Arb. Y. 149; Swan, "Ships Passing in the Night: Arbitrators and the Courts", [1999-2000] 1 Lab. Arb. Y. 1; Kaplan et. al., "The Scope of Rights

subsequent decisions by the Supreme Court and courts and boards across the country that have tried to apply its reasoning to different contexts of potential overlaps in jurisdiction between arbitration and other forums. For a decision which was so clearly designed to cut down on litigation arising from disputes which were somehow related to the workplace it has certainly shown great promise in achieving the exact opposite result, at least during the first 20 years after its release.

In this paper I will set out my own thoughts on where *Weber* and its progeny have brought us today in terms of issues of multiplicity of proceedings in the adjudication of workplace related disputes. To do so I will focus on four aspects of *Weber* and its progeny. First, I will examine *Weber* in context, looking at its origins and purpose and considering it as part of larger trend to privatize and collectivize workplace dispute resolution in the name of efficiency. Second, I will assess the extent to which *Weber* has impacted on jurisdiction and access to justice in the areas of Charter, common law and statutory rights claims by organized workers, paying attention to the extent to which it has created a gap or shortfall between substantive rights and access to forums to protect or enforce those rights. Third, throughout the paper I will discuss the hierarchy of values that appears to lie behind the single minded drive towards an exclusive jurisdiction approach in *Weber* and many of its offspring. Fourth, at various points I will touch on the impact of the *Weber* movement on unions and grievance arbitration as viable institutions to pursue successfully the objectives of collective bargaining. Finally, I will offer some thoughts on different approaches that might provide more principled and functional solutions to the problems raised by interaction between the three employment law regimes and provide a better balancing of the interests at stake.

Clearly *Weber* and its progeny, most importantly *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*³, have been the key judicial contributions to the

Arbitration after *Weber v. Ontario Hydro*” (1999), 7 C.L.E.L.J. 249; Matthews Lemieux, “The Ongoing Debate Over the Scope of *Weber*: Who Has Jurisdiction?” in *Annual Review of Civil Litigation*, T. Archibald & M. Cochrane, eds. (Carswell, 2002) 141; Alexandrowicz, Restoring the Role of Grievance Arbitration: A New Approach to *Weber* (2003), 10 C.L.E.L.J. 301; Lokan & Yachnin, From *Weber* to *Parry Sound*: The Expanded Scope of Arbitration (2004), 11 C.L.E.L.J. 1.

3 [2003] 2 S.C.R. 157. See discussion *infra*, at note 107. As discussed below, this decision held that all collective agreements must be deemed to incorporate the substantive rights and obligations contained in applicable employment related statutes.

transformation of arbitration from an ADR mechanism for the resolution of private contractual collective bargaining disputes to a quasi-public forum (some have called it a ‘labour court’) for the enforcement of both contractual claims and public statutory rights, including constitutional rights. While some have questioned the overall efficiency and policy effectiveness of using such a privately funded device to administer and enforce public employment law regimes, I contend that the prime motivations for the transformation were the ascendancy of efficiency and finality concerns during the 1990’s and early 2000’s, in many cases at the expense of access to justice and institutional appropriateness concerns. *Weber* in particular was not about increasing access to justice or expanding arbitral jurisdiction but rather about getting the claims of organized workers out of the courts and into privately funded forums. Nevertheless, I contend that, with one or two notable exceptions, the decision of the Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) et Morin v. Quebec (Att. Gen.)*⁴ in 2004 provided a turning point after which courts and administrative decision makers became more willing to take a more nuanced and balanced approach to deciding jurisdictional issues where the competition is between arbitration and other statutory decision makers. Thus while the detrimental effects of *Weber* for access to justice for common law and Charter claims has not been undone, the single minded presumption of exclusive arbitral jurisdiction has almost been transformed into an assumption of concurrent jurisdiction for overlaps with other statutory tribunals, allowing for an appropriate and balanced consideration of efficiency, finality, access to justice and institutional appropriateness concerns when dealing with those types of issues.

The *Weber* Standard

In *Weber* the plaintiff was an employee with Ontario Hydro and covered under a collective agreement. He was injured at work and began receiving workers' compensation benefits including a 20% disability pension. Subsequently, he went on an extended leave of absence. The employer hired private detectives to conduct a secret surveillance of Weber. Under a pretence, they gained entrance to his home and using the information gathered by this entry the employer suspended the plaintiff for abusing his sick leave. The union filed three

4 2004 SCC 39 (hereinafter referred to as ‘*Morin*’).

grievances on his behalf pursuant to the collective agreement. At the same time, the plaintiff initiated a civil action alleging trespass, nuisance, deceit, invasion of privacy and breaches of his rights under sections 7 and 8 of the Charter of Rights and Freedoms.

A motions judge granted an order dismissing the civil action. The plaintiff appealed and in the meantime the union settled the grievances. The settlement made no reference to the grievor's civil action.

The Ontario Court of Appeal upheld the dismissal of Weber's tort action. The court, however, reinstated the Charter claim, holding that the policy justification for granting exclusive jurisdiction to arbitration could not justify denial of an individual citizen's access to the courts for protection of his most fundamental constitutional rights.⁵

In the Supreme Court a majority opinion, authored by McLachlin J. (joined by L'Heureux-Dube, Gonthier and Major), found that all claims fell within the exclusive jurisdiction of the arbitrator, thereby blocking access to the courts. Partially concurring reasons were delivered by Iacobucci J., who was joined by La Forest and Sopinka JJ. The concurring group agreed with the majority opinion on its finding of exclusive jurisdiction for common law claims but would have allowed the Charter claims to continue.

McLachlin J. identified three distinct judicial views on the effect of Ontario labour legislation that required final and binding arbitration clauses to be included in the collective agreement. The "concurrent" model, contemplates concurrent regimes of arbitration and court action. If an action is recognized either at common law or by statute, the action may proceed and the collective agreement cannot deprive the court of jurisdiction. The second view was the "overlapping jurisdiction" model whereby a civil action may be brought if the issues raised go beyond the traditional subject matter of labour law. The final view, which was embraced by the court, was the "exclusive jurisdiction" model. If the differences between the parties arise from the collective agreement, arbitration is the exclusive remedy and the courts have no jurisdiction to entertain an action.

McLachlin J. relied on the Court's prior decision in *St. Anne Nackawic Pulp & Paper Co.*

⁵ *Weber v. Ontario Hydro* (1992), 98 D.L.R. (4th) 32 (Ont. C.A.).

*V. C.P.U., Local 219*⁶ to conclude that regardless of how the dispute may be characterized legally, if it arises “expressly or inferentially out of the collective agreement”⁷, the jurisdiction to resolve it lies exclusively with the labour tribunal. She also noted that the provincial Labour Relations Act excluded court action by providing specifically for arbitral resolution of “all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement”.⁸ To permit concurrent actions would undermine the goal of providing quick and economical resolution of disputes between parties to a collective agreement with minimum disruption to the parties and the economy.

McLachlin J. also rejected the model of overlapping jurisdiction which would have allowed court action where the issues went beyond the traditional subject matter of labour law. While accepting that this was a more attractive model, she concluded that this also failed “to meet the test of the statute, the jurisprudence and policy” and would permit parties to evade deference to arbitral resolution of labour disputes by artful and imaginative pleading.

McLachlin J. concluded that if the differences between the parties creating the dispute could be said as factual matter to arise expressly or inferentially out of the collective agreement, arbitration is the exclusive remedy. “The question in each case is whether the dispute viewed with an eye to its essential character, arises from the collective agreement.”⁹ Whether or not a dispute arises out of a collective agreement should be determined by looking at both the essential nature of the dispute and the ambit of the collective agreement. This applies to claims alleging violation of *Charter* rights as well as claims in contract and tort. Where arbitrators lack expertise in a particular area of law, their errors may be corrected by way of judicial review. She also held that arbitrators would have the jurisdiction to apply common law doctrines and remedies when

6 [1986] 1 S.C.R. 704.

7 *Supra* note 1, at 956-7

⁸ *Supra* note 1, at C.C.E.L. 20, quoting from s. 45(1) of the Ontario Labour Relations Act, R.S.O. 1990, c. L.2.

⁹ *Weber, supra* note 1, at C.C.E.L. 26.

dealing with disputes under the collective agreement.¹⁰ Where they lack power to provide an appropriate remedy, courts may exercise their inherent jurisdiction so that the grievor will not be deprived of an ultimate and effective remedy.¹¹

The flood of litigation that followed in the years immediately following *Weber* was, I think, the inevitable consequence of two or three of its most apparent deficiencies. First and most obvious, was the inherent ambiguity of the purported new ‘bright line’ test for exclusive jurisdiction espoused by the majority. Although the Court stated a two factor analysis relying on both the factual nature of the dispute and the ambit of the collective agreement, the patently vague standard of whether the dispute could be said to arise ‘inferentially’ from the collective agreement created an “unprecedented standard upon whose application honest adjudicators will inevitably differ, and in relation to which employers and unions may exercise less contractual control and predictability.”¹² Anyone who doubted the wisdom of that observation need only look at the differences of opinion between courts of appeal in various provinces and between those courts and the various majority and dissenting Supreme Court opinions in subsequent

10 *Weber, supra* note 1. “This does not mean that the arbitrator will consider separate “cases” of tort, contract or Charter. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter.

The appellant *Weber* also argues that arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and duty of arbitrators to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes.” Per MacLachlin J., at S.C.R. 968.

11 In applying these principles to the facts in *Weber*, the court said that the benefits of the Ontario Hydro Sick Leave Plan were part of the collective agreement. The Court also relied on the fact that Art. 2.2 of the agreement provided that its grievance procedure applied to “[a]ny allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of” the agreement. Michel Picher, *supra* note 2, has pointed out the irony in the Court’s reliance on this provision because it failed to note that Art. 3.1 prevented grievances concerning allegations of unfair treatment from being submitted to arbitration. However the Court also relied on the fact the agreement provided that the benefits of the Sick Leave Plan should be considered part of the Agreement, and that the administration of the “plan and all decisions regarding the appropriateness or degree of its application shall be vested solely in Ontario Hydro”. Therefore, any decision concerning the medical plan fell within the purview of the collective agreement. Since it was alleged that Hydro had acted improperly in making its decision regarding coverage of the medical plan, the arbitrator had exclusive jurisdiction over all aspects of the dispute.

12 M. Picher, *supra*, note 2, at 115.

decisions concerning where jurisdiction resides in cases involving arbitration in competition with courts and other statutory tribunals.¹³

Second, although the Court in *Weber* did not expressly address whether its new standard for exclusive jurisdiction for arbitration would apply to areas of potential overlap in jurisdiction between arbitration and statutory tribunals administering employment law statutes, its reasoning certainly invited applications to extend its approach to such cases. The Court's finding that the policy concerns of efficiency and not undermining labour arbitration as the legislative choice for resolution of workplace disputes were sufficiently important to override concerns that an individual might be denied access to any forum to protect and enforce her most fundamental individual constitutional rights and freedoms certainly led some observers to speculate that the same rules should be applied to the arguably less fundamental rights granted to employees under employment law statutes.

And finally, making access to courts to seek protection and enforcement for fundamental individual constitutional rights contingent on union support to have access to the arbitral forum meant that employees who were unable to gain the required support were likely to seek vindication in court in any event, no matter how likely such an avenue was foreclosed by the principles of *Weber*. The more fundamental the rights involved the more likely disaffected and unsupported employees are to turn to litigation if turned down by their union, despite the cost and time involved. They simply have nothing to lose at that point.

Placing *Weber* in Context: Was it the Temper of the Times?

At the time *Weber* was decided I found it incredible that the Supreme Court could so cavalierly disregard the concerns expressed by Justice Arbour in the Ontario Court of Appeal that an individual citizen's access to the courts for protection of her most fundamental constitutional rights should not be made contingent on support from a collective organization

13 See for example the history of judicial decisions recounted in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2001] 1 S.C.R. 360; *Allen v. Alberta*, [2003] S.C.C. 13; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] S.C.C. 39; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] S.C.C. 40; and *Bisaillon v. Concordia University*, [2006] S.C.J. No. 19

like a union.¹⁴ What was most disturbing at the time was the refusal by the majority to even address this concern, instead addressing other concerns about expertise of arbitrators to decide *Charter* issues as if that was the main concern of the Court of Appeal. How could the Court's refusal to even address this concern be explained, especially when it related to constitutional individual rights?

Looking back on the Court's decision in *Weber* today, it is much more easily understood when viewed as part of a larger trend among legislators, administrators and adjudicators to place much more value on concerns of efficiency and avoiding multiplicity of proceedings in a period of significant cutbacks and downsizing of government resources. There were numerous developments from the late 1980's to the beginning of the new millennium to suggest this shift in values. The proliferation of statutory individual employment law rights in the 1960's and 1970's had led some commentators to note problems arising from the potential for a multiplicity of proceedings by the early 1980's.¹⁵ But if one reads the commentary of that time period there was generally a very profound recognition of the difference between the statutory employment standards processes designed to protect individual public statutory rights as opposed to private contractual rights to be enforced in common law courts or in private arbitration mechanisms created and appointed by the parties under collective agreements. Suggestions that exclusive jurisdiction should be granted to one forum or the other to avoid overlaps in jurisdiction were generally rejected because of the threat that might present to access to an appropriate forum for the effective enforcement of the various private and public rights at stake. However, commentators were often in favour of some policy of deference by adjudicators to prior decisions by other tribunals to avoid the problems arising from multiplicity of proceedings, provided that measures were taken to ensure that the various public and private rights at stake had received due consideration in the prior proceeding. This is similar to the approach taken by the Ontario Labour Relations Board when faced with issues of overlapping jurisdiction between

14 See Gottheil, *supra* note 2 at 160 for discussion of this point.

15 See for example Swinton and Swan, "The Interaction Between Human Rights Legislation and Labour Law," in Swan and Swinton, eds., *Studies in Labour Law* (Toronto: Butterworths, 1983), at 111.

itself and grievance arbitration.¹⁶ Although adjudicators and commentators were beginning to become concerned about the potential inefficiencies and costs associated with overlapping jurisdiction they continued to place significant value on the need to ensure access to justice where it conflicted with efficiency concerns.

However, in the late 1980's and 1990's several important developments arising in a context of disappearing public resources point to a reversal of this hierarchy of values.¹⁷ Most notable was a shift to privatize and collectivize various processes for the administration and enforcement of individual statutory rights. Faced with large backlogs of complaints and extensive delays of many years to have complaints processed by human rights commissions,¹⁸ individual complainants turned to alternative processes to seek protection against human rights violations. In the organized sector they increasingly turned to the grievance process to pursue their complaints if they could get the support of their union. Arbitrators had begun to gradually accept jurisdiction to hear grievances alleging a violation of the human rights code if there was a sufficient nexus with a collective agreement provision to give them jurisdiction. In 1993 this method of acquiring arbitral jurisdiction over human rights issues was given legislative recognition in the Ontario *Labour Relations Act*.¹⁹ Several other jurisdictions in Canada also give grievance arbitrators an express mandate to interpret and apply human rights legislation in their decision making process. Unorganized employees, aided by creative counsel, went back to common law courts to seek human rights protection under the guise of traditional torts and were

16 See for eg., *Valdi Inc.*, [1980] O.L.R.B. Rep. August 1254.

17 Although not directly on point, Geoffrey England has written several articles and books in the last 20 years that explore what he saw as a gradual transformation of substantive employment law principles to reflect an increasing tension between a rights paradigm which had seen its values in ascendancy in the 1960's and 70's and an efficiency paradigm which was gaining in popularity among judges and policy makers in the 1980's and 90's. See for example, "Recent Developments in the Law of the Employment Contract: Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm" (1995), 20 Queen's L.J. 557.

18 For those not familiar with the extent of these problems and the difficulties it presented for access to justice for members of diversity groups protected by human rights legislation, see Ontario, *Ontario Human Rights Code Review Task Force: Achieving Equality: A Report on Human Rights Reform* (Toronto: Queen's Printer, 1992) (The Cornish Report).

19 See *Labour Relations Act, 1995*, S.O. 1995, c. 1, s. 48 (12)(j).

initially blocked by the bar to imposed in *Board of Governors of Seneca College v. Bhadauria*²⁰. However, in the early 1990's courts began to allow actions based on conduct addressed by human rights legislation to continue as long as they based their claim on the assertion of causes of action previously recognized at common law and did not seek damages based on a violation of the human rights code.²¹

The tightening of government budgets and the push to make the delivery of government services more efficient led to a further significant move towards privatization and collectivization of human rights processes. The human rights commissions in several jurisdictions, most notably Ontario, adopted a policy of almost complete refusal to take jurisdiction over human rights complaints by employees who worked in an organized workplace and were subject to a collective agreement. In the interests of responding to criticisms of inefficiency and delay, in 1993 the Ontario Commission adopted a strict and rigorous policy of deferral to arbitration where the complainant worked under a collective agreement.²² The Commission's guidelines²³ referred to the important public interest in stable and harmonious labour relations and expressed concerns that the human rights process should not become a tool to replace the collective bargaining process. The guidelines in place at that time did suggest that the Commission should consider each case on its own basis and note that one factor to consider is whether there may also be complaints against the union. Nevertheless, published statistics and anecdotal evidence suggested that a refusal to process complaints submitted by organized

20 [1981] 2 S.C.R. 181 (*Bhadauria*)

21 See the discussion in Mactavish & Lenz, "Civil Actions for Conduct Addressed by Human Rights Legislation - Some Recent Substantive and Procedural Developments" (1996), 4 C.L.E.L.J. 375. In some cases the courts actually commented on the ineffectiveness of the human rights process as a reason for letting the court action continue.

22 The Commission claims the authority to adopt this policy under the discretion given to it under s. 34 of the *Human Rights Code* to not deal with a complaint where it could be more appropriately dealt with under another Act.

23 Ontario Human Rights Commission, *Guidelines on the Application of Section 34 of the Ontario Human Rights Code*, (1996 - OHRC).

employees had become the normal course of operations by the late 1990's.²⁴

Perhaps even more indicative of this shift in values in the 1990's was the outright legislative transfer of exclusive jurisdiction of the adjudication of *Employment Standards Act* complaints to grievance arbitration processes for organized employees in the 1996 amendments to the Ontario *Employment Standards Act*,²⁵ an express transfer of jurisdiction over statutory individual rights claims from public officials and tribunals to private organizations and procedures - unions and grievance arbitration.

The growing concern about the inefficiencies caused by overlapping jurisdiction and the potential for multiplicity of proceedings was also reflected in academic commentary and government law reform studies published during this time period.²⁶ Interestingly however, if one looks at the journal articles and law reform commission reports of this period the solution of exclusive jurisdiction adopted by the Court in *Weber* is seldom mentioned and almost never recommended. Instead, most commentators from both the private and government sectors recommended recognition of overlapping jurisdiction and deployment of some form of pre-

24 "Ontario Complaint Guidelines Cause Rejection Rate to Triple" (Jan/Feb. 1999), Lancaster's Human Rights and Charter Law Reporter, Vol. 15, No. ½, at 3. Cases in which a decision to decline to process has been taken have tripled since introduction of the policy in 1993. Union counsel reported that during this period the Commission refused to process cases when they learned the complainant worked under a collective agreement, even in most cases where there was concern expressed that the union would not support a grievance to arbitration and there was a possibility of a claim against the union as well as the employer.

25 Ontario *Employment Standards Act*, 2000, S.O. 2000, c. 41 as amended, ss. 99 - 101. The Act currently also indicates its concern with preventing the inefficiencies of allowing multiple proceedings under different regimes by putting unorganized employees to an election between civil proceedings for wrongful dismissal and a complaint under the Act regarding claims for termination and severance payments. (ss. 97-98).

26 For examples of academic commentary see, R. Abramsky, 'Grievance Arbitration, External Law and the Problem of Multiple Forums', [1994-95] Lab. Arb. Y. 41; R. Abramsky, 'The Problem of Multiple Proceedings: and Arbitrator's Perspective', [1996-97] Lab. Arb. Y. 45. In addition, in 1990 the Ontario Law Reform Commission began a long running project on multiple proceedings in workplace adjudication that culminated in its publication of a *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes* (1995). See also the Ontario Ministry of Labour's short lived 2001 proposal for a new 'super' labour tribunal to take over the adjudicative workload of six existing statutory adjudication tribunals: *Looking Forward: A New Tribunal for Ontario's Workplaces - Consultation Paper* (Feb. 2001, Ont. Ministry of Labour), although this proposal did not deal with private sector grievance arbitration.

hearing deferral and referral combined with post-hearing policies of deferral or expanded application of existing doctrines of res judicata and issue estoppel to avoid unnecessary multiplicity of proceedings.²⁷ What is clear from reading these articles and reports is that there was a rising concern that the proliferation of employment law rights under the various regimes required some measures to address the inefficiencies and other problems that can arise from multiple proceedings but any measures adopted should ensure that the various rights issues arising under the different workplace laws are addressed effectively by an appropriate adjudicative body while avoiding unnecessary duplication and relitigation of issues.

Finally, growing concern with multiplicity of proceedings caused by overlapping jurisdiction was also reflected in a flurry of decisions commencing in the early 1990's concerning the application of the doctrine of issue estoppel to civil claims for wrongful dismissal based on prior rulings made by administrative bodies in processing claims made by employees under employment standards legislation. The move to relax the requirements of issue estoppel to prevent multiple proceedings was commenced by the Ontario Court of Appeal ruling in *Rasanen v. Rosemount Instruments Ltd.*²⁸ The majority reasons clearly indicate concern about efficiency in workplace adjudication, with several quotations from precedents urging the need to defer to administrative decision makers and treat their decisions as final and binding. The decision in *Rasanen* was followed by a series of decisions on the same issue in the Ontario Court of Appeal in which different panels of the Court displayed very different levels of commitment to the values of efficiency in adjudication when weighed against access to justice for individual employees.²⁹

27 *Ibid.*, see especially the Ontario Law Reform Commission *Report on ... Multiple of Proceedings...*

28 (1994) 17 O.R. (3d) 267.

29 *Danyluk v. Ainsworth Technologies Inc.* (1998), 42 O.R. (3d) 235 (C.A.) represents the high point of broad application of issue estoppel. For the conflicting view which clearly tips the balance in favour of access to justice: see *Minott v. O'Shanter Development Company Ltd* (1999), 42 O.R. (3d) 321; and *Heynen v. Frito Lay Canada Ltd* (1999), May 11/99. Docket No. C28688. (2000). For a return to a more efficiency oriented approach see *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. C.A.). However the priorities recognized in *Rasanen* appear to have been ultimately reversed by the Supreme Court of Canada's decision in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, which held that even

It is in this context that one can best understand a decision that appears to place greater weight on efficiency concerns than the need to ensure access to justice for the protection of fundamental individual *Charter* rights. In its brief attempts to give policy justifications for its adoption of the exclusive jurisdiction model, the majority opinion in *Weber* makes express reference to two reasons, efficiency³⁰ and the need to not allow court actions that might undermine arbitration as the legislative choice for the resolution of workplace disputes.³¹ But it is important to recognize that no commentator writing on this topic has ever suggested that arbitration was facing a risk of being undermined by numerous litigants seeking to evade it by going to courts or other tribunals. Arbitration was clearly the forum of choice for most, if not almost all, potential litigants, provided that they could get union support that was required for access to arbitration, because it was generally the least expensive and quickest route to a hearing. If there was any concern about the health of grievance arbitration in the 1990's it was that it might be the victim of its own success, becoming overburdened by its ever increasing jurisdiction to decide statutory and *Charter* issues, and facing a risk that it may become too complex, slow and expensive to be the dispute resolution success story it had been up to that point. Of course to suggest that it was the victim of its own success cannot conceal the fact that its increasing popularity was perhaps more a result of the failures of administrative agencies and adjudicative forums under the statutory regimes to provide timely and effective resolution of claims. Whatever the reasons for the popularity of arbitration, any concerns expressed in *Weber* that grievance arbitration needed to be given exclusive jurisdiction over common law and *Charter* claims to prevent it from suffering from disuse were disingenuous at best. The only justification offered that held any water was the adjudication efficiency rationale, and it clearly reflected a value that was in ascendancy in that period.

where the requirements of issue estoppel are made out by one party the Court must go on to exercise a broad discretion to decide if it should nevertheless allow the second proceeding to continue after considering several contextual criteria, the most important of which is the potential injustice to the individual litigant of denying access to proceed.

30 *Weber*, supra note 1, at paragraph 46, 'It is important that disputes be resolved quickly and economically, with a minimum of disruptions to the parties and the economy'.

31 *Ibid.* at para. 58.

Weber's Impact on Common Law Claims and the Jurisdictional Divide Between Arbitration and Courts

Although there have been several subsequent Supreme Court of Canada decisions that deal with arbitral jurisdiction over common law claims by bargaining unit employees, I agree with the view expressed by other commentators that they have done little to bring an end to the confusion and inconsistency wrought by the *Weber* approach.³² The most straightforward was the 2003 decision in *Allen v. Alberta*³³, in which the Court held, not surprisingly, that a claim by former civil servants, whose positions had been privatized, for severance pay provided for under the public service collective agreement, was subject to exclusive arbitral jurisdiction and could not be pursued in court, despite the fact the union and government had signed a letter of intent that stated that employees who accepted a job with the new private employer would not be entitled to severance pay under the agreement.

In *Goudie v Ottawa (City)*³⁴ the Court found that a civil action by bargaining unit workers could continue. It was based on a claim by bargaining unit employees that the employer had

32 *Allen v. Alberta*, 2003 S.C.C. 13 (Q.L.) In *Goudie v Ottawa (City)*, 2003 SCC 14, the Court found that civil action by bargaining unit workers could continue. It was based on a claim by bargaining unit employees that the employer had made pre-hiring representations that they would continue to enjoy the same terms and conditions they had enjoyed while working for their former employer, the Ottawa Police Force. Although the judge at first instance held that *Weber* precluded court action, the Court of Appeal and Supreme Court of Canada relied on pre-*Weber* jurisprudence to find that if there was a pre-employment agreement a dispute over such an agreement, in its essential character, could not arise from the collective agreement because the employees were not in the bargaining unit when the agreement was made. I agree with the observations of Lokan and Yachnin, *supra*, note 2 (at 8 - 9), that these decisions do little to instruct us about how the essential character of a dispute is determined. They point out that it is not obvious why a dispute about a pre-employment representation concerning terms of employment that are to apply after hiring under a collective agreement does not arise out of the collective agreement while issues arising from a letter of intent concerning conditions that are to apply after employees leave the workplace do, given the fact that arbitrators have in past cases taken jurisdiction over disputes that concerned the effect of pre-hiring representations made to employees. They conclude it is 'difficult to discern a principled basis for the distinctions drawn by the Court in *Allen* and *Goudie*' (at 9).

³³ 2003 S.C.C. 13 (Q.L.). As noted by J.P. Alexandrowicz, *supra*, note 2, this being essentially a claim to enforce a collective agreement clause this would likely have been the result based on the case law that preceded *Weber*, although the Alberta Court of Appeal had ruled in favour of court jurisdiction.

³⁴ 2003 SCC 14,

made pre-hiring representations that they would continue to enjoy the same terms and conditions they had enjoyed while working for their former employer, the Ottawa Police Force. Although the judge at first instance held that *Weber* precluded court action, the Court of Appeal and Supreme Court of Canada relied on pre- *Weber* jurisprudence to find that if there was a pre-employment agreement a dispute over such an agreement, in its essential character, could not arise from the collective agreement because the employees were not in the bargaining unit when the agreement was made.³⁵

Weber has led to a considerable number of arbitration decisions concerning the extent to which it has increased the jurisdiction of arbitrators to decide common law contract and tort claims by bargaining unit employees against employers and third parties (both co-workers and others, including insurance companies). Despite some initial uncertainty arising from early decisions suggesting that *Weber* expressed an intention to have all workplace disputes that arose in some fashion from the collective agreement resolved exclusively by arbitrators even where such resolution would require empowering arbitrators to exercise jurisdiction over third parties,³⁶ those issues have been resolved by subsequent judicial and arbitral rulings foreclosing such

³⁵ I agree with the observations of Lokan and Yachnin, *supra*, note 2 (at 8 - 9), that these decisions do little to instruct us about how the essential character of a dispute is determined. They point out that it is not obvious why a dispute about a pre-employment representation concerning terms of employment that are to apply after hiring under a collective agreement does not arise out of the collective agreement while issues arising from a letter of intent concerning conditions that are to apply after employees leave the workplace do, given the fact that arbitrators have in past cases taken jurisdiction over disputes that concerned the effect of pre-hiring representations made to employees. They conclude it is ‘difficult to discern a principled basis for the distinctions drawn by the Court in *Allen and Goudie*’ (at 9). However I note that this exception to *Weber* mandated exclusive arbitral jurisdiction for common law claims based on pre-hiring representations by employers has been followed in several lower court decisions across Canada on a fairly consistent basis since *Goudie*. See for example *Woloshen v. Manitoba Baptist Home Society Inc.*, 2013 CarswellMan 409, 2013 MBQB 191, 231 A.C.W.S. (3d) 674, 295 Man. R. (2d) 314, Man QB, tort action for negligent misrepresentation allowed to proceed on basis that claim arose from a pre contractual representation.

³⁶ The best known examples in the early years were cases involving contractual claims by employees against third party insurers under benefit clauses in the collective agreement. The decision of the *Ontario Court of Appeal in Pilon v. International Minerals and Chemical Corporation (Canada) Ltd.* (1996), 31 O.R. (2d) 210 seemed to say that *Weber* required arbitrators to take exclusive jurisdiction over claims under benefit plans or policies as long as it could be said the employee would not have had a claim but for a clause in the collective agreement. In *Honeywell Ltd and CAW* (1997), 65 L.A.C. (4th) 37 (Mitchnick), and *Dubreuil Forest Products Limited and Dubreuil Brothers Employees’ Assoc.* (1998), (Bendel) the arbitrators took the Court at its word and held that they had jurisdiction over the claim against the employer and the insurer, but made it clear his ruling did not affect the traditional approach to

jurisdiction to arbitrators.³⁷ This lack of any arbitral jurisdiction under *Weber* to add third parties or impose orders against them appears to apply whether they are non bargaining unit co-workers, insurance companies, or other third parties and appears to apply equally to tortfeasors or discriminators under human rights legislation.³⁸

Perhaps more noticeable have been numerous court decisions concerning the jurisdiction of courts to hear tort claims between employees and employers and third parties, including co-workers. These decisions have demonstrated a significant degree of confusion and inconsistency amongst courts of appeal across the country in terms of the application of the standard for exclusive jurisdiction established in *Weber*.

The inherent confusion and inconsistency of attempts to apply this test can be illustrated by juxtaposition of just a few court of appeal decisions from Ontario, B.C and Quebec. The Ontario Court of Appeal, has, albeit with some inconsistency, applied the *Weber* standard of

determining liability as between the employer and the insurer based on the four category approach of *Brown and Beatty*, Canadian Labour Arbitration, 3d. ed., loose leaf (Aurora: Canada Law Book, 1997) at para. 4:1400.

³⁷ The decisions referred to in footnote 34 were later quashed by the Ontario Divisional Court and Ontario Court of Appeal, where the Court failed to recognize the distinction between issues of forum and liability and ruled that *Pilon* did not intend to change the traditional approach and further held that arbitrators have no jurisdiction to add third parties without their consent. See *London Life Insurance Co. v. Dubreuil Brothers Employees' Assoc.* (2000), 49 O.R. (3d) 766, leave to appeal denied [2000] S.C.C.A. No. 496 (QL) and *Sun Life Assurance Co. of Canada v. C.A.W.* [2000] O.J. No. 2608 (QL) (C.A.), leave to appeal den. [2000] S.C.C.A. No. 429.

³⁸ Arbitrators have also been asked to rule on whether they have jurisdiction to resolve tort claims by one employee against another, sometimes another who is outside the bargaining unit, where the basis of the action is conduct by the co-worker in the workplace. A good example is *Air Canada Pilots' Association and Air Canada* (1998) (Mitchnick), in which the arbitrator held he lacked jurisdiction to decide a defamation claim by a pilot against a flight attendant who was in another bargaining unit, where the basis of the claim was a memo from the attendant to the employer alleging misconduct by the pilot. Contrast this decision with *Giorno v Pappas* discussed *infra*, in which the Ontario Court of Appeal held that *Weber* prevented the Court from taking jurisdiction over such a claim despite the fact it was against another employee who was not in the bargaining unit. This represents one type of *Weber* gap that has arisen in several arbitration cases in recent years in which arbitrators have held that they have no jurisdiction to add third parties to the proceeding or impose liability against them, even where they may be co-workers. See *Cherubini Metal Works Ltd. v. United Steelworkers of America, Local 4122 (Harassment Grievance)*, [2008] N.S.L.A.A. No. 6 93, 172 L.A.C. (4th) 1, (Christie) and *GDI Services (Canada) LP and UFCW, Local 175 (Aguilar), Re*, (2013) 237 L.A.C. (4th) 331 (Parmar) (It was held that the application of *Weber* and *Parry Sound* do not give an arbitrator applying the HR Code jurisdiction to award remedies against third party discriminators).

disputes arising expressly or inferentially from the collective agreement in the most expansive fashion to exclude tort claims by employees against third party co-workers, both supervisors³⁹ and non-managerial co-workers.⁴⁰ Perhaps the most remarkable decision in this line of cases is *Giorno v. Pappas*⁴¹. The plaintiff filed a grievance alleging workplace harassment against a co-worker who was not a supervisor and was not in her bargaining unit. The grievance was settled by the union (without prejudice to any civil claims by the grievor) and the grievor then commenced a defamation action against the co-worker, her employer the Ministry of Housing, and Ontario Rent Review Hearings Board. The Ontario Court of Appeal upheld an order striking out the claim against all defendants on the basis of *Weber*. The Court held that *Weber* required exclusive jurisdiction for the arbitral forum because the facts giving rise to the dispute were all workplace related. The dispute could be said to arise inferentially from the collective agreement because the agreement contained a broad general clause requiring the employer to provide a safe and healthy workplace. The Court held that it was irrelevant that relief was sought against third parties other than the employer, despite the fact that *Weber* had said nothing about claims against third parties. The Court seemed to accept the fact that this would likely deprive the plaintiff of any forum in which to claim relief for intentional torts committed by the third party co-worker. The deprivation of a forum for organized employees to make claims for intentional torts against third parties was justified on the basis the employee could claim some remedy against the employer under the general health and safety clause in the collective agreement. This was a questionable assumption at best, particularly as it related to attempts to hold the employer vicariously liable for the intentional torts of co-workers.⁴²

But note that it is entirely likely that the impugned co-worker speech could be found to not be a threat to the plaintiff's health and safety under the terms of the collective agreement and

39 *Dwyer v. Canada Post Corp.*, [1997] O.J. No. 1575 (C.A.)

40 *Ruscetta v. Graham* [1998] O.J. No. 1198 (C.A.); leave to appeal to SCC refused Oct. 15, 1998..

41 (1999), 42 O.R. (3d) 626 (C.A.).

⁴² See for example *City of Toronto and CUPE, Local 79*, (2014), 245 L.A.C. (4th) 439, (H Brown) Applied *Weber* to deny an employer grievance against the union for fraud and theft of a former member of the bargaining unit because there was no breach of CA by union and it could not be held liable for the intentional wrongdoing of one of its members.

yet could still be found to be defamatory. As far as I am aware no court has held that you must prove that speech presents a threat to your health or safety to succeed on a defamation claim. And as stated in *Weber*, arbitrators do not have any independent jurisdiction to grant tort remedies in the absence of a finding that there is a violation of the collective agreement. Thus the plaintiff was quite likely to be denied any ‘ultimate remedy’ for defamation in arbitration. This possibility seems to be ignored by the reasoning in *Giorno v. Pappas*. Note that the rulings of other Ontario courts, particularly those of the Divisional Court and Ontario Court of Appeal in *Dubreuil Forests, supra*, mean that the arbitrator can never add the co-worker who committed intentional torts as a party to the arbitration proceedings. One also has to question the desirability of requiring unions to be exclusive gatekeepers in deciding whether claims of intentional torts such as defamation should be brought against co-workers, managers and employers in the arbitration process.⁴³ I would certainly question the desirability of this for good labour relations and ensuring access to justice for organized workers.

These concerns may have led the Quebec Court of Appeal to reject such a broad reading of *Weber* in several decisions released at approximately the same time as *Giorno v. Pappas*. The two most notable decisions which stand in stark contrast to the Ontario approach are *Saiano v. Côté*⁴⁴ and *Nadeau v. Carrefour Des Jeunes de Montréal*⁴⁵. In *Saiano* the plaintiff sued his employer and his manager for defamation based on what he claimed were false allegations by the manager that the plaintiff had made sexist remarks about a co-worker. The court refused to strike out the plaintiff’s claim against his manager on the basis that the claim was not one that could be characterized as in essence arising from the collective agreement. However, the Court also distinguished *Weber* on the basis it had not dealt with claims against a third party who is not a party to the collective agreement. The Court held that *Weber* did not deprive individual workers of their common law rights simply because they were unionized and working under a collective agreement.⁴⁶ In *Nadeau* the plaintiff and 13 co-workers were fired after allegations of

⁴³ See *Seneca College and OPSEU*, infra note .

⁴⁴ [1998] AQ No. 2063 (Que C.A.).

⁴⁵ [1998] (June 12 , 1998, Que. C.A.)

⁴⁶ *Supra*, note 42, paragraph 27.

child abuse followed by a police investigation and criminal charges. All charges were dropped after a preliminary inquiry. The plaintiff then sued her employer, several co-workers and police for several torts including bad faith and negligence. The Quebec Court of Appeal struck out the claim against the employer on the basis of *Weber*, but upheld the plaintiff's right to sue her managers and co-workers. On the claim against the employer, the Court rejected the Ontario Court of Appeal's finding in *Piko v. Hudson's Bay Co*⁴⁷ that somehow the involvement of criminal justice system actors changed the essential character of the dispute and deprived the arbitrator of exclusive jurisdiction.⁴⁸ However, on the claims against third parties the Quebec Court affirmed its position from *Saiano* that *Weber* could not deprive a court of jurisdiction to hear claims against managers or co-workers because they were not parties to the collective agreement and not subject as individuals to the mandatory grievance procedure. The Court was unwilling to deprive Nadeau of her *only* opportunity to seek redress against her co-workers.

Contrasting the reasoning of the courts in *Giorno* and the Quebec cases reveals a difference in the hierarchy of values held by both courts. Near the end of his reasons in *Giorno*, Justice Goudge refers to the need to preclude employees from suing co-workers in court because it "prevents the undercutting of the dispute resolution process that is given exclusive statutory jurisdiction over disputes that arise under the collective agreement." The concerns of efficiency and not undermining the collective bargaining dispute resolution mechanism in dealing with workplace disputes are clearly paramount to any concerns about access to justice for individual workers. The fact that the worker may be deprived of any forum in which to protect her common law rights against intentional torts is not significant as long as she may have a potential

47 (1998), 41 O.R. (3d) 729 (C.A.). In *Piko* the Ontario Court of Appeal held that the employer's decision to call in the police to investigate allegations of theft somehow transformed the essential character of the dispute from a matter concerning employer allegations of wrongdoing in the workplace, clearly a matter arising under the just cause provisions of the collective agreement, to a matter suitable for a civil action for malicious prosecution against the employer. In any event, *Piko* certainly appears to be the outlier in the Ontario cases, as demonstrated by several further Court of Appeal decisions which have followed *Giorno v. Pappas* with little or no analysis or reasoning - see for example, *Bhadauria v. Toronto Board of Education*, [1999] O.J. 582 (C.A.) and *Sloan v York Region District School Board*, [2000] O.J. 2754 (C.A.). Tort claims by a university professor against the employer and several individual administrators alleging harassment and sabotage of research were also found to be barred from the courts by *Weber* in *Hemmings v. University of Saskatchewan*, [2002] S.J. No. 457 (C.A.).

⁴⁸ *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405, affirms the *Piko* exception to allow court jurisdiction for the tort of malicious prosecution.

claim of some kind against her employer, albeit one which may not go forward if the union chooses not to support it to arbitration. It was also not considered significant that the grievor could have a valid defamation claim despite a failure to prove a threat to her health and safety but would be deprived of any forum to assert such claim under the Ontario Court of Appeal approach to *Weber*. In the Quebec cases the Court clearly recognized the need to preserve access to justice for individual workers above efficiency concerns. They emphasized the fact that the plaintiff's only opportunity to seek redress against her co-workers was to invoke court jurisdiction, and that *Weber* should not be used to deprive workers of common law rights against intentional torts simply because they are organized.

The juxtaposition of *Giorno* with the B.C. Court of Appeal decision in *Fording Coal Ltd. v. USWA, Local 7884*⁴⁹ is even more striking. In *Fording Coal Ltd.* the employer sued the union and its president for remarks in a local newspaper alleging lax safety practices on the part of the employer. The employer also filed a grievance under the collective agreement. The union pushed to have the grievance heard by the arbitrator and the company sought an adjournment so that it could proceed with its civil action. The arbitrator held that he had jurisdiction based on *Weber* and the fact that the dispute concerned the exercise of management rights in terms of productivity, discipline and safety in the workplace. The union also referred to collective agreement language requiring the parties to promote cordial relations and to co-operate fully in the promotion and achievement of matters set out in the agreement. The B.C. Court of Appeal however quashed the arbitral ruling, preferring to characterize the dispute as being in essence about the defamatory statements made by the union president and not about production or safety issues.⁵⁰ The majority also stated that in its opinion the collective agreement did not contemplate arbitrators adjudicating upon the freedom of speech rights of the union president or the law of defamation. The majority also noted that there are special procedures and rules of evidence applicable to defamation actions in court that could not be easily dealt with in the arbitration process. It concluded that the dispute fell well outside "the normal scope of employer-employee

49 (1999), 169 D.L.R. (4th) 468 (B.C.C.A.)

50 If a similar approach had been taken in *Weber* the dispute could easily have been characterized as being in essence about the invasion of privacy by a third party using false pretences and not about components of the sick leave policy of the employer.

relations” and thus was not contemplated as an appropriate subject for arbitration.⁵¹

When one contrasts the subject matter of the disputes and the collective agreement language at issue in *Fording Coal* and *Giorno* it is clear that the different results had little to do with the application of the tests stated in *Weber* for exclusive arbitral jurisdiction and were much more likely determined by the different values placed on efficiency, access to justice, and institutional appropriateness concerns in the two decisions. There appeared to be a much more direct connection or nexus between the alleged defamatory speech and collective agreement obligations in *Fording Coal* than that which existed in *Giorno*, where the grievor had to make the contentious and probably untenable argument that critical speech was a threat to her health and safety in order to have any chance for redress. In addition, the putative rationale given by Justice Goudge for his ruling in *Giorno*, that it “prevents the undercutting of the dispute resolution process that is given exclusive statutory jurisdiction over disputes that arise under the collective agreement”, has absolutely no validity when it is applied to actions by organized workers for torts committed by third parties who are not members of the bargaining unit. This is because both the Court of Appeal of Ontario and numerous arbitrators have held consistently since *Dubreuil Forest Products*⁵² decision, that the arbitrator has no jurisdiction to add third

51 An approach similar to *Fording Coal* was taken in *Johnston v. Anderson*, [1999] B.C.J. No. 245 (C.A.) where the Court held that *Weber* did not prevent a court action for defamation by a workplace supervisor against several bargaining unit employees for derogatory comments published in a newsletter circulated to fellow employees and some non-employees. However, the B.C.C.A. has more recently ruled in favour of exclusive arbitral jurisdiction over issues raised in a defamation claim in *Haight-Smith v. Neden* [2002] B.C.J. No. 375, where the Court struck out a defamation claim by a former teacher against a principal, vice-principal, school superintendents, teachers and three members of C.U.P.E.. The Court held that all claims against board officials and fellow members of the bargaining unit were barred by *Weber* because all of the alleged defamatory statements related to the plaintiff’s character, history and capacity as an employee and had been made to persons who would be expected to be informed of workplace problems. The claims against the non bargaining unit members were dismissed on the ground of qualified privilege. In a similar vein see *Blanco-Arriba v. British Columbia*, [2001] B.C.J. No. 2375 (B.C.S.C.). However, *Fording Coal* was applied recently with some vigour by an Ontario arbitrator to deny arbitral jurisdiction *Renfrew County and District Health Unit and ONA (Letter to Editor), Re*, [2013] O.L.A.A. No. 429, 116 C.L.A.S. 301, (Keller) The decision contains a good discussion of the defamation jurisdiction of arbitrators particularly when claim brought by employer against union president for statements made in a newspaper about employer, but raises the question of whether the employer might be denied access to the courts based on *Giorno* and other Ont. CA decisions that have applied *Weber* broadly to keep tort claims out of the courts.

⁵² *Supra* note 34.

parties to an arbitration proceeding or to make remedial orders imposing liability against those third parties.⁵³ Nevertheless the *Giorno* broad approach to the use of *Weber* to bar access to courts for tort actions against both employers and third parties continues to be applied with vigour in Ontario and some other provinces.⁵⁴

The numerous judicial decisions on whether *Weber* barred access by federal civil servants to the courts to pursue common law claims against their employers and individual co-workers might be described as almost incomprehensible in their diversity of analysis and reasoning during the first ten years after *Weber*. The complexity of the issues in this area are significantly enhanced by the somewhat unique and frequently criticized restrictions on access to third party adjudication built into the federal grievance and adjudication process under section 91 and 92 of the federal *Public Service Staff Relations Act*.⁵⁵ There were numerous and ever increasing decisions of provincial courts of appeal and the Federal Court of Appeal prior to 2005 that were inconsistent and led to great difficulty predicting with any degree of certainty when the courts would or would not take jurisdiction over claims made by federal civil servants. While some of the better decisions in this area suggested a strong emerging resistance to the simple minded application of *Weber*⁵⁶, the law reports nevertheless contained many provincial and federal court

⁵³ *Limojet Gold Express Ltd. v. P.S.A.C., Local 05/21081*, (2006), 160 L.A.C. (4th) 3 (Larson); *Cherubini Metal Works Ltd. v. USWA, Local 4122* (Harassment Grievance) (2008), 192 172 L.A.C. (4th) 1, I. Christie; *GDI Services (Canada) LP and UFCW, Local 175 (Aguilar), Re*, (2013) 237 L.A.C. (4th) 331, (Parmar); For an outlier on this issue see *Rivtow Marine Inc and IUOE, Local 115*, p[2005] CLAD No. 17 (Glass).

⁵⁴ See for eg. *Andrews v. Air Canada*, 2008 ONCA 37, (2008), 88 O.R. (3d) 561 barring action for both tort and Charter claims against employer and non bargaining unit co-workers in a case involving false accusations of wrongdoing against plaintiff; *Giesbrecht v. McNeilly*, 2008 MBCA 22, [2008] 7 W.W.R. 615; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38, [2007] N.S.J. No. 134; *Beaulieu v. University of Alberta*, 2014 ABCA 137; 373 D.L.R. (4th) 55, Applies *Weber* to bar access to courts by university prof. based on harassment and seeking injunction against co workers.

55 R.S.C. 1985, c. P-35 (hereinafter *PSSRA*). That Act was replaced by the Public Service Labour Relations Act (S.C. 2003, c. 22, s. 2) in 2005, but similar issues arise in that certain types of grievances are barred from referral to arbitration under s. 209 and s. 236 in a manner that is similar to the PSSRA legislation that led to all the litigation under s. 91 and 92.

⁵⁶ Most notable in this regard are *Pleau v. Attorney General of Canada* (1999), 182 D.L.R. (4th) 373 (N.S.C.A.) application for leave denied [2000] S.C.C.A. No. 83; and *Guenette v. Attorney General of*

decisions which applied *Weber* to deny access to the courts by civil servants whose access to third party adjudication to enforce their common law rights was very uncertain.⁵⁷

However in 2005 the SCC issued a decision in *Vaughan v. Canada*⁵⁸ that applied *Weber* in a broad fashion to foreclose access to the courts by federal civil servants under the PSSRA even where that legislative scheme did not appear to provide them with any access to third party adjudication. The majority agreed that the legislation was not as clear as the labour relations legislation at issue in *Weber* in expressly ousting court jurisdiction but held nevertheless that the doctrine of judicial restraint set out in *Weber* should be followed even where the labour relations scheme in question did not provide for recourse to independent adjudication. It did however suggest that courts may retain some residual jurisdiction to grant access in cases involving whistle blowers who were being punished by their employer and suggested that the cases that had gone in favour of court access to that point⁵⁹ had been based on such an exception. Nevertheless the majority appeared to reject the argument that the determination of when to exercise residual court jurisdiction should be based on the presence of effective redress in the

Canada, [2002] 60 O.R. (3d) 601 (C.A.). Although *Burgess v. Ontario (Ministry of Health)* (2001), 1999 D.L.R. (4th) 295 (Ont. C.A.) dealt with concurrent or overlapping jurisdiction between courts and a provincial adjudicative body for non unionized civil servants in the area of wrongful dismissal, it provides a similar analysis in favour of allowing for access to courts in areas where the legislation creating the statutory device does not provide a clear and unequivocal ouster, where there is considerable uncertainty about whether the claimants will be able to pursue the type of claims at issue in the statutory adjudicative forum, and where courts are likely to provide a more expert tribunal than the statutory mechanism given the nature of the claims at issue. See also *Phillips v Harrison*, [2000] M.J. No. 606 (C.A.) for a similar analysis in a different public service context.

⁵⁷ See the numerous decisions cited on the second page of *Guenette*, *supra*, and for recent examples see *Jadwani v. Attorney General of Canada* (2001), 52 O.R. (3d) 660 (C.A.); *Gaignard v. Canada (Attorney General)* (2003), 67 O.R. (3d) 611 (C.A.); and *Vaughan v. Canada*, [2003] 3 F.C. 645 (C.A.) leave to appeal granted, [2003] S.C.C.A. No. 165. In the latter decision the plaintiff was denied access to the courts despite the fact it was admitted that he would not have access to take his claim beyond the grievance process to adjudication under the PSSRA. The Court held the comprehensiveness of the statutory scheme nonetheless indicated the intention to ouster court jurisdiction. This decision appears to be in direct contradiction of the decisions in *Guenette* and *Pleau*, *supra*.

⁵⁸ [2005] 1 SCR 667. The plaintiff had been on leave for four years working in the private sector when he was notified that he had been declared surplus under the Public Service Employment Act and would soon be laid off. He then applied for early retirement incentives that were being made available to employees in the federal civil service but was denied. This type of decision was grievable under the PSSRA but was not something that could be referred to arbitration so he commenced a civil action making a tort claim based on negligence.

⁵⁹ See *Guenette* and *Pleau*, *supra* note 50.

form of access to independent adjudication. The dissenters (McLachlin and Bastarache) found that the absence of access to an effective independent forum for adjudication pointed away from a finding of exclusive jurisdiction for the labour relations grievance mechanism. Clearly the value of access to justice was in ascendancy in the rulings made by the majority in *Vaughan*.⁶⁰

In *Canada (House of Commons) v. Vaid*,⁶¹ the Court applied *Weber* and its progeny to hold that an adjudicative body established to hear grievances under the *Parliamentary Employment and Staff Relations Act* (PESRA) had exclusive jurisdiction over a constructive dismissal claim made by the former chauffeur of the Speaker of the House of Commons, including claims of breaches of the *Canadian Human Rights Act*. The Court found that the parallel jurisdiction of the Canadian Human Rights Commission was ousted by the exclusionary wording of s. 2 of the PESRA.⁶²

Weber on Steroids - Bisailon v. Concordia University⁶³

The SCC focus on keeping workplace disputes that arose in an organized setting was continued with a vengeance in its 2006 decision in *Bisailon v. Concordia University*. The majority of the Supreme Court reaffirmed what it referred to as “a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement.” (at para. 33)⁶⁴ The case involved an application by a university employee who worked under a collective agreement to institute a class action on behalf of members of the employee pension plan against the university for actions, including a

⁶⁰ In *Bron v. Canada (Attorney General)*, 2010 ONCA 71, [2010] O.J. No. 340, CA found that despite *Vaughan*, there was no longer room for any exception to *Weber* exclusive arbitral jurisdiction for tort claims by whistleblowers because of express provisions in Section 236 of the PSLRA enacted in 2005.

⁶¹ [2005] 1 S.C.R. 667, [2005] S.C.J. No. 28, the SCC applied *Weber* to .

⁶² RSC 1985, c. 33 (2d Suppl). s. 2. This provision stated that “... except as provided in this Act, nothing in any other Act of Parliament that provides for matters similar to those provided for under this Act ... shall apply.”

⁶³ [2006] S.C.J. No. 19

⁶⁴ This wording could be seen as affirming the kind of broad application imposed by provincial courts in cases like *Giorno v Pappas*, which appeared to no longer require that the dispute in its essential nature “arose” expressly or inferentially out of the collective agreement, but rather only required a finding of some implicit (one might even use the term ‘loose’ or ‘tenuous’) connection with the collective agreement.

unilateral contribution holiday, taken with respect to the administration and use of the pension fund. The majority of members of the pension plan were employees who were in nine bargaining units subject to nine separate collective agreements with nine different unions. One union had agreed to the actions taken by the employer but eight unions supported the employee's application for a class action. The superior court judge declined to authorize the class action on the basis the subject matter of the dispute was within the exclusive jurisdiction of grievance arbitration under each of the nine collective agreements because the pension plan was a benefit provided for under the various collective agreements. The Court of Appeal reversed the decision on the basis that the pension plan existed independently of any single collective agreement and a grievance arbitrator appointed under any one agreement would have no jurisdiction over the claims of employees covered by the other eight agreements. As the Court of Appeal recognized, this was a case where real efficiency and finality could only be obtained through access to a court action encompassing all employees.

The majority of the Supreme Court, in an opinion by LeBel J., reinstated the application judge's decision to not authorize a class action on the basis that the disputes fell within the exclusive jurisdiction of grievance arbitrators under the various applicable agreements because each of the agreements referred expressly to the pension plan. The parties had decided to incorporate the conditions for applying the pension plan into their collective agreements and it would be incompatible with the collective bargaining regimes assignment of exclusive representation rights for the nine unions to grant the status of class representative to the individual plaintiff in a class action. This despite the fact that eight of nine unions supported the application, and the majority admitted that each grievance arbitrator would only have jurisdiction over the claims of employees who were subject to the collective agreement under which he or she was appointed and the whole process could lead to multiple proceedings and inconsistent results.⁶⁵

The dissenting opinion, authored by Bastarache J., found that the essential character of the dispute did not arise out of the interpretation or application or violation of the collective

⁶⁵ The majority briefly acknowledges the practical problems that would result from its ruling but then suggests in a cryptic fashion, without providing any guidance, that there were "a number of tools of civil procedure that can be used to resolve the problems .. of multiple proceedings". No such tools are identified.

agreement because the pension plan transcended any single collective agreement making the Superior Court the only forum with jurisdiction to hear these claims. It also noted that the presence of a single indivisible pension fund that had existed before the multiple collective agreements and employment contracts involved helped establish that the essential character of the claim arose out of the plan and not the various agreements. In this respect it was noted that although more than one agreement sought to regulate access to the pre-existing pension fund, no single agreement could purport to alter or affect the fund itself. The dissent was also influenced by the fact that the risk of multiple proceedings and contradictory rulings was inevitable and there was no way of reconciling contradictory orders when they arose. This made the vehicle of a class action in superior court the only principled and practical way to resolve the claims in dispute.⁶⁶

Arbitration as a Forum for Common Law Claims

⁶⁶ In *Isidore Garon ltee v. Tremblay; Fillion et Freres* (1976) inc v. Syndicat des national des employes de garage du Quebec inc., 2006 S.C.C. 2 the Court dealt with the decisions of two Quebec arbitrators that they had jurisdiction to consider claims for reasonable notice of termination under the Civil Code of Quebec (CCQ) where the employers had closed down their operations and simply provided the notice required under the Quebec Act respecting labour standards (ALS). In both cases the collective agreements did not include a plant closing provision. One of the agreements did have a clause requiring the employer to pay notice required under the ALS if employees were laid off for longer than 6 months. The other agreement had no language concerning payment of termination payments. Although there was a split at the Superior Court level on the correctness of these two decisions, the Quebec Court of Appeal had upheld the arbitrators' findings of jurisdiction in both cases. It had done so largely on the strength of the Supreme Court of Canada's ruling in *Parry Sound*, that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement whether that agreement makes reference to them or not.

The Supreme Court's decision in *Parry Sound* had created a significant extension of arbitral jurisdiction over the statutory claims of employees for breach of employment related statutes. However, the decision of the Supreme Court in *Isidore Garon ltee* creates an important limitation on the extension of arbitral jurisdiction over statutory claims by incorporation of substantive rights from employment related statutes into collective agreements. Substantive rules or rights from a statutory scheme that are incompatible with the collective labour relations regime cannot be incorporated into the collective agreement and therefore do not come within the jurisdiction of a grievance arbitrator appointed under the agreement. If a rule in a statutory provision governing the individual employment relationship is compatible with the collective bargaining regime and it is a supplementary or mandatory norm then the arbitrator will have jurisdiction to apply it. However, not everything set out in the CCQ or other employment related statutes are implicitly incorporated into collective agreements, only those parts of the statute that are compatible with the collective scheme.

Have individual employees found access to justice to acquire redress for violation of common law rights through access to grievance arbitration and appropriate arbitral treatment of such claims since *Weber*? Or has application of the *Weber* standard for exclusive jurisdiction allowed for the development of a gap between rights and access to fora for enforcement of those rights, what I will refer to herein as one type of ‘*Weber* gap’?

It is difficult to assess the extent of the effect of the first possible factor in the creation of a *Weber* gap, the number of cases in which employees seeking to enforce common law rights through arbitration are denied access to arbitration by a refusal by their union to support what is in effect often an individual private rights claim by a worker against other employees or managers. In such cases the union may be unable to see any collective benefit to be derived from supporting the grievance and may in fact see the risk of causing significant harm to the union’s collective bargaining interests, especially where it may harm its ability to work with management on a day to day basis. A careful, comprehensive and costly empirical study would be required to try to answer that question with any accuracy.

However, a brief review of arbitral jurisprudence considering claims for remedies for common law rights allows us to make several observations of their frequency and prospects for success. First, the number of such claims to result in an arbitral award does not appear to have been great.⁶⁷ Second, where they have been made they are frequently met with strong preliminary objections by employers that they are beyond the jurisdiction of the arbitrator, which may go some way toward explaining the first observation.⁶⁸ Third, arbitrators have generally refused to take jurisdiction to consider a claim for damages under a common law right or protection if they are unable to find any violation of the collective agreement.⁶⁹ Although an

67 As someone who has been active as a grievance arbitrator in Ontario, I would add that my personal experience supports the fact my research revealed a very small number of awards in which such claims were made before the arbitrator.

68 See for example *Transit Windsor and A.T.U., Local 616 (Orsi)* (2003), 114 L.A.C. (4th) 385 (Brandt); *Vancouver Hospital and Health Sciences Centre and B.C.N.U.* (2000), 87 L.A.C. (4th) 205 (Gordon); and *ABT Building Products Canada Ltd and C.E.P., Local 434 (Shatford)* (2000), 90 L.A.C. (4th) 1 (Christie).

69 See for example *Ontario (Ministry of Correctional Services) v. O.P.S.E.U.* (2002), 113 L.A.C.

arbitrator in the 2004 British Columbia decision *Vancouver Coastal Health Authority v. H.E.U.*⁷⁰ relied on *Weber* to take jurisdiction to consider and decide a defamation claim where the union had not even alleged a violation of the collective agreement, this clearly appears to be an anomaly in the jurisprudence. A close reading of the decision suggests the arbitrator was trying to avoid the ‘*Weber* gap’ created by decisions like *Giorno v. Pappas*, by taking exclusive jurisdiction on every bit as broad a basis as it was being rejected by such court decisions, despite the absence of any claimed violation of the collective agreement.⁷¹ Fourth, where arbitrators do take jurisdiction to consider a common law claim such as defamation the legal analysis of the common law requirements is often fairly rudimentary,⁷² although there are notable exceptions.⁷³

(4th) 49 (G.S.B. - R. Brown, Vice Chair); *Vancouver Hospital and Health Sciences Centre and B.C.N.U.*, *supra*, note 45; and *Mount Sinai Hospital v. O.N.A.*, [2000] O.L.A.A. No. 475 (Davie) and *Nordic Gaming Corp. v. S.E.I.U., Local 2.ON*, [2006] O.L.A.A. No. 738, 157 L.A.C. (4th) 296, 88 C.L.A.S. 282 (O.V. Gray). This of course is consistent with the passages in *Weber* itself where McLachlin J. stated, “This does not mean that the arbitrator will consider separate “cases of tort, contract or Charter. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter.” This clearly suggests there is no jurisdiction to award common law damages in the absence of a collective agreement violation, something the Courts of Appeal in several jurisdictions appear to have completely overlooked.

70 [2004] B.C.C.A.A.A. No. 14 (R.K. McDonald).

71 Interestingly this case was decided by the same arbitrator who took jurisdiction over a defamation claim by the employer against union officials for comments made in a local newspaper in *Fording Coal*, *supra*, note , only to have that decision quashed by the B.C.C.A.. In *Vancouver Coastal Health Authority* the defamation claim was being made by a number of employees for comments made by a management spokesperson to a local newspaper that they had created a security risk by leaving their security guard posts one hour early. It appears the arbitrator was motivated by a concern that the employees might find themselves falling within a *Weber* gap due to a trend in recent B.C.C.A. cases decided after *Fording Coal* which seem to consistently use *Weber* to deny access to the courts to pursue defamation claims when they are brought by *bargaining unit employees* as opposed to the employer or management employees. See for example *Haight-Smith v. Neden*, [2002] B.C.J. No. 375 (B.C.C.A.).

72 See for example *Surrey (City) v. C.U.P.E., Local 402 (Weber)*, [2003] B.C.C.A.A.A. No. 243 (S. Beattie); *Clearbrook Grain and Milling Co. and U.F.C.W., Local 1518* (2000), 93 L.A.C. (4th) 312 (Burke); *Snowcrest Packers Ltd and UFCW* (2005) 80 CLAS 256 (Jackson); *Bilodeau and NB (Bd of Mgmt)*, [2005] NBLAA No. 21 (Bladon);

73 For a more comprehensive analysis of common law doctrine see *ABT Building Products Canada Ltd and C.E.P., Local 434 (Shatford)* (2000), 90 L.A.C. (4th) 1 (Christie); and *Transit Winsdor and A.T.U., Local 616 (Orsi)* (2003), 114 L.A.C. (4th) 385 (Brandt); and *York University and YUFA (Noble Gr)*, [2005] OLAA No. 792 (Goodfellow);

Fifth, arbitrators who have considered claims for defamation and intentional infliction of mental suffering have in several cases decided not to award damages, despite finding the elements of the tort are made out,⁷⁴ and in most cases where damages are held to be payable they have tended to award minimal damages in the range of \$1,000.00 to \$5,000.00.⁷⁵ Sixth, although arbitrators have often indicated they have jurisdiction to award punitive and aggravated damages, in the first decade following *Weber* they generally took the position that such damages would not be available for breach of the collective agreement unless the union could prove an independently actionable wrong such as a common law tort in addition to violation of the collective agreement, and they have very often denied claims for such damages even where an independent tort is proven.⁷⁶ The independently actionable wrong is no longer a requirement for mental distress

74 See for example, *ABT Building Products Canada Ltd and C.E.P., Local 434 (Shatford)* (2000), 90 L.A.C. (4th) 1 (Christie) where the arbitrator concluded there were no damages proven; and *Transit Windsor and A.T.U., Local 616 (Orsi)* (2003), 114 L.A.C. (4th) 385 (Brandt) where the arbitrator employed both the concepts of qualified privilege and absence of malice to find no damages were payable despite the defamatory nature of the comments. Note Ontario and OPSEU (2015), 122 CLAS 215 (Briggs) in which the arbitrator applies Parry Sound to find concurrent jurisdiction to apply the FIPPA privacy legislation as part of the collective agreement and applies tort jurisdiction under *Weber* to find that the new tort of intrusion upon seclusion had been made out by the improper disclosure of confidential medical information by a co worker but held that no damages could be awarded against the employer because vicarious liability did not apply where the tortious actions were intentionally dishonest and not part of scope of duties of coworker.

75 See for example *Clearbrook Grain and Milling Co. and U.F.C.W., Local 1518* (2000), 93 L.A.C. (4th) 312 (Burke) - \$1,000.00; *Canada Post Corp. v. C.U.P.W.*, [1998] C.L.A.D. No. 658 (Joliffe) - \$1,000.00. *Bilodeau and NB (Bd of Mgmt)*, [2005] NBLAA No. 21 (Bladon) (\$2000). *Canada Safeway v UFCW, Local 401*, [2009] AGAA No. 1 (Ponak) (\$2500 for mental distress). *Village of Harrison Hot Springs and CUPE, Local 458* (2006) 155 LAC (4th) 200 (Keras) (4 weeks wages for intentional infliction of mental distress). Although there have been one or two exceptions to this trend toward minimal damages for common law torts, they tend to have been in cases where the behaviour of the employer has driven the grievor out of the workplace and there is no claim for reinstatement so the damages for tort may have been seen as a way of augmenting compensation to replace reinstatement. The two cases that appear to be the only examples of significant damage awards for tortious conduct are *Surrey (City) v. C.U.P.E., Local 402 (Weber)*, [2003] B.C.C.A.A.A. No. 243 (S. Beattie) - \$20,000 for defamation and intentional infliction of mental distress; and *C.V.C Services and I.W.A. - Canada, Local I-71* (1997), 65 L.A.C. (4th) 54 (Lanyon) where the arbitrator appears to award damages in the amount of one year of wages \$16,000, but it is difficult to separate tort damages from damages for violation of the collective agreement.

76 See for example, *Eurocan Pulp and Paper Co. v. C.E.P., Local 298*, [2003] B.C.C.A.A.A. No. 233 (M. Jackson); *Bethany Care Society v. U.N.A. Local 91*, [2000] A.G.A.A. No. 18 (Sims); *Pacifica Papers Inc. v. C.E.P., Local 76*, [200] B.C.C.A.A.A. No. 73 (Taylor); and *Seneca College and O.P.S.E.U.*

damages because of the SCC's decision in *Honda v Keays*⁷⁷ and it would appear that arbitrators seem to be somewhat more prepared to seriously consider such claims where they are supported by the evidence. There also appear to have been a few more arbitral decisions awarding significant damages for aggravated and punitive damages in recent years, although they are still relatively few in number.⁷⁸

Overall, the cases on *Weber* jurisdiction for arbitrators to remedy common law wrongs leave one with the impression that arbitrators are not totally comfortable with the role of making findings of tortious wrongdoing by employers, managers and union officials or providing significant damage awards to provide redress to particular individuals. This is perhaps understandable when one considers that arbitrators do not enjoy the tenured security of judges and depend on their continued acceptance by both parties, the union and employer, for their continued employment as a third party neutral. As such their primary criterion for a good decision is more likely to be the impact of their decision on the future labour relations between the two parties to the collective agreement, a criterion that may not be met by considering what remedies best protect the common law rights of individual workers.

(*Olivo*) (2001), 102 L.A.C. (4th) 298 (P. Picher), quashed *O.P.S.E.U. v. Seneca College*, [2004] O.J. No. 4440 (Div. Ct.). The one great outlier in this area is *Province of Newfoundland and Labrador (Treasury Branch) v. Newfoundland Public and Private Employees* (unreported decision of Arbitrator Peter Darby, Feb. 17, 2003) in which the arbitrator awarded \$100,000 in punitive damages to the grievor. The award appears to be both unique and somewhat peculiar in that although the arbitrator found that the independently actionable tort of intentional infliction of mental suffering had been committed he declined to award aggravated damages on that claim on the basis the grievor has been adequately compensated in his award for general damages for the tort, but it is difficult to find in the award any indication of an amount for general damages being awarded for the independent tort as opposed to amounts awarded for breaches of the collective agreement.

⁷⁷ 2008 SCC 39.

⁷⁸ See for eg. *Greater Toronto Airports Authority v. PSAC, Local 0004* (2010) 191 LAC (4th) 277 (Shiime). Arbitrator awarded \$50,000 for mental distress damages and \$50,000 punitive damages in addition to significant amounts for compensation in lieu of reinstatement. In *Greater Toronto Airports Authority v. P.S.A.C., Local 0004*, 2011 ONSC 487, [2011] O.J. No. 358, the Divisional Court quashed both mental distress and punitive awards and sent it back to arbitrator to reconsider appropriate amounts in light of principles of amount of other damages awarded and why punitive amount was needed in this case. See also *Madill and Spruce Hollow Heavy Haul Ltd.*, 2015 CarswellNat 1480 (Larson sitting as Unjust Dis. Adj. under CLC), applied *Weber* to give \$50,000 aggravated and \$25,000 punitives. See also *Canada Post Corp. v. C.U.P.W.*, (2012), 217 L.A.C. (4th) 181, (Peltz). Arb applies *Weber* and *GTAA* (Shime) (2010) to give mental distress damages of \$11,500. See also *Limojet Gold Express Ltd. v. P.S.A.C., Local 05/21081*, [2008] B.C.C.A.A.A. No. 40, 171 L.A.C. (4th) 28, (Larson) applies *Weber* to give \$100,000 punitives for unlawful strike

The most significant and thoughtful consideration of the impact of *Weber's* intended transfer of jurisdiction over common law tort claims to arbitration came in the decision of Arbitrator Pamela Picher in *Seneca College and O.P.S.E.U. (Olivo)*.⁷⁹ The arbitration concerned the discharge of a college professor for allegedly sending anonymous anti-Semitic material in inter-office mail envelopes to a human resources director who was an adherent of the Jewish faith. The Board concluded that the employer had terminated the grievor, after an unreasonable delay of seven years following the alleged incidents, without any evidence to prove he was responsible for writing the offensive material or sending it to the recipient, and ordered him reinstated. In addition to the usual remedies for discharge without just cause, the union sought aggravated and punitive damages for the torts of defamation and intentional infliction of mental distress, arguing that the employer had acted in bad faith and with malice in moving to discharge without evidence to support just cause.

Despite first attempting to factually distinguish *Weber* from the case before her, Arbitrator Picher moved on to what can only be described as a scathing but insightful indictment of the failure of the Supreme Court to consider the labour relations implications of its broad and ambiguous standard for exclusive arbitral jurisdiction over tort claims. She noted that collective agreements include the aspects of their workplace relationship the parties have decided to regulate under that agreement and traditionally they have not chosen to include the regulation of alleged tortious wrongdoing under the common law, although they could of course do so if they wished. She also noted the parties have traditionally not permitted such matters to be considered in the arbitration process but have chosen for good reason to leave such matters to the operation of the common law and adjudication by the courts. For Picher, if not for the Supreme Court, those reasons are obvious: alleged tortious misconduct normally involves heated and emotional personal disputes of a one-time nature and requiring them to be resolved in the arbitration process is not conducive to nurturing ongoing collective bargaining relationships. Making arbitration the forum for pursuing such individual personal disputes and seeking aggravated and punitive damages would actually create an incentive for participants in the process to not bury the hatchet and move forward in the case of the use of strong language to

79 (2001), 102 L.A.C. (4th) 298.

advocate positions, a common feature of collective bargaining. It would also divert the energy and resources of the parties away from traditional collective bargaining concerns. In addition, if arbitration becomes the exclusive forum for pursuit of such claims it is likely to create a very heavy financial burden for both employers and unions and deplete their ability to pursue traditional collective agreement claims through arbitration. As well, under *Weber* and *O'Leary* individual employees could be made liable in negligence for accidents at work and made subject to orders for damages that could ruin them financially for life, without the procedural rights and appeals provided to litigants in courts. Picher concluded "if all wrongs arising in the workplace, tortious as well as contractual, are indiscriminately placed within the grievance and arbitration procedure, the very efficiency and vitality of that cornerstone of the labour relations system is at risk."⁸⁰

What approach then does Arbitrator Picher recommend? In effect she advocates the adoption of what I will refer to as the 'anti-*Weber* presumption'. She concludes that because of the inherent dangers in giving arbitrators broad exclusive jurisdiction over tort claims arising in the workplace we should be loathe to conclude that the parties 'would intend by inference to embrace such potentially devastating consequences.' Instead we should adopt the following approach:

Absent clear and compelling language in the collective agreement that would give rise to the inference, or absent express legislative authority, the parties should be presumed to intend that such tortious disputes will be resolved, as they have been for centuries, in the courts of common law, not at arbitration.⁸¹

Thus Picher was able to find no arbitral jurisdiction over the tort claims, although the factual matrix showed a much closer connection between the tort claims of the grievor and the employer's blatant violation of the collective agreement than existed in many of the previous cases in which courts and arbitrators had applied *Weber* to find exclusive arbitral jurisdiction.⁸² On this reasoning the tort claim could proceed to court despite the fact the arbitration had

80 *Ibid.*, at 317.

81 *Id.*

82 *Ibid.*, 318-20.

jurisdiction to deal with the just cause issues.

Although Arbitrator Picher could be admired for her articulate expression of the harmful impact of the transfer of exclusive jurisdiction over tort claims that has been wrought by *Weber*, the juxtaposition of several perhaps over broad applications of *Weber* in court decisions like *Giorno v. Pappas* and her ‘anti-*Weber*’ award in *Seneca College* left us with the following question. To the extent more arbitrators were prepared to follow her lead and severely restrict exclusive arbitral jurisdiction would they widen the *Weber* gap, leaving more individual employees with no forum for protection of common law rights? Ultimately Arbitrator Picher’s award was upheld by the Ontario Court of Appeal in a decision⁸³ which confirmed that Court’s overall stance of deference to arbitral decision making by ruling that the standard of review to be applied was that of patent unreasonableness despite the jurisdictional nature of the issue of the application of *Weber* to determine arbitral jurisdiction over common law tort claims. The deferential stance of the Court was also perhaps surprising given the extent to which the *Seneca College* award declining arbitral jurisdiction over tort claims arising from a collective agreement dispute was out of synch with all of the judicial decisions like *Giorno* applying *Weber* to decline court jurisdiction.⁸⁴

However, it is quite apparent in reviewing arbitral awards taking exclusive jurisdiction over tort claims asserted under the *Weber* doctrine in the last 10 years that arbitrators have declined to adhere to the anti-*Weber* presumption advocated by Picher and have at least indicated a willingness to deal with these common law issues where there is an arguable violation of the collective agreement to ground their jurisdiction over the dispute. In many cases the arguable violation of the collective agreement that is the basis of the arbitral jurisdiction over the tort claim is an alleged violation of an employment related statute, or the new ‘extended’ portion of the collective agreement created by the decision of the SCC in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*⁸⁵. Arbitrator MacDowell provides a

⁸³ (2006), 80 OR (3d) 1 CA.

⁸⁴ This latter point was made very clearly by the Divisional Court when it quashed Arb Picher’s award. See *O.P.S.E.U. V. Seneca College*, [2004] O.J. No. 4440 (Div. Ct.).

⁸⁵ [2003] 2 S.C.R. 157. See discussion *infra*, at note 107. As discussed below, this decision held that all collective agreements must be deemed to incorporate the substantive rights and obligations contained in applicable employment related statutes.

very eloquent discussion of the expansion of arbitral jurisdiction created by *Weber* and *Parry Sound*, and its application to take jurisdiction over claims of violation of privacy legislation and tort claims based on invasion of privacy in *Niagara Falls (City) and CUPE, Local 133*.⁸⁶

Impact on Charter Claims

The judicial decisions applying *Weber* to *Charter* claims arising from the workplace indicate that our courts have taken the Supreme Court's concern for adjudicative efficiency seriously and they have applied the *Weber* standard broadly to bar access to courts to pursue such claims. With very few exceptions,⁸⁷ almost all *Charter* claims by organized employees to date have been found to be barred by *Weber*,⁸⁸ often with only cursory reasons that contain little or no analysis.⁸⁹ Perhaps its most frequent use has been to bar access to courts for *Charter* claims by

⁸⁶ [2005] OLAA No. 228. A similar analysis is offered in two other cases also involving tort claims based on the recently recognized privacy tort of inclusion upon seclusion in *Kawartha Pine Ridge District School Board v. E.T.F.O.* (2008), 169 L.A.C. (4th) 353 (Luborsky) and *Ontario v OPSEU* (2015), 122 CLAS 215 (Briggs).

⁸⁷ *Billinkoff v. Manitoba School Division No. 1*, [1999] M.J. No. 98 (C.A.). The Court allowed numerous applications by teachers and their associations for declarations under the Charter and human rights law to proceed despite the fact that some of the applications asked for declarations in relation to contraventions of the Charter and human rights law by collective agreements. This was because there were some applications by non organized teachers and officials on the same discrimination issues that would have to go to the human rights commission and could not be decided by arbitration so it made sense to have all applications decided in one forum to avoid unnecessary costs and inconsistent results. Perhaps the most interesting decision in its non compliance with *Weber* is *Morin v. P.E.I. Regional Administrative Unit No. 3*, [2002] P.E.I.J. No. 36 (C.A.). The plaintiff teacher's Charter claim for violation of his freedom of expression based on a restriction on his right to show an instructional film appeared to clearly fall within exclusive arbitral jurisdiction under the *Weber* standard, but that argument was not even raised by the employer even though *Weber* was used to strike out a wrongful dismissal claim. The majority in the Court of Appeal did not even mention *Weber* in deciding to uphold the teacher's Charter claim, but the dissent of McQuaid J.A. noted the essential character of the dispute fell under the collective agreement and seemed to indicate it was not within the jurisdiction of the Court but nonetheless said perhaps it was alright for the Court to deal with Charter issues because it was not absolutely clear the grievance arbitration board was empowered to grant the remedy sought by the plaintiff under s. 24 of the Charter.

⁸⁸ See for example, *Brunet v. Ottawa Police Assn. and Dunlop*, [2004] O.J. No. 2185 (S.C.); *Blanco-Arriba v. Province of British Columbia*, [2001] B.C.J. No. 2376; *McCaffery v. British Columbia (Solicitor General) et al.*, [2004] B.C.J. No. 217 (S.C.); *Petrov v. British Columbia Ferry Corp.*, [2003] B.C.J. No. 395 (S.C.); *Small v. Newfoundland*, [2003] N.J. No. 152 (T.D.);

⁸⁹ See for example, *Bhaduria v. Toronto Board of Education*, [1999] O.J. No. 582 (C.A.) and

federal civil servants who are also subject to the grievance and adjudication procedures provided in the *PSSRA*.⁹⁰ The *Charter* cases to date appear to have generally adhered to the *Giorno v Pappas* position that *Weber* bars actions against not only the employer but also other individual employees, both those who are in the bargaining unit, including union officials,⁹¹ and those who are not.⁹²

Perhaps most notable in this group of decisions are the arguments made by the plaintiff in *Chase v. Canada*⁹³ that the operation of the *Weber* standard itself, in barring the plaintiff's access to court to protect his fundamental *Charter* rights, is a violation of his s. 7 and s. 15 *Charter* rights in the circumstances faced by the plaintiff. A similar argument was made in respect to s. 15 rights in *Pieters v. Canada*⁹⁴. In both cases the equality rights challenge was dismissed on the ground that although *Weber* prevented access to the courts to pursue a claim of discrimination under s. 15 of the *Charter* on the basis of race or nationality, the *Weber* bar itself operated solely on the basis of whether the claimant was a unionized employee and not on the basis of an enumerated or analogous ground under s. 15 of the *Charter*. Unfortunately the s. 7 challenge to *Weber* in *Chase* was dismissed in a one-line rejection of the argument that the plaintiff's life, liberty or security of the person were threatened by the *Weber* doctrine. It may well be that on the facts of both *Chase* and *Pieters* the access to adjudicative procedures under sections 91 and 92 of the *PSSRA* could undermine a section 7 claim. However, if a *Charter* claim was in issue in a fact situation similar to those found in *Pleau* and *Guenette*, or even *Giorno v. Pappas*, and there was a real threat that the *Weber* gap would leave the employee without access to a forum to enforce *Charter* rights, it would be much more difficult for a court to dismiss an argument that

Andrews v. Air Canada, 2008 ONCA 37, [2007] O.J. No. 5224, O.R. (3d) 561 (CA).

90 See for example, *Gaignard v. Canada (Attorney General)* (2003), 67 O.R. (3d) 611 (C.A.); *Jadwani v. Att. Gen. of Canada* (2001), 52 O.R. (3d) 660 (C.A.); *Chase v. Canada*, [2004] F.C.J. No. 311 (T.D.); *Pieters v. Canada*, [2004] F.C.J. No. 20 (T.D.).

91 *Brunet v. Ottawa Police Assn. and Dunlop*, [2004] O.J. No. 2185 (S.C.)

92 *Gaignard v. Canada (Attorney General)* (2003), 67 O.R. (3d) 611 (C.A.); *Jadwani v. Att. Gen. of Canada* (2001), 52 O.R. (3d) 660 (C.A.) and *Brunet v. Ottawa Police Assn. and Dunlop*, *supra* note 62.

93 *Supra* note 64.

94 *Supra* note 64.

security of the person was not threatened by a rule of law that could result in a denial of access to any legal forum to protect fundamental constitutional rights.

What has been the impact of *Weber* on the treatment of *Charter* claims by arbitrators? In addressing this question it is important to remember that the Supreme Court of Canada had, in *Douglas College v. Douglas/Kwantlen Faculty Ass.*,⁹⁵ held that arbitrators had the jurisdiction to apply the *Charter* under s. 52 of the *Constitution Act 1982* to statutes at issue in disputes before them, and to collective agreements and the actions of the parties where the *Charter* was applicable to those agreements or actions. The Court also held that arbitrators could grant the remedies sought for breach of the *Charter* as long as they were within the remedial powers they possessed under the statute that provided their mandate and they had jurisdiction over the parties and the subject matter of the dispute. Despite recognizing concerns that it might burden arbitration with undue complexity, the Supreme Court recognized the advantages of speedy access to justice by having arbitrators ensure compliance with *Charter* rights at that first level of adjudication.⁹⁶

Weber purported to change things in two respects. First, unlike *Douglas College* it made arbitration the *exclusive* forum for adjudication of *Charter* claims arising inferentially from the collective agreement. In using *Douglas College* as support for a move to exclusive jurisdiction over *Charter* claims Justice McLachlin effectively turned that prior decision on its head, taking a decision which was expressly intended to expand the fora available for access to *Charter* justice and using it as authority for a decision to severely restrict access to courts for *Charter* claims. Second, *Weber* declared that arbitrators were courts of competent jurisdiction to grant *Charter* remedies under s. 24 of the *Charter*. However, McLachlin J immediately qualified this status by saying arbitrators would only have jurisdiction to grant remedies for *Charter* violations to the extent that the remedies sought are within the remedial authority granted to arbitrators under their founding statute. This did not appear to expand the jurisdiction of arbitrators to grant *Charter* remedies to any significant extent beyond what had already been recognized in *Douglas*

95 [1990] 3 S.C.R. 570.

96 *Ibid.*, at 601-605.

College.⁹⁷

However, while *Weber* did little to increase the applicability of the *Charter* to arbitration or to expand the *Charter* jurisdiction of arbitrators, one might nevertheless expect some increase in *Charter* claims made before arbitrators as a consequence of the denial of access to the courts to pursue individual *Charter* actions. While there may have been a slight increase in such claims since 1995, it would be misleading to suggest that there has been a significant increase or flood of such claims at arbitration as a consequence of the *Weber* decision.⁹⁸ In assessing the lack of significant growth in *Charter* claims it should also be remembered that there has been some expansion of the basis for a finding that the *Charter* applies to the actions of a private party, at least where it is acting in furtherance of a government policy or program,⁹⁹ which by itself should have led to more *Charter* cases in arbitration. Nevertheless there has been a fairly wide variety in the type of *Charter* claims brought before arbitrators, including the following: a claim that a provision of the Ontario *Employment Standards Act* violated section 15 of the *Charter*;¹⁰⁰ several claims that a benefits insurance plan discriminated on the grounds of family status, marital status and sex contrary to s. 15;¹⁰¹ a claim that a mandatory retirement policy and the

97 It is perhaps for this reason that many of the significant *Charter* decisions by arbitrators in the years since *Weber* have placed greater reliance on *Douglas College* than on *Weber* as the basis for their jurisdiction. See for example *Mount Sinai Hospital and O.N.A.* (2000), 91 L.A.C. (4th) 215 (Devlin) and *Peel Regional Services Board and Peel Regional Police Assn* (2001), 100 L.A.C. (4th) 73 (Kirkwood).

98 I counted approximately 20 arbitral decisions from 1996 to 2004, reported in a national computer database for arbitration decisions (arb on QL systems) that contained some discussion of a *Charter* claim as part of the matter under adjudication and made some reference to *Weber* giving them authority for their jurisdiction to apply the *Charter*. In the same period there were approximately 400 cases in the same database that made some reference to the *Charter* of Rights and Freedoms, of which I would estimate only about 50% or less actually found that the *Charter* was relevant and applicable to the case before them (based on an unscientific sampling of the first 30 to 40 cases in the search, the cases that had the most references to the *Charter*).

99 *Eldridge v. British Columbia (Att. Gen.)* (1997), 151 D.L.R. (4th) 577 (S.C.C.). For application of this broader standard in arbitration see *Independent Electricity Market Operator and Society of Energy Professionals (Mand. Retirement)* (2003), 118 L.A.C. (4th) 385 (Herman).

100 *Mount Sinai Hospital and O.N.A.* (2000), 91 L.A.C. (4th) 215 (Devlin), reversed *O.N.A. v. Mount Sinai Hospital* (2004), 69 O.R. (3d) 267 (Div. Ct.).

101 *Peel Regional Services Board and Peel Regional Police Assn* (2001), 100 L.A.C. (4th) 73 (Kirkwood); and *Calgary Roman Catholic Separate School Dist. No. 1 and A.T.A. Local 55* (1998), 68

Human Rights Code of Ontario violate s. 15;¹⁰² a claim that the 2006 amendments to the Ontario *Human Rights Code* that abolished mandatory retirement but continued to allow employers to discriminate against persons over age 65 in terms of benefits and insurance plans violated s. 15 of the Charter;¹⁰³ claims that employer surveillance of employees violates s. 8 of the Charter;¹⁰⁴ a claim that an employer dress code that prohibited certain hair and beard styles offended the grievor's privacy rights under s. 7 of the Charter,¹⁰⁵ claims that breathalyser evidence acquired by contravention of the Charter should be excluded from evidence under s. 24 (2) of the Charter;¹⁰⁶ claims that discipline for statements made by employees violated their freedom of expression under s. 2(b) of the *Charter*;¹⁰⁷ and a claim by an individual employee that his freedom to not associate under s. 2(d) of the *Charter* was violated by a union shop security clause when he was given separate standing in the arbitration where the union sought an order forcing the employer to comply with the union shop clause by terminating the individual employee for refusing to

L.A.C. (4th) 1 (Sims); *Re Upper Canada District School Board and Ontario Secondary School Teachers' Federation, District 26* (2004), 126 L.A.C. (4th) 158 (Keller)

102 *Independent Electricity Market Operator and Society of Energy Professionals (Mand. Retirement)* (2003), 118 L.A.C. (4th) 385 (Herman).

¹⁰³ *O.N.A. v. Chatham-Kent (Municipality)* (2010), (sub nom. *Chatham-Kent (Municipality) v. O.N.A.*) 202 L.A.C. (4th) 1, (Etherington).

104 *Toronto Transit Comm. v. A.T.U. Local 113* (2004), 126 L.A.C. (4th) 353 (Shime); *Friolet v. Treasury Board (Solicitor Gen.)*, [2002] C.P.S.S.R.B. No. 68 (Henry); *Re City of Toronto and Canadian Union of Public Employees, Local 79* (2004), 128 L.A.C. (4th) 217 (Kirkwood)

¹⁰⁵ *United Parcel Service Canada and Employes du transport et industries diverses, local 931*, [2003] D.A.T.C. No. 582 (QL) Foisy. Note that the collective agreement expressly incorporated the Charter by reference. Foisy upheld the Charter claim.

106 *Edmonton Power Inc. and I.B.E.W.* (1997), 69 L.A.C. (4th) 283 (Malone); and *Cape Breton (Reg. Mun.) v. C.U.P.E., Loc. 759* (1999), 84 L.A.C. (4th) 106 (MacLellan). Interestingly both of these decision found that the arbitration was not a court of competent jurisdiction under s. 24 of the Charter because unlike *Weber*, they were consensual arbitrators appointed under provincial legislation that required the parties to have provision in the collective agreement to provide for final settlement of disputes without work stoppage, *by arbitration or otherwise*.

107 *Peel Board of Education v. O.S.S.T.F. (Fromm)*, [2002] O.L.A.A. No. 154 (Burkett); *A.U.P.E. v. Alberta*, [1998] A.G.A.A. No. 57 (McFetridge); *B.C. Teacher's Fed. V. B.C. Public School Employers Assoc.*, [2004] B.C.C.A.A.A. No. 82 (Munroe).

become a member of the union.¹⁰⁸

Two recent arbitration decisions demonstrate the potential significance of arbitral jurisdiction to apply the Charter in light of the SCC's recent expansion of the scope of protection for collective bargaining activity under s. 2(d) of the Charter. First, in *Alberta v AUPE*,¹⁰⁹ a three person arbitration board considered a Charter challenge under s. 2(d) that the provision of the Public Service Employee Relations Act of Alberta that excluded many categories of public servants from being included in any bargaining unit violated their freedom of association. It is clear from the facts that the policy grievance was filed after the *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*¹¹⁰ decision was rendered but before *Fraser v Attorney Gen*¹¹¹ of Ontario was decided. However the case was argued and decided in the months immediately following the release of *Fraser*. The arbitrator provided a lengthy consideration of all of the SCC's jurisprudence on freedom of association but ultimately dismissed the grievance on the basis that the exclusions did not render it effectively impossible for those excluded employees to join together to make some form of collective representation to their similar to what was upheld in *Fraser*. Second, in *Canadian Union of Public Employees, Local 835 v. South Shore District Health Authority*¹¹² Arbitrator Dorsey received a special statutory appointment as a 'mediator arbitrator' to assist the government and four unions in implementing the restructuring of the nine existing district health care authorities into one single provincial authority with only four large province wide bargaining units. The unions affected brought several Charter challenges before the mediator arbitrator involving claims that the new regime violated the freedom of association of the affected workers in several different respects.

108 *Canada Post Corp. v. C.U.P.W. (Safire)*, [1996] C.L.A.D. No. 11 56 (Christie). And there have been other cases, often search or surveillance cases where privacy interests are at issue, where arbitrators have held that although the *Charter* is not applicable to the dispute before them their interpretation and application of arbitral doctrines should nevertheless take into account *Charter* values. See for example *West Lincoln Memorial Hospital and Christian Labour Association of Canada, Local 302* (2004), 126 L.A.C. (4th) 52 (Luborsky)

109 (2011), 212 LAC (4th) 114 (Jones Chair).

110 2007 SCC 27 ("B.C. Health").

111 2011 SCC 20; [2011] 2 SCR 3.

112 (*Acute Health Care Restructuring Grievance*), [2014] N.S.L.A.A. No. 10, (Dorsey)

The most far reaching claim brought by only one union (NSGEU) was effectively seeking an order or declaration that the entire restructuring and powers given to the arbitrator to create new units were inoperative as inconsistent with the s. 2(d) rights of the affected workers in destroying their existing bargaining rights. Arbitrator Dorsey rejected claims that he had authority to grant the constitutional remedies sought by NSGEU in terms of effectively declaring the provisions under which he himself was given authority inoperative. However he found that the decisions in *Weber* and other SCC decisions on arbitral authority gave recognized his jurisdiction to determine the constitutional validity of a provision in the enabling statute and to grant specific Charter remedies of the type sought by CUPE in seeking the interpretation and application of the provisions of the empowering statute in a manner that balanced Charter values and statutory objectives.

These two recent arbitral decisions applying s. 2(d) of the Charter may foreshadow an increase in the number of arbitral cases dealing with freedom of association under the Charter based on the SCC's 2015 trilogy of decisions that increase the scope of Charter protection for concerted collective activity in pursuit of collective bargaining objectives.¹¹³ For example it is quite foreseeable that the broad recognition of the right to strike contained in the *SFL v Saskatchewan* decision could allow a union to raise Charter issues in an arbitration dealing discipline or damages arising from illegal strike activity.

Impact on Jurisdictional Divide Between Arbitration and Other Administrative Tribunals

The decision in *Weber* left litigants with great uncertainty over whether it was intended to apply to potential overlaps in jurisdiction between arbitration and other administrative tribunals. Although the Court made no reference to this area of concern, its ruling on *Charter* claims made it inevitable that litigants would attempt to use it to argue for exclusive jurisdiction for arbitration over other statutory tribunals in such cases. If employees could be denied access to courts for claims concerning their fundamental *Charter* rights, why not for claims involving human rights or other employment related statutes?

The specter of an exclusive jurisdiction approach to determine jurisdiction between arbitration and a statutory tribunal was raised once again by the Supreme Court of Canada's decision in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*.¹¹⁴ The case concerned a dispute over whether a police officer should be allowed to withdraw a resignation given in the face of threats of disciplinary action by the police chief. The union filed a grievance under the collective agreement which went to arbitration but the arbitrator held she lacked jurisdiction because the dispute was in essence about discipline and matters of discipline and discharge were governed by the provincial Police Act and dealt with by adjudicative bodies created under that Act. The arbitrator's decision was upheld on the first level of review but reversed by the Court of Appeal that held *Weber* meant exclusive jurisdiction should rest with arbitration.

The Supreme Court of Canada reversed the appeal decision and reinstated the arbitrator's ruling. In doing so it held that the exclusive jurisdiction model created in *Weber* should be applied to determine jurisdictional disputes between two competing statutory regimes as well. If the essential character of the dispute as a factual matter arises explicitly or implicitly from the interpretation, application, administration or violation of the collective agreement, then exclusive jurisdiction rests with arbitration. However, where the competing forum is another statutory regime, ultimately the Court must decide whether the essential character of the dispute falls within the ambit of the collective agreement or within the statutory scheme, and in doing so it must consider the intention of the legislature in creating that legislative scheme.¹¹⁵ But the decision did not appear to contemplate the possibility of concurrent or overlapping jurisdiction between the two statutory regimes.¹¹⁶

¹¹³ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (“MPAO”); *Meredith v. Canada (Attorney General)*, 2015 SCC 2 (“Meredith”); *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (“SFL”).

¹¹⁴ [2001] 1 S.C.R. 360.

¹¹⁵ *Ibid.*, at 374-377.

¹¹⁶ The binary choice between exclusive jurisdiction for either arbitration or a Police Act tribunal set out in *Regina Police* continues to be the rule of the day in numerous subsequent arbitration awards dealing with whether an arbitrator or the applicable tribunal created under police legislation in each jurisdiction has exclusive jurisdiction. See for eg. *Durham Regional Police Assn. v. Durham Regional Police Service (Turpin Grievance)*, [2009] O.L.A.A. No. 411 (Albertyn); *Toronto Police Services Board*

Although there were several attempts to have courts recognize exclusive arbitral jurisdiction in the area of overlapping jurisdiction with other administrative tribunal processes, both before and after *Regina Police*, for the most part courts of appeal across the country declined to apply *Weber* to find that arbitrators had exclusive jurisdiction where the legislature had given a statutory mandate to a public tribunal created under the statutory regime to enforce the legislation. Canadian courts have been particularly consistent in ruling in favour of concurrent jurisdiction in the case of overlaps with human rights tribunals. In several cases the courts pointed to access to justice concerns that could result from making access to any forum to enforce human rights contingent on union support.¹¹⁷

Most notable of these early appellate court decisions, because it was issued shortly after the release of *Regina Police Assn.*, was the Ontario Court of Appeal decision in *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)*.¹¹⁸ The reasons of the Court seriously challenged the applicability of *Weber's* exclusive jurisdiction approach in cases of overlap between arbitration and statutory human rights tribunals. The case involved a former employee whose discharge for cause in 1985 had been upheld by an arbitrator who did not apply the Human Rights Code or make any express findings on allegations of discrimination made by the grievor. When a human rights board of inquiry upheld the grievor's complaint of discrimination in 1996 and ordered the employee reinstated, the employer appealed on the basis that the arbitrator had exclusive jurisdiction over the dispute and also claimed issue estoppel. Abella

v. Toronto Police Assn., [2011] O.L.A.A. No. 65, 202 L.A.C. (4th) 113, (Knopf); quashed on JR - *Toronto Police Assn. v. Toronto Police Services Board*, 2015 ONCA 188, 382 D.L.R. (4th) 621 (CA); *Edmonton (City) v. Edmonton Police Assn.* (2012), 216 L.A.C. (4th) 291, D.P. Jones

117 One of the earliest Court of Appeal decisions was *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)*. [1999] S.J. No. 217 (C.A.); leave to appeal denied, [1999] S.C.C.A. No. 492. The decision appeared to pay lip service to *Weber* by referring to its approach and describing the dispute before it as one concerning a human rights violation in its essential character. However, it appeared to place greater significance on the fact that human rights had been recognized by the courts as quasi-constitutional rights which are fundamental, more important than other laws, do not have to be bargained for, and cannot be undermined by contract.¹¹⁷ The Court also noted the special procedures that applied to complaints under the public statutory regime, giving the human rights commission carriage of the complaint before the tribunal. These features of the statutory regime indicated that the legislature did not intend to grant exclusive jurisdiction to arbitration where such complaints could be made subject to support by the union as a precondition to having any access to a forum to protect human rights.

118 (2001), 209 D.L.R. (4th) 465 (Ont. C.A.).

J.A. expressed doubt about whether *Weber* was intended to apply to claims arising under human rights disputes because of the fundamental quasi-constitutional nature of human rights legislation. She went on to pay lip service to *Weber* and *Regina Police Assn.* by holding that the essential character of the dispute before the arbitrator and the human rights commission “were separate and distinct, warranting consideration by separate adjudicative bodies.”¹¹⁹ In her view, the essence of the grievance related to the grievor’s discharge and discipline while the essence of the human rights complaint related to racial discrimination and harassment. This appeared to be little more than an attempt to recast *Weber* to allow for concurrent or overlapping jurisdiction in the human rights area.¹²⁰

More importantly, Abella J.A. openly questioned the appropriateness of adopting *Weber* in areas of fundamental human rights because of the danger of making access to some forum to enforce individual rights contingent upon support by a collective entity. Abella J.A. noted that in an arbitration proceeding only the employer and union have party status and decisions to proceed rested with the union and not the grievor. She also noted that violations may be alleged against the union as well. She concluded that giving exclusive jurisdiction to arbitrators in that context could render chimerical the human rights of individual organized employees.¹²¹

Here the Court of Appeal appears to approve the adoption of a model of concurrent jurisdiction with reliance on a policy of deferral based on the nature of the dispute, the conduct of the prior proceeding, and the results, to avoid undue multiplicity of proceedings. But perhaps most significant is that the rationale adopted by the Court for this approach mirrors the concerns

119 *Ibid.*, at 477.

120 *Ibid.*, at 489. However the Court also noted by giving authority to the Commission to not deal with a complaint where it feels it is appropriate to defer to processes available under another Act, the Ontario HRC showed a legislative intent to shift from exclusive jurisdiction to a model of concurrent jurisdiction. This is a common feature of human rights legislation in other jurisdictions in Canada.

121 *Ibid.*, at 489-90. “... The unionized employee’s interests are advanced by and through the union, which necessarily decides how the allegations should be represented or defended. Applying *Weber* so as to assign exclusive jurisdiction to labour arbitrators could therefore render chimerical the rights of individual unionized employees. This does not mean, however, that the availability of jurisdictional concurrency should be seen as encouraging ‘forum’ shopping. The jurisdictional outcome will depend upon the circumstances of each case, including the reasonableness of the union’s conduct, the nature of the dispute, and the desirability of finality and consistency of result.”

expressed by the Ontario Court of Appeal in *Weber* as the reason for not making *Charter* claims subject to the exclusive jurisdiction approach. As noted by other commentators,¹²² if the quasi-constitutional nature of individual human rights is important enough to require access by the individual to a separate forum to enforce those rights then how can they be denied similar individual access for the enforcement of their more fundamental constitutional *Charter* rights.

Although the issue of the application of *Weber* to human rights disputes was argued by the Ontario Human Rights Commission before the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board*, the Court expressly declined to make any holding on whether its finding that the arbitrator had jurisdiction to apply the Human Rights Code ousted the jurisdiction of the statutory commission.¹²³ Of course the Court's ruling that all collective agreements henceforth must be deemed to incorporate the provisions of employment related statutes that imposed rights and obligation was at least as significant as *Weber* in terms of the expansion of arbitral jurisdiction and transforming the role of arbitration from private adjudication to forum for enforcement of public statutory rights.¹²⁴ But that same expansion of arbitral jurisdiction also significantly expanded the scope for overlapping jurisdiction between arbitration and statutory employment tribunals. Nevertheless the Court chose to postpone the decision on whether to apply the *Weber* approach to this area to a future decision.¹²⁵

The answer arrived a year later in somewhat dramatic fashion in *Quebec (Commission des droits de la personne et des droits de la jeunesse) et Morin v. Quebec (Att. Gen.)*¹²⁶. This decision appears to represent a considerable retreat from the position set out in *Regina Police Assn.*, that one should apply an exclusive jurisdiction approach in all cases where there is a

122 Alexandrowicz, *supra* note 2.

123 *Supra* note 84, at paragraph 15.

¹²⁴ This assessment of the significance of *Parry Sound* arises from both practice experience and a look at the volume of arbitral decisions that refer to and apply *Parry Sound*. In the last ten years there were 400 to 500 reported arbitral awards that referred to *Weber*. In that same time period there were between 800 and 900 awards that referred to *Parry Sound*.

125 Some commentators have suggested that the decision implicitly supports a concurrent jurisdiction approach, see Lokan and Yachnin, *supra* note 2, at 19. The decision of the B.C.C.A. in *Canpar Industries v. I.U.O.E., Local 115*, (2003), 122 L.A.C. (4th) 330, tends to support that view.

126 2004 SCC 39 (hereinafter referred to as '*Morin*').

potential for overlap between two statutory regimes.¹²⁷ In 1997 the provincial teachers' unions agreed to an amendment to provincial collective agreements with Quebec to not give credit for wage grid purposes to teaching experience gained in 1996-97. This had a negative impact on the financial compensation to be received by a minority group comprised of younger and less experienced teachers. The younger teachers filed a complaint with the Quebec Human Rights Commission that this amendment discriminated against them on the basis of age contrary to the *Quebec Charter of Human Rights and Freedoms*. The Commission referred the complaint to the Quebec Human Rights Tribunal where the Attorney General of Quebec, the school boards and the teacher unions and their federations asked the Tribunal to find that it had no jurisdiction because the dispute was within the exclusive jurisdiction of labour arbitration under the collective agreement pursuant to *Weber* and *Regina Police*. The Quebec Court of Appeal ruled in favour of the employer and unions, but its decision was reversed by a majority decision of the Supreme Court of Canada authored by the Chief Justice.

The very different tenor of the decision is signaled by the following quote from the early part of McLachlin C.J.'s opinion after setting out the overlapping, concurrent, and exclusive jurisdiction models discussed in *Weber*.

Weber holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. ... However, *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction ...¹²⁸

The Chief Justice went on to warn that we should not start with a presumption of exclusive jurisdiction for arbitrators when dealing with other statutory regimes. Rather one must ask the question in each case “whether the relevant legislation applied to the dispute at issue, taken in its full factual context, establishes that the labour arbitrator has exclusive jurisdiction over the dispute.” To answer this question we must perform a two-step analysis, first examining the relevant legislation and what it says about arbitral jurisdiction and second looking at the

127 This is certainly the position taken by Bastarache J. in a strong dissenting opinion supported by Arbour J.

nature of the dispute to see whether the legislation suggests it falls exclusively to the arbitrator. McLachlin C.J. went on to look at the provisions of both the labour legislation and the human rights statute to see what it said about the mandate of both tribunals. She noted that the Quebec Charter openly acknowledged the possibility of concurrent jurisdiction with other tribunals. Moving on to the second step of her inquiry, she noted that the focus should be on “whether the dispute, viewed in its essential character and not formalistically, is one over which the legislature intended the arbitrator to have exclusive jurisdiction”.¹²⁹

The next step in McLachlin’s reasoning is notable for a glaring omission. When comparing the essential nature of the dispute in *Weber* with the dispute in *Morin* she refers twice to the dispute in *Weber* as one concerning a claim for tort arising from the employer’s alleged trespass on the employee’s land in the course of a dispute about sick-leave under the collective agreement. On both occasions she fails to mention that *Weber* was also a claim for damages for breach of privacy rights under sections 7 and 8 of the *Charter of Rights and Freedoms*.¹³⁰ The failure to mention the Charter claims in *Weber* throughout her opinion I can only assume was deliberate, given the similarities with the *Morin* case in terms of claims for violation of fundamental individual rights. It is also critical to her analysis as she describes the critical difference between *Weber* and *Morin* as lying within the factual context that gave rise to the disputes not the labour relations legislation governing arbitration in the two provinces. She describes the *Morin* dispute as being essentially a dispute as to how the collective agreement should allocate decreased resources among union members which gave rise to the issue of whether it was discriminatory to negotiate and agree to a term that adversely affected only younger and less experienced teachers. Although this would appear to fall within subject areas with which arbitrators are familiar¹³¹, the Chief Justice concludes this is not a dispute over which

128 Ibid., at paragraph 11. The majority opinion was supported by five justices.

129 *Ibid.*, at paragraph 20.

130 *Ibid.*, at para. 21 and 22.

131 Arbitrators frequently have to look at negotiation history evidence to settle disputes about the meaning of agreement language or whether one party should be estopped from enforcing contractual rights. They also have been asked on many occasions to determine whether collective agreement language violated human rights legislation or Charter guarantees of equality. See for example *Peel*

the arbitrator has exclusive jurisdiction because it did not arise out of the operation of the collective agreement so much as out of the pre-contractual negotiation of that agreement.¹³²

This leads her to conclude that the dispute, viewed in its essential nature,

pertain[s] more to alleged discrimination in the formation and validity of the collective agreement, than to its “interpretation or application”, which is the source of the arbitrator’s jurisdiction under the Labour Code, s. 1(f). The Human Rights Commission and the Human Rights Tribunal were created by the legislature to resolve precisely these sorts of issues.¹³³

These attempts to distinguish *Morin* from *Weber* as a factual matter are unconvincing in almost every respect. As Bastarache J. notes in his dissent, *Weber* also included a claim for violation of fundamental constitutional rights under ss. 7 and 8 of the Canadian *Charter*.¹³⁴ Also as noted by the dissent, it was *the result* of the negotiations, the offending amended clause in the collective agreement that was challenged by the complaint, not the talks themselves. The essential character of the dispute concerned pay and whether teaching experience during the 1996-97 school year should be taken into account to determine pay levels, part of the foundation of collective agreement terms setting out working conditions.

What then really leads the majority to retreat from an exclusive jurisdiction approach in this case? The explanation for this apparent about face comes in the last two pages of the

Regional Services Board and Peel Regional Police Assn (2001), 100 L.A.C. (4th) 73 (Kirkwood); and *Calgary Roman Catholic Separate School Dist. No. 1 and A.T.A. Local 55* (1998), 68 L.A.C. (4th) 1 (Sims); *Re Upper Canada District School Board and Ontario Secondary School Teachers' Federation, District 26* (2004), 126 L.A.C. (4th) 158 (Keller).

132 In this respect she relies on *Goudie, supra* note 32, for the proposition that the court has found that disputes that arise out of prior contracts or the formation of the collective agreement itself may raise issues that do not fall within the scope of arbitration. As noted above, *Goudie* is clearly a case which could have been decided either way on the basis of what arbitrators have been asked to do traditionally in terms of resolving disputes arising from pre collective agreement representations, but the type of dispute at issue in *Morin*, whether the actions of the one party or another in negotiation should make a clause in question unenforceable, has long been a matter on which arbitrators are asked to rule.

133 *Ibid.*, at para. 25. Interestingly, in the next paragraph the Chief Justice holds that the nature of the dispute does not lend itself to characterization as a grievance under the collective agreement because the claim is that the agreement itself is discriminatory. Yet the arbitration reports are full of just this type of grievance and as noted by Bastarache J. in his dissent, the collective agreement at issue contained a typical human rights clause guaranteeing to the teachers the full exercise of rights under the *Quebec Charter*.

majority's reasons where they adopt three additional reasons for declining to find exclusive arbitral jurisdiction. First, after noting that the unions in this case were possibly opposed in interest to the complainants because they were affiliated with the federations that made the offending agreement amendment, the majority expressly adopted the concerns stated by the Ontario Court of Appeal in *Ford Motor Company, supra*, that the individual claimant employees could be left without meaningful legal recourse to enforce their individual statutory rights if the union chose not to put a grievance before arbitration on their behalf.¹³⁵ Second, the majority expressed concerns that even if a grievance got to arbitration, the provincial teacher federations and provincial government ministry that negotiated the amendment at the provincial level would not be subject to the jurisdiction of the arbitrator as the parties to such arbitration were the local unions and school boards. After reading numerous decisions concerning tort and *Charter* claims in which the courts have said they are not concerned that third parties who are responsible for the harm suffered by claimants may not be made subject to arbitral jurisdiction as long as the grievor may be able to claim redress against some employer entity, this seems like a tremendous change of heart. Finally, the majority also held that because the complaints involved a general challenge to the collective agreement that could affect hundreds of teachers, the provincial Human Rights Tribunal 'was a "better fit" for this dispute than the appointment of a single arbitrator to deal with a single grievance' under the Labour Code.¹³⁶ This could also be said to be a common feature of many *Charter* claims.

It is most significant that the last three reasons offered for the Court's change in direction appear to be directed to concerns about *access to justice* and *institutional appropriateness* for the effective enforcement of the rights in issue, the very interests that the Court refused to acknowledge in *Weber* in its single minded pursuit of adjudicative efficiency. These differences are graphically displayed by contrasting the majority's decision with the dissenting opinion of Bastarache J., which once again insists that in all cases we must "determine the essential

134 *Ibid.*, at para. 56

135 *Ibid.*, at para. 28. In making this point the majority opinion quotes the passages from *Ford Motor Company* that are quoted above in footnote 120.

136 *Ibid.*, at para. 30.

character of the issue and find one single entity to handle it.”¹³⁷ It speaks only to the pursuit of adjudicative efficiency and concern that allowing for concurrent jurisdiction in any case would do violence to the comprehensive statutory scheme and undermine arbitration. In the dissenters’ view, even if the problem in *Morin* could be characterized exclusively as a human rights violation, it would still be subject to the arbitrator’s exclusive jurisdiction because it is an issue that is expressly or inferentially linked to the collective agreement.¹³⁸ In essence the minority’s position is that if the arbitrator would have had jurisdiction to rule on the grievance if it had been brought in that forum then it should be found to be the subject of exclusive arbitral jurisdiction.

The extent of the emerging rift among members of the Court on its application of *Weber* to potential overlap between statutory regimes was further revealed in its decision in *Quebec (Att. Gen.) V. Quebec (Human Rights Tribunal)*,¹³⁹ released the same day as *Morin*. Although the case does not deal with a collective agreement or arbitration as one of two possible forums for the pursuit of legal rights, it nevertheless indicates radically different approaches to questions of overlap in jurisdiction between two statutory regimes. The majority, comprised of two separate opinions each supported by two justices, appears to endorse a return to the *Weber/Regina Police Assn.* approach in finding that a provincial Commission des affaires sociales (CAS) possessed exclusive jurisdiction over a claim that a feature of a low income social benefits program discriminated against women on maternity leave and thus discriminated on the basis of sex and pregnancy contrary to the *Quebec Charter*. It was held that the Quebec Human Rights Commission lacked jurisdiction to consider a complaint filed with them in connection with the denial of benefits to the complainant by the CAS. McLachlin C.J., supported by two of the members of the majority in *Morin*, filed a strong dissent consistent with her reasons in that decision. In essence her reasons are an even more open endorsement of a concurrent or overlapping jurisdiction approach when the dispute can be characterized as also raising clear human rights issues, despite finding language that indicated an intention to give

137 *Ibid.*, at para. 71.

138 *Ibid.*, at para. 67.

139 2004 SCC 40 (hereinafter *CAS*).

exclusive jurisdiction to the CAS in the provincial *Income Security Act*.¹⁴⁰

The conflicting opinions of different factions of the court in the decisions of *Morin* and *CAS* appear to indicate differences among members of the Court concerning the importance to be given to adjudicative efficiency as opposed to access to justice and institutional appropriateness concerns. For those of us who have criticized *Weber* and its progeny for failing to give adequate weight to the latter two concerns, the majority opinion in *Morin* and the dissent in *CAS* offer the basis for some hope that the debate has been reopened, at least in the case of overlapping jurisdiction with human rights tribunals, and one would think by analogy that this should provide an opportunity to reconsider the appropriateness of an exclusive jurisdiction approach to claims under the *Canadian Charter of Rights and Freedoms*.

In the years since *Morin* was decided concurrency has clearly been accepted across Canada as the general approach to be followed in dealing with human rights issues.¹⁴¹ There have been Court of Appeal decisions in several provinces that have applied *Morin* as endorsing concurrent jurisdiction between arbitrators and human rights processes.¹⁴² In some cases the

140 This was the position of the dissent despite the fact that there was no union or other collective that might render it impossible for the complainant to access the CAS appeal processes. This latter difference from *Morin*, and the fact there were no third parties involved that would not be subject to CAS jurisdiction, led two of the members of the *Morin* majority to agree with Bastarache J. that the CAS had exclusive jurisdiction, despite the expertise of the Human Rights Commission on such issues (Concurring opinion of Binnie and Fish J.J. at para. 42-43).

¹⁴¹ I recognize that Elizabeth Shilton has taken the position that *Morin* properly interpreted does not suggest a presumption in favour of concurrency for arbitrators and human rights tribunals but rather leaves us with a multi factor inquiry that has to be applied on an ad hoc case by case basis to decide whether arbitrators or tribunals have exclusive jurisdiction. See “Choice, But No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada” (2013), 38 *Queen’s L.J.* 461. I disagree with her on this point mainly because if you apply the factors identified in the *Morin* reasons to any human rights legislation in effect in Canada you are left with a conclusion of concurrency in the absence of an express provision to the contrary. I contend that the proof of that analysis is in the results of its application across the country by courts and tribunals and arbitrators since *Morin* to find concurrency in all cases. But of course I share the concerns she expresses about problems that can arise for human rights complainants in a situation of concurrency and reliance on the concepts of deferral and tribunal authority to refuse to deal with a complaint on the basis that it has been dealt with appropriately in arbitration. (see pgs 495-502). However I would note that the *Paterno v Salvation Army*, 2011 HRTO 2298 and 2012 HRTO 205 appears to be an outlier in that it is the only case I am aware of where the arbitrator accepted the employer’s motion that he had to take jurisdiction over the human rights issues attached to the discharge of the grievor over the objections of the union and the grievor.

¹⁴² See for example, *A.T.U., Local 583 v. Calgary (City)*, 2007 ABCA 121, [2007] 8 W.W.R. 452. The Court cited the *Morin* decision’s approval of *Ford Motor Co v OHRC (Naraine)* (2001), 209 D.L.R.

courts have indicated that in the case of competition between arbitral and statutory tribunal jurisdiction one should start with a presumption of concurrent or overlapping jurisdiction unless there is express statutory language to rebut that presumption.¹⁴³ In other cases they have pointed to the fundamental quasi-constitutional nature of human rights law as a further justification for insisting on concurrent jurisdiction for the human rights tribunal unless there is very clear and express language to indicate otherwise.¹⁴⁴ Many human rights statutes across the country clearly contemplate concurrent jurisdiction with other tribunals such as arbitration in setting out mechanisms for deferral and the dismissal of a complaint where it has already been dealt with appropriately in another forum.¹⁴⁵ And clearly this is the manner in which our arbitrators and

(4th) 465 (Ont. C.A.) finding that exclusive arbitral jurisdiction was not appropriate for human rights complaint matters because it could deprive individual unionized workers of access to justice in the area of human rights. The Court noted that in this case to apply the exclusive jurisdiction model would effectively leave the grievor without a forum in which to air her discrimination allegations (because the union chose not to pursue human rights issues in the just cause grievance). But the Court also suggested that in such cases of competing jurisdiction between arbitration and human rights tribunal there should be a presumption of concurrent jurisdiction unless there is very clear language to indicate an intention to create exclusive jurisdiction in one tribunal.

¹⁴³ In *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)* (2007), 2007 ABCA 120, [2007] 7 W.W.R. 663,, the Court of Appeal once again ruled in favour of concurrent jurisdiction. Here the grievor was terminated during her probationary period. The union filed a grievance alleging violation of the collective agreement, bad faith, and discrimination contrary to the anti-discrimination clause in the agreement. Ten days later the grievor filed a human rights complaint claiming the employer discriminated against her on the grounds of physical disability (CFS) and mental disability (depression). The employer argued exclusive arbitral jurisdiction but the union argued concurrent and requested the arbitration board to defer the hearing pending the outcome of the human rights complaint. The arbitrator applied Morin to rule in favour of concurrent jurisdiction but refused to defer to the human rights process because he thought the arbitration process was a better fit given the nature of the dispute. On judicial review the superior court held that this was a case for exclusive arbitral jurisdiction. The Alb. CA endorsed the arbitrator's rulings. The Court in effect appears to create a presumption, relying on Morin, that in the absence of legislative language pointing clearly to exclusivity, one of the other non-exclusive jurisdictional outcomes would generally apply. Here concurrency was the proper approach.

¹⁴⁴ *Nova Scotia (Human Rights Commission) v. Halifax (Regional Municipality)*, 2008 CarswellNS 107, 2008 NSCA 21 (relying on *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)*, [1999] S.J. No. 217 (C.A.) on this point.

¹⁴⁵ See for example, Ontario *Human Rights Code*, RSO 1990, c H-19, s. 34. Tribunal is only given jurisdiction to dismiss an application on the basis of other proceedings if it finds the substance of the complaint has been appropriately dealt with by another proceeding (s. 45.1). In addition, it is given the authority to defer to another proceeding under s. 45. Both of these discretionary powers, deferral and dismissal, are provided for in a way that contemplates concurrent jurisdiction in another proceeding, and

HRT chairs have interpreted these provisions and the *Morin* decision. When confronted with motions to adjourn and defer to the other process with concurrent jurisdiction, arbitrators have looked at very pragmatic considerations concerning access to justice, fairness, efficiency, expertise of the decision makers, prejudice to the parties, the likelihood of inconsistent results and duplication of efforts, the status of the proceeding in each forum, and which forum has the broader jurisdiction to resolve all of the issues at play.¹⁴⁶ Similarly there are numerous decisions of HRT chairs considering motions to defer to grievance and arbitrations procedures. Once again all of these decisions approach the case from the premise of concurrent jurisdiction shared by HRTs and arbitrators and make the decision on deferral based on pragmatic considerations of fairness, expedition, efficiency and the avoidance of duplication and inconsistent results.¹⁴⁷

Rulings in favour of concurrent jurisdiction are also common in many, of not most, areas of overlap with other statutory processes. Arbitrators have frequently found that they have concurrent jurisdiction in cases involving issues arising under legislation concerning

there is nothing in the legislation that appears to contemplate that another proceeding or tribunal would have exclusive jurisdiction sufficient to deprive the HRT of the jurisdiction to hear the matter.

¹⁴⁶ See for example *Ont. Ministry of Community Safety and Correctional Services and OPSEU (Therrien)*, [2008] OGSBA no. 93 (Lynk); *Ont. Ministry of Community Safety and Correctional Services and OPSEU (O'Connor)*, [2010] OGSBA no 156 (Lynk); *Ont. Ministry of Community Safety and Correctional Services and OPSEU* [2008] OGSBA no 54 (Carrier); *Ont. (LCBO) and OPSEU (Crowley)*, [2010] OGSBA no 124 (Kirkwood); *Kawartha Pine Ridge District School Board v OSSTF District 14 (Mr. S. Gr)*, [2010] OLAA no 429 (Knopf); *Paragon Health Care Inc. v SEIU, Local 1 (Markland)*, [2011] OLAA no 313 (Kaplan); *University Health Network v OPSEU (Vedd)*, (2007) 159 LAC (4th) 298 (Marcotte). In the latter case the arbitrator expressly rejected the employer submission that he take exclusive jurisdiction over the human rights issues, holding that the law did not allow him to oust concurrent HRT jurisdiction. See also *Bayshore Home Health v SEIU, Local 1 (Pidgeon)*, [2011] OLAA no 3 (Randall) and *BC (Ministry of Prov. Revenue v BCGSEU (Chang)*, [2009] BCCAAA no 11, 181 LAC (4th) 278 (Hope). In the latter case the arbitrator accepted the motion of the employer to dismiss the grievance on the basis that the HRT had ruled against the grievor's human rights complaint which dealt with the same facts and issues. He relied on the principle of collateral attack from *City of Toronto v CUPE*, [2003] 3 SCR 77. In all cases it was recognized that the arbitrators shared concurrent jurisdiction with HRTs.

¹⁴⁷ See for example *Aubin v Waterloo (Regional Municipality)*, [2008] HRTO 214, [2008] OHRTD no 206. "The tribunal will generally defer an application where there is an ongoing grievance under the collective agreement based on the same facts and issues. However, the Tribunal must also consider, in light of the particular circumstances of each case, whether deferral is the most fair, just and expeditious way of proceeding with the application." (para 4) The application was deferred because the union had referred the grievances to arbitration.

occupational health and safety,¹⁴⁸ pay equity,¹⁴⁹ labour relations,¹⁵⁰ privacy,¹⁵¹ and pensions.¹⁵² However, I should note that while several arbitrators have ruled in favour of concurrent jurisdiction rather than the exclusive jurisdiction for arbitrators whenever one could say the pension dispute arose out of the collective agreement in some fashion as suggested by *Bisaillon*, the numerous decisions on arbitral jurisdiction over pension issues appear to indicate a significant lack of consensus. They may also indicate a lack of familiarity and comfort with dealing with some of the complexities of the law regulating pensions.¹⁵³ Workers compensation, offers similar difficulties in that most workers compensation legislation provides for exclusive jurisdiction for workers' compensation tribunals over the issues of whether there has been a workplace injury or illness, which is generally accepted as indicating exclusive jurisdiction over those particular issues. However several arbitrators have indicated that they

¹⁴⁸ See for eg. *Central Care Corp. v. S.E.I.U., Local 1.on*, 2006 CarswellOnt 4182 (Levinson); *Valard Construction LP and CUSW (De Vries)*, Re, 2014 CarswellAlta 139, [2014] A.W.L.D. 1267 (Alexander-Smith)

¹⁴⁹ See for eg. *Chatham-Kent Board of Health and ONA* (2006), 85 C.L.A.S. 144 (Crljenica)

¹⁵⁰ See for eg., *Millwrights and Machine Erectors, Local 2309 v. IBEW*, [2005] CLAD No. 175 (MacDowell); *Expertech Network Installation Inc. and CEP*, (2006) 87 CLAS 361 (Surdykowski).

¹⁵¹ *Ontario and OPSEU* (2015) 122 C.L.A.S. 215 (Briggs); *Niagara Falls and CUPE, Local 133*, [2005] OLAA No. 228 (MacDowell); *Kawartha Pine Ridge DSB and ETFO* (2007), 169 LAC (4th) 353 (Luborsky).

¹⁵² *Greater Essex DSB and OSSTF (Omers Gr)* 2015 CanLII 38721 (MacDowell); See also, *PPG Canada Inc. v. Ontario (Supt. Of Fin. Services)* 2015 CarswellOnt 5557 (Fin. Serv. Trib. – Ch. Shilton). The latter ruling is really one that recognizes partial concurrency, holding that the pension legislation at issue gave the FST exclusive jurisdiction over some issues, such as the approval of pension plan wind up report.

¹⁵³ See for example. *West Parry Sound Health Centre and ONA (Pension Contributions)*, (2008) 96 C.L.A.S. 12 (Parmar); *Grand River Hospital Corp. v. O.N.A.*, [2010] O.L.A.A. No. 602, 200 L.A.C. (4th) 363, (Howe); *Rouge Valley Health System v. Ontario Nurses' Assn. (Union Grievance No. 0877)*, [2013] O.L.A.A. No. 57 (Stout). In all three cases the arbitrators declined to take jurisdiction over grievances arguing the employer had failed to make appropriate pension contributions for part time nurses based on certain types of hours that attracted premium rates, despite the fact the collective agreement referred to the pension plan and gave part-time nurses the option to enroll in it or get a percentage in lieu. All three arbitrators held they had no jurisdiction because the dispute in its essential nature arose from the pension plan, not from the collective agreement. Even in the *Greater Essex DSB and OSSTF* case referred to above, although arbitrator MacDowell found he had concurrent jurisdiction he chose to defer to the expertise of the decision makers under the Pension Benefits Act and OMERS legislation but remained seized with jurisdiction to deal with it if the union was unable to get an appropriate hearing in the other process.

may have concurrent jurisdiction over related issues such as harassment arising from the reporting of a workplace injury or illness.¹⁵⁴

Conclusion

What has been missing from *Weber* and most of its offspring is a principled yet pragmatic and functional approach to deciding questions of appropriate forum in cases of overlapping jurisdiction. The single minded drive displayed in *Weber*, *Regina Police* and *Bisaillon* to apply an ‘exclusive jurisdiction’ approach to all areas of potential overlap between arbitration and other forums focused almost exclusively on considerations of adjudicative efficiency and finality. Although lip service was paid to concerns about not undermining arbitration as the legislative choice for resolving workplace disputes under the collective bargaining regime, there was no real threat of this happening at the time *Weber* was decided, or at any time since then. Prior to *Weber* being decided arbitration was already becoming, in the view of some, too popular as the chosen forum to pursue human rights, *Charter* and other employment statute claims. The reasons for that popularity are obvious given the cost, expense and delay for the average individual to pursue those claims elsewhere on her own. So there was no need to bolster the demand for resort to arbitration to resolve rights disputes. Nor would I ever suggest that we should attempt to prevent arbitration from having jurisdiction to play the important role it has played in recent years as an available forum for the resolution of such rights.¹⁵⁵

The problem with the *Weber* approach from the outset was its failure to consider the access to justice and institutional appropriateness concerns that arise from making collective bargaining institutions, designed for the effective pursuit of collective interests, the exclusive mechanism for the enforcement of fundamental individual constitutional and statutory rights.

¹⁵⁴ See for eg., *Manitoba and MGEU (St Hilaire)* (2010), 102 CLAS 126 (Gibson); *Valard Construction LP and CUSW (De Vries)*, Re, 2014 CarswellAlta 139, [2014] A.W.L.D. 1267, 117 C.L.A.S. 230, (Alexander-Smith); *Edmonton Police Service and Edmonton Police Association*, 2015 CanLII 39179 (AB GAA) (Sims)

¹⁵⁵ I have never felt otherwise, despite the reservations I have expressed elsewhere that the privatization and collectivization of the enforcement of public individual rights presents significant concerns about access to justice and effective protection and enforcement of such rights. See Etherington, “Promises, Promises: Notes on Diversity and Access to Justice” (2001), 26 Queen’s L.J. 43.

The access to justice and institutional concerns raised by imposing a system on organized workers that makes unions the gatekeepers to enforcement of fundamental *Charter* and human rights have been recognized by some courts despite *Weber's* failure to even mention them. The Ontario Court of Appeal decisions in *Weber* and *Ford Motor Co.*, and perhaps most importantly the majority opinion in *Morin*, represent the most significant judicial recognition of the need to balance these concerns with adjudicative efficiency interests in deciding to allow for concurrent or overlapping jurisdiction in appropriate cases. Similarly, the reasons of Arbitrator Pamela Picher in *Seneca College* give very articulate expression to the access to justice and institutional appropriateness concerns that should be considered in determining whether arbitrators should be granted exclusive jurisdiction over tort claims by employees. That decision is invaluable for stating the very real dangers to the future viability and long-term success of unions and grievance arbitration as institutions to resolve collective bargaining disputes if the *Weber* approach to exclusive jurisdiction is followed blindly.

In my view these later decisions, in particular *Morin*, have provided the springboard for a rethinking of our approach to dealing with issues of potential overlaps in jurisdiction, particularly in the area of *Charter* claims. What is required is a multi-factored analysis to determine whether a particular type of dispute should be subject to exclusive arbitral jurisdiction or should allow for overlapping or concurrent jurisdiction.¹⁵⁶ I propose that the following factors should be addressed in approaching issues of overlapping jurisdiction if we are to have a truly principled, functional and pragmatic approach that also addresses access to justice and institutional appropriateness concerns.

- (1) The nature of the rights at issue. Are the rights being asserted primarily of a private and collective nature? Or are they primarily individual statutory or constitutional rights that are being asserted? If the rights are fundamental public individual rights of a constitutional or quasi-constitutional nature then we probably should not make their protection or enforcement subject to exclusive control by private collective procedures, such as union controlled grievance

¹⁵⁶ I note in this respect that even before *Morin* was decided other commentators called for development of a policy of deferral to replace the exclusive jurisdiction approach. See most notably, Alexandrowicz, *supra* note 2, at 355-56. Most of the factors proposed in this paper were included in a proposed scheme for a multi-factored analysis included in a paper I presented at a meeting of the Canadian Labour Law Casebook Group at the University of Toronto in the summer of 1999.

procedures, or arbitration processes controlled by unions and employers.¹⁵⁷

- (2) The intention of the parties. Looked at both subjectively and objectively, is it the kind of dispute that the parties would have contemplated as being dealt with exclusively by arbitration?¹⁵⁸ In this respect I cannot imagine that any employers or unions contemplated the possibility before *Weber* that agreeing to collective agreement language concerning harassment in the workplace would preclude all employees in the unit from access to courts to protect their *Charter* rights and freedoms. Could any employer or union say, with any honesty, that before *Giorno* they thought about the possibility that agreeing to a health and safety clause could bar employees from access to courts to pursue defamation actions against third party employees not in the bargaining unit or in a managerial capacity?
- (3) The essential character of the dispute.¹⁵⁹ Is the dispute of a kind that bargaining concerns are, or should be central, to its resolution? Is it the type of issue that is normally addressed in collective bargaining or grievance and arbitration proceedings?¹⁶⁰ Is it essentially a dispute about terms and conditions of employment or the enforcement and application of terms of the collective agreement or representations by one party to the other?¹⁶¹

157 See for example the decisions of Justice Arbour in *Weber v. Ontario Hydro* (1992), 98 D.L.R. (4th) 32 (Ont. C.A.), Justice Abella in *Ford Motor Co.*, supra note 90, and the majority opinion of McLachlin J. in *Morin*, supra note 97.

158 See *Seneca College*, supra note 56.

¹⁵⁹ I note that this continues to be one of the most easily manipulated criteria from the original *Weber* test and leads to a lot of result oriented or declaratory reasoning. Examples of that are McLachlin CJ's own ability to characterize Mr Weber's concerns about the invasion of the privacy of his and his wife's privacy in his home by a third party as arising from the collective agreement but finding in *Morin* that a complaint that clause in the collective agreement was discriminatory did not as a matter of fact arise from the collective agreement but rather arose from the negotiations preceding the agreement. Similarly in *Bisaillon* the majority finds that concerns about employer contributions to the pension plan in their essential nature arise from the collective agreement while the dissent finds they are essentially issues that arise from the pension plan. However I think it remains a relevant concern.

160 It has been long accepted that arbitrators should have exclusive jurisdiction over these types of disputes as a central feature of an industrial pluralist approach to our collective bargaining regime. *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 S.C.C.; and *St. Anne-Nackawic Pulp & Paper Co. Ltd. v. C.P.U. Local 219*, [1986] 1 S.C.R. 704.

161 As noted above, it would have been quite plausible in *Goudie v. Ottawa (City)*, supra, note 31, for the Supreme Court to have found, as the trial judge did, that the claim should fall within the exclusive jurisdiction of arbitration as it could easily be considered as a dispute concerning whether the current collective agreement terms should apply or the employer should be estopped from resiling from his pre-hiring representations to some employees. See *C.N.R. Co. v. Beatty* (1981), 34 O.R. (2d) 385 (H.C.).

- (4) Access to justice concerns. What are the implications of granting exclusive jurisdiction to arbitration for access by the claimant to a forum with the jurisdiction and authority to grant effective redress for the enforcement of the rights at issue? Will a grant of exclusive jurisdiction raise a real threat of denial of access to justice to protect individual rights of the organized employee? See for example *Giorno*, where the Court seem to ignore the prospect that the employee might fail on a grievance because she could not prove a threat to health and safety despite the fact she has been the subject of defamation, with the result that she is denied any forum for vindication of her common law rights.
- (5) Institutional appropriateness concerns. Are the claims in dispute of a type that arbitrators are accustomed to dealing with and have the necessary expertise and resources to resolve successfully? Is the forum capable of dealing with procedural problems raised by the type of claims being made in the dispute, such as adding parties?¹⁶² It is also very questionable whether we want arbitrators who are essentially private adjudicators who depend on their continued mutual acceptability with the parties, employers and unions, for their future employment, to have exclusive jurisdiction in the first instance over the development of fundamental individual public rights.¹⁶³
- (6) The impact on the long term health and viability of collective bargaining institutions like arbitration and unions of giving them exclusive jurisdiction to deal with the type of individual rights dispute at issue. Most unions are not enamoured with the prospect of having exclusive jurisdiction to decide whether to proceed with defamation or other intentional tort actions against employers, managers or co-workers, especially workers in the same bargaining unit. They are similarly not enamoured with being turned into private tort law commissions or private Charter of Rights commissions that provide the only means of bringing a tort claim or Charter claim forward for all employees in the unit. For most unions the burden of ensuring the enforcement of collective agreement rights is seen as more than sufficient to demand all of their financial and personnel resources. The downloading of sole responsibility for the costs of enforcing public statutory rights, from government institutions to unions, is a serious concern for most unions.¹⁶⁴

162 See majority reasons in *Morin*, supra note 97.

163 Note that Don Carter in his paper on the aftermath of *Weber*, supra note 2, expressed similar concerns with the *Weber* approach and proposed a more functional approach that takes in to account institutional appropriateness concerns.

164 These developments would also seem to reinforce the concerns expressed by many critical legal scholars in the 1970's and 1980's that unions were at risk of being co-opted as junior management in the workplace through their control over the grievance arbitration process. See Glasbeek, "Voluntarism, Liberalism, and Grievance Arbitration: Holy Grail, Romance, and Real Life", in Geoffrey England, ed.,

- (7) Concerns about undermining arbitration as the primary method of resolving workplace disputes in a collective bargaining context. Would allowing concurrent or overlapping jurisdiction provide a serious threat to the future viability and acceptance of arbitration as the primary dispute resolution mechanism?
- (8) Adjudicative efficiency concerns and finality. What are the implications of allowing for a concurring or overlapping jurisdiction approach in terms of adjudicative and party resources, including cost, delay and other multiplicity of proceeding concerns? Can such concerns be dealt with or managed effectively by applying a policy of deferral and issue estoppel premised on the type of context based approach to balancing access to justice and efficiency concerns found in the Supreme Court's decision in *Danyluk v. Ainsworth Technologies Inc.*?¹⁶⁵

While a multi-factored approach of this type for determining the jurisdiction of tribunals with overlapping jurisdiction may appear to present problems of complexity and uncertainty, the 'bright line' *Weber* approach has done little to eliminate confusion and inconsistency and has continued to promote considerable litigation, while at the same time presenting the dangers of the *Weber* gap and the potential for harm to our collective bargaining institutions. I would also venture that the application of these factors would in most cases result in a finding of concurrent jurisdiction between arbitrators and statutory tribunals where there is overlapping jurisdiction under employment related statutes. In the interests of certainty and predictability I would also not be adverse to the courts recognizing a general assumption or presumption of concurrent jurisdiction in areas of overlap between arbitrators and statutory regimes, of course subject to rebuttal where the legislators use express language to denote an intention to give one body exclusive jurisdiction. I see nothing wrong with requiring legislators to make it clear when they intend to grant exclusive jurisdiction to arbitrators when they have created a statutory tribunal and given it a clear mandate to administer and enforce the law at issue.¹⁶⁶ In addition, I would make Charter claims subject to concurrent jurisdiction between arbitration and courts, thereby returning us to the law as it existed under *Douglas College*, immediately before *Weber* was

Essays in Labour Relations Law (CCH Canadian, 1986) 57.

¹⁶⁵ *Supra*, note 28.

¹⁶⁶ Of course legislatures have experience with how to do this clearly. For eg., see s. 99, *Employment Standards Act, 2000*, SO 2000, c. 41.

decided. If there ever was any justification for making such claims subject to exclusive arbitral jurisdiction in *Weber*, that justification has been destroyed by the majority recognition in *Morin* that access to justice concerns must override efficiency concerns when we are dealing fundamental individual human rights, for which access to a forum for enforcement should never be made contingent on collective support.