Essentially Unsound?: The Impact of the "Essential Character" Approach to Arbitral Jurisdiction on The Administration of Industrial Justice

Allan (Yi Lin) Wu,

Class of 2013 Juris Doctor at the University of Victoria,

It has long been acknowledged that the purpose of the Canadian labour arbitration regime is the speedy, efficient, cost-effective, fair and expert resolution of workplace disputes.[1] For instance, the Supreme Court of Canada noted in *Toronto (City) v Canadian Union of Public Employees, Local 79*[2] that the volatile context of labour relations requires a speedy means of providing sensitive and expert decisions which are final and binding on workplace parties.[3] Accordingly, labour arbitration and labour law have been shaped with a view to the effective administration of industrial justice. However, as Chief Justice Winkler has noted, labour arbitration's ability to effectively dispense industrial justice has been hindered as "the arbitration system has been overburdened in a number of ways and for a number of reasons."[4] Chief Justice Winkler attributes some of the overburdening to an expansion of arbitral jurisdiction resulting from the Supreme Court of Canada's decisions in *Weber v Ontario Hydro*[5] and *Parry Sound v OPSEU, Local 324*.[6] In this paper, I investigate the impact of these cases on the administration of industrial relations.

If the Supreme Court's decisions have adversely impacted the efficacy of labour arbitration, that is an unfortunate result of two decisions which sought to strengthen labour arbitration's effectiveness. Notwithstanding the Court's good intentions, its jurisprudence has been widely criticized on a number of grounds. Broadly speaking, the allocation of jurisdiction created by *Weber* and *Parry Sound* has been criticized for its uncertainty, its indifference to arbitration's institutional appropriateness for certain matters, and its potential denial of access to justice. This paper surveys both the praise and the criticism that have been directed at the jurisdictional framework established by *Weber* and expanded by *Parry Sound*. It also canvasses the recommendations for reform that have been advanced both by those who

---

[1] Justice Warren Winkler, ""Arbitration as a Cornerstone of Industrial Justice" online: Court of Appeal for Ontario <http://www.ontariocourts.ca/coa/en/ps/speeches/2011-arbitration-cornerstone-industrial-justice.htm>.
[2] *Toronto (City) v Canadian Union of Public Employees, Local 79*, 2003 SCC 63, 2003 CarswellOnt 4328 (WL Can).
[3] *Ibid* at para 68.
[4] Winkler *supra* note 1.
[5] [1995] SCJ No 59, [1995] 2 SCR 929 [*Weber*].
[6] 2003 SCC 42, [2003] 2 SCR 157 [*Parry Sound*].

support a more expansive role for arbitration and those who would prefer a retrenchment of arbitral jurisdiction. It concludes that arbitration's ability to provide expedient, efficient, expert and fair decision-making is hindered, in many respects, by *Weber* and *Parry Sound*. It suggests that reforms which depart from the formalism of the current approach will improve the administration of industrial justice. The considerations that should underlie every decision regarding a dispute's appropriate forum must be placed at the forefront of a transparent and principled analysis concerning the dispute's proper forum.

A. The Jurisprudence

Before embarking on an examination of the criticism and recommendations which have been directed at the current framework governing arbitral jurisdiction, it is appropriate to briefly review the jurisprudence against which the criticisms and recommendations must be understood. The starting point for our purposes is *Weber*, which was responsible for introducing the exclusive jurisdiction model of arbitral jurisdiction. After almost two decades, *Weber* remains the seminal case concerning arbitral jurisdiction.

Weber was an employee of Ontario Hydro who took an extended leave of absence due to back problems. While Ontario Hydro initially paid the sick leave benefits provided by its collective agreement, it came to suspect the legitimacy of Weber's claim and hired private investigators to verify whether Weber's condition was genuine. The investigators entered Weber's home under false pretenses and obtained information which prompted Ontario Hydro to suspend Weber for abusing his sick leave benefits.[7] Weber's union commenced arbitration with respect to the suspension, which ultimately settled. However Weber also commenced a court action based on tort and breach of *Charter*

[7] *Weber supra* note 5 at para 33.

rights, which proceeded after the arbitration's settlement.[8] The question for the Supreme Court of Canada was what effect final and binding arbitration clauses in labour legislation had on arbitral jurisdiction, and whether they served to oust the courts' jurisdiction over claims such as Weber's which arose from a collective bargaining relationship.[9]

A majority of the Court rejected the concurrent model of arbitral jurisdiction which "contemplates concurrent regimes of arbitration and court actions."[10] One of the majority's reasons for rejecting this model was that it was found to undercut "the purpose of the regime of exclusive arbitration which lies at the heart of all Canadian labour disputes."[11] The majority suggested that to permit concurrent court actions would undermine an objective of the Canadian labour regime, which is the quick and economical resolution of disputes with minimal disruption to the parties and the economy.[12] The majority also rejected the model of overlapping jurisdiction, which provides that "notwithstanding that the facts of [a] dispute arise out of the collective agreement, a court action may be brought if it raises issues which go beyond the traditional subject matter of labour law."[13] In the majority's view, this model would allow creative pleaders to "evade the legislative prohibition on parallel court actions by raising new and innovative causes of action… [and] undermine the legislative purposes underlying [final and binding arbitration clauses] and the intention of the parties to the agreement."[14] That would have had adverse effects on the administration of industrial justice.

The majority settled on the exclusive jurisdiction model of arbitral jurisdiction as the most appropriate approach. This model requires that where "the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an

[8] *Ibid* at para 34-5.
[9] *Ibid* at para 38.
[10] *Ibid* at para 39.
[11] *Ibid* at para 46.
[12] *Ibid*.
[13] *Ibid* at para 47.
[14] *Ibid* at para 49.

action in respect of that dispute."[15] In determining whether the difference at issue arises from the collective agreement, the decision-maker must determine whether the dispute's "essential character… arises from the interpretation, application, administration or violation of the collective agreement."[16] In exhorting the virtues of the exclusive jurisdiction model, the majority touted the desirability of having "a single tribunal deciding all issues arising from the dispute in the first instance."[17] This included *Charter* claims, which the majority decided arbitrators were capable of deciding as courts of competent jurisdiction.

Weber's broad understanding of arbitral jurisdiction was expanded by the Supreme Court's subsequent decision in *Parry Sound*, which concerned the termination of a probationary employee upon her return from maternity leave.[18] The question in this case was whether "the substantive rights and obligations of the *Human Rights Code* [were] incorporated into a collective agreement"[19] in such a manner as to render them arbitrable. A majority concluded that "the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction."[20] Consequently, "human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract."[21] While the Court acknowledged that this position was inconsistent with the traditional understanding of collective agreements as private contracts which determine the arbitrability of differences, it justified the result on the basis that collective agreements also serve a public function of promoting the peaceful resolution of labour disputes.[22]

---

[15] *Ibid* at para 50.
[16] *Ibid* at para 52.
[17] *Ibid* at para 55.
[18] *Parry Sound supra* note 6 at para 3.
[19] *Ibid* at para 14.
[20] *Ibid* at para 28.
[21] *Ibid*.
[22] *Ibid* at para 30.

Parry Sound has been described as sending another signal, after *Weber,* "that the Supreme Court favours an expansive model of arbitrators' jurisdiction, and that the Court sees arbitration as the pre-eminent forum for resolution of workplace disputes in the unionized sector."[23] However, *Parry Sound* raised the question of how one reconciled the exclusive jurisdiction model articulated by *Weber* vis-à-vis the relationship between arbitrators and courts, with arbitral jurisdiction over employment-related statutes, many of which provided their own tribunals for enforcement and dispute resolution. Indeed, Lokan and Yachin described *Parry Sound* as placing the court's jurisprudence on "a collision course with the 'exclusive jurisdiction' model, at least where competing statutory regimes are involved."[24] This apparent contradiction would be resolved, albeit imperfectly, as we shall see.

The allocation of jurisdiction between labour arbitrators and other statutory tribunals was addressed by the Supreme Court in *Commision des Droits de la Personne et des Droits de la Jeunesse c Quebec (PG)* ("*Morin*").[25] *Morin* concerned a modification to a collective agreement in the education sector, providing that the experience acquired by teachers during the 1996-1997 school year would not be recognized for the purposes of seniority or salary increases. The only teachers prejudiced by this change were younger and less experience teachers who had not obtained the highest level of the pay scale. This group filed a human rights complaint alleging the change discriminated against them on the basis of age.[26] The employers argued that the human rights tribunal had no jurisdiction over the dispute as it belonged under the exclusive jurisdiction of an arbitrator.

The Supreme Court acknowledged the difficulty of allocating jurisdiction among multiple tribunals, stating "[t]here is no easy answer to the question of which of two possible tribunals should decide

---

[23] Andre K Lokan & Maryth Yachin, "From *Weber* to *Parry Sound*: The Expanded Scope of Arbitration" (2004) 11 CLELJ 1 at 3.
[24] *Ibid* at 19.
[25] 2004 SCC 39, 2004 2 SCR 185 [*Morin*].
[26] *Ibid* at para 2.

disputes that arise in the labour context where legislation appears to permit both to do so."[27] According to the majority, *Weber* does not give labour arbitrators exclusive jurisdiction over every employer-union dispute.[28] Rather, "the question in each case is 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."[29] This involves a two-step analysis. First, a decision-maker must examine the relevant legislation and what it says about the arbitrator's jurisdiction. Second, the decision-maker must "look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator."[30] This requires an examination of the dispute in its full factual context for the purpose of determining "whether the dispute, viewed in its essential character and not formalistically, is one over which the legislature intended the arbitrator to have exclusive jurisdiction."[31] Applying this test, the Court found that the dispute concerned an allegedly discriminatory collective agreement, and the essence of the dispute was the "process of the negotiation and… inclusion of this term in the collective agreement."[32] The arbitrator did not enjoy exclusive jurisdiction over the complaint as "[it did] not arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement."[33] Further considerations provided by the Supreme Court in support of the result included the fact that the unions were opposed in interest to the complainants,[34] the fact that the arbitrator would not have jurisdiction over all the parties even if the union had filed a grievance on behalf of the complainants,[35] and its view that the Human Rights Tribunal was a better fit for this dispute than an

[27] *Ibid* at para 7.
[28] *Ibid* at para 11.
[29] *Ibid* at para 14.
[30] *Ibid* at para 15.
[31] *Ibid* at para 20.
[32] *Ibid* at para 23.
[33] *Ibid* at para 24.
[34] *Ibid* at para 28.
[35] *Ibid* at para 29.

arbitrator appointed to decide a single grievance because the outcome could affect hundreds of teachers.[36]

A discussion of *Morin*'s application to each statutory regime which may impact the collective bargaining relationship is beyond the ambit of this paper. *Morin*'s application to the allocation of jurisdiction between arbitrators and human rights tribunals indicates that concurrent jurisdiction will often be warranted. The appellate jurisprudence in this area suggests that arbitrators and human rights tribunals enjoy concurrent jurisdiction over human rights matters arising from the collective bargaining relationship.[37] *Morin*'s allocation of jurisdiction between arbitrators and other statutory bodies, including those which may not yet exist, is less clear.

The effect of the above developments has transformed labour arbitration from a private dispute resolution mechanism into what MacDowell calls a "labour court" which not only reads and interprets collective agreements, but also "enforce[s] an array of statutes, including the *Charter*, and… [decides] common law claims that were formerly dealt with only by the courts."[38] This has not been a seamless transformation. The application of *Weber* and its successor cases has generated extensive debate, and decision-makers continue to struggle with their application to emergent situations.[39] It is to these debates and difficulties we now turn.

B. <u>The Jurisprudence in Practice</u>

---

[36] *Ibid* at para 30.
[37] Sonia Regenbogen Luciw, "*Parry Sound* and Its Successors in the Supreme Court" (2004) 11 CLELJ 376 at 380. See also Dana F Hooker & Carman J Overholt, "Defending Claims in Different Fora: The Competing Jurisdiction of Arbitrators and Tribunals in British Columbia" (2010-2011) 43 UBC L Rev 47 at 64. See for example *Ford Motor Co of Canada v Ontario (Human Rights Commission)*, (2001), 209 DLR (4th) 465, 158 OAC 380; *Amalgamated Transit Union, Local 583 v Calgary (City)*, 2007 ABCA 121, 404 AR 102; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2008 NSCA 21, 264 NSR (2d) 61; all cited in Hooker and Overholt.
[38] Richard MacDowell, "Labour Arbitration- The New Labour Court?" (2000) 8 CLELJ 121 at 122.
[39] John-Paul Alexandrowicz, "Restoring the Role of Grievance Arbitration: A New Approach to *Weber*" (2003) 10 CLELJ 269 at 270.

The jurisprudential developments outlined above concerning the jurisdiction of arbitrators, courts, and other tribunals, has been recognized as having some salutary effects on the administration of industrial justice. As Lokan and Yachnin have observed, "[u]nions, employers and individual employees alike are frustrated by the plethora of competing tribunals that have authority over different facets of labour and employment law. "[40] Accordingly, "[g]iven the delay and expense of litigation, there is much to be said for a system in which the tribunal that is most likely to deal initially with a dispute (usually an arbitration board) is presumed to have exclusive jurisdiction to decide the matter."[41] In their view, it would be inefficient "to allow an employee to prosecute a grievance through to settlement, as… Weber did, and then to entertain a lawsuit relating to the same events."[42] Conversely, it would be undesirable if "an employer were allowed to use its power of discipline – and have an arbitration board rule on the propriety of such discipline – and then be permitted to bring a lawsuit against the employee claiming losses arising from the conduct in question."[43] Similarly, labour lawyer Craig Flood has commended the one-stop shopping approach to workplace dispute resolution on the basis that it "potentially avoids the scenario of inconsistent results… and may eliminate wasteful duplication of litigation and adjudication resources."[44] Further, Flood remarks that arbitrators may be better positioned to provide workplace remedies that address concerns raised by a range of sources, such as employment standards, the collective agreement, and human rights.[45]

On the subject of human rights, some commentators have suggested that the creation of arbitral jurisdiction over human rights statutes has a positive impact on workplace human rights adjudication.

---

[40] Lokan & Yachin *supra* note 23 at 5.
[41] *Ibid*.
[42] *Ibid*.
[43] *Ibid*. This was the situation in *Weber*'s companion case, *New Brunswick v O'Leary*, [1995] 2 SCR 967, 125 DLR (4th) 609.
[44] Craig Flood, "Efficiency v Fairness: Multiple Litigation and Adjudication in Labour and Employment Law" (2000) 8 CLELJ 383 at 387.
[45] *Ibid*. See also William Kaplan, Andrew Lokan, Carol S Nielsen, Ian J Roland, Peter J Thorup & Debra Parkes, "The Scope of Rights Arbitration after *Weber v Ontario*" (1999) 7 CLELJ 249 at 249-50.

Fay Faraday suggests that the adjudicability of human rights in labour arbitration "provides an additional and, in many cases, a more accessible forum in which these fundamental rights can be adjudicated."[46] For Faraday, this is valuable because "greater access to enforcement and the 'threat effect' of ready enforcement should promote compliance with human rights statutes."[47] Peter Gall, Andrea Zwack, and Kate Bayne from Heenan Blaikie have also delivered a vociferous endorsement for arbitral adjudication of workplace human rights:

> Labour arbitrators have a specialized understanding of labour relations issues, which is invaluable when adjudicating disputes arising in the workplace. While this expertise originally may have been acquired through the more limited exercise of interpreting and applying collective agreement language, it nevertheless gives arbitrators a sizeable advantage over the courts and other tribunals in resolving workplace disputes of any kind. Moreover, as this expertise evolved, it well surpassed its original confines to encompass the application of policy and substantive legal principles arising out of the parties' collective agreement.[48]

While the authors from Heenan appear to have been cognizant of criticisms directed at the institutional competence of arbitrators for the adjudication of human rights matters, they noted that "a review of arbitral awards… demonstrates that arbitrators are no less vigilant than human rights tribunals in holding unions and employers to their duty of accommodation."[49] For them, the difference between the approaches adopted by human rights tribunals and arbitrators was that "arbitrators generally approach the issue in a manner which recognizes the competing interests and values at play, and articulate the scope of the duty to accommodate in a manner that acknowledges and strives to harmonize those competing principles."[50] This, the authors submit, is a positive consequence rather than a detriment of arbitral jurisdiction over human rights.

It is evident that the Supreme Court's jurisprudence has had some positive effects on labour arbitration's ability to administer industrial relations. Insofar as arbitration's objective is to provide

---

[46] Fay Faraday, "The Expanding Scope of Labour Arbitration: Mainstreaming Human Rights Values and Remedies" (2005) 12 CLELJ 355 at 372.
[47] *Ibid*.
[48] Peter A Gall, Andrea L Zwack, & Kate Bayne, "Determining Human Rights Issues in the Unionized Workplace: The Case for Exclusive Arbitral Jurisdiction" (2005) 12 CLELJ 381 at 387.
[49] *Ibid* at 402.
[50] *Ibid*.

prompt and efficient resolution of workplace disputes, arbitral jurisdiction over a broad range of statutory and common law matters makes arbitration a forum where most workplace disputes can be resolved quickly and efficiently by a labour arbitrator. To the extent that arbitration aims at the expert resolution of disputes, parties now have access to human rights adjudicators in the arbitration context who are sensitive to the manner in which human rights operate in the workplace. However, the jurisprudence's positive effects may be outweighed by the uncertainty it has created, the questions of institutional competence it has raised, and its potential denial of access to justice. I will address these concerns in turn.

I. The Uncertainty Produced by the Jurisprudence

The "essential character" tests articulated by *Weber* and *Morin* have been broadly recognized as uncertain and difficult to apply.[51] Even Justice Laskin of the Ontario Court of Appeal has remarked that "the boundaries of *Weber* have not always been easy to apply."[52] The "essential character" test is vague and open-textured,[53] and this has resulted in "different courts [reaching] contradictory conclusions on the basis of quite similar facts."[54] Even the Supreme Court of Canada's application of *Weber* in subsequent cases have been criticized for making unprincipled distinctions[55] in a manner which obscures the borders between arbitral and court jurisdiction.[56]

---

[51] Alexandrowicz *supra* note 39 at 270. See also Donald D Carter, "Looking at *Weber* Five Years Later: Is it Time for a New Approach?" (2000) 8 CLELJ 231 at 232; and David Mullan, "Tribunals and Courts – The Contemporary Terrain: Lessons from Human Rights Regimes, (1998-1999) 24 Queens LJ 643 at 644.
[52] *Piko v Hudson's Bay Co*, (1998) 41 OR (3d) 729, 116 OAC 92 at para 12.
[53] Alexandrowciz *supra* note 39 at 311.
[54] *Ibid* at 311. See for example *Bhaduria v Toronto Board of Education*, (1999) 173 DLR (4th) 382 (ONCA) and *Fording Coal Ltd v USWA Local 7884*, (1998) 169 DLR (4th) 468 (BCCA) both cited in Alexandrowciz at 289.
[55] Lokan & Yachin *supra* note 23 at 8.
[56] *Ibid* at 15. See Lokan & Yachin 6-8 for their discussion of the problems with the Supreme Court's decisions in *Allen v Albert*, (2002) 223 DLR (4th) 385 (SCC); and *Goudie v Ottawa (City)*, (2003) 223 DLR (4th) 395 (SCC).

This uncertainty has the expensive and inefficient effect of encouraging parallel proceedings in multiple forums as well as litigation concerning jurisdiction.[57] Where arbitration does not a suit a plaintiff's interests, this uncertainty encourages plaintiffs to distinguish *Weber* in order to access the courts.[58] If plaintiffs do not pursue parallel proceedings, they may be prejudicially affected if a decision-maker finds that they pursued their remedies in the wrong forum after time limits have expired in the proper forum.[59]

Weber's "essential character" analysis is further complicated by *Morin*'s requirement to determine legislative intent when allocating jurisdiction between an arbitrator and another statutory body. Lokan and Yachin have argued that the problem with *Morin*'s legislative intent analysis is that "the existence of multiple statutory schemes makes it… difficult to infer legislative intent as to where disputes are to be heard."[60] Consequently, "conclusions as to the legislature's intention appear to be little more than *ad hoc* judgments about the desirability of assigning a dispute to one tribunal rather than another."[61] The distinction made in *Morin* between disputes over the formation of a collective agreement and disputes over its interpretation has been criticized by labour lawyer Sonia Luciw as a "tenuous distinction" which should not be used to decide jurisdictional issues, lest jurisdiction "be determined on the basis of how [a] particular complaint was framed."[62] The problematic nature of the distinction was also identified by Justice Bastarache's dissent, where he observed that "[i]t [was] not possible to separate agreements resulting from negotiations and the collective agreement itself."[63] The Supreme Court would disagree again on *Morin*'s application in a subsequent case.

---

[57] *Ibid* at 312 and 271. See also Flood *supra* note 44 at 384.
[58] Kaplan *et al supra* note 45 at 250.
[59] Alexandrowciz *supra* note 39 at 312.
[60] Lokan & Yachin *supra* note 23 at 19.
[61] *Ibid*.
[62] Sonia Regenbogen Luciw, "*Parry Sound* and Its Successors in the Supreme Court of Canada: Implications for the Scope of Arbitral Authority" (2004) 11 CLELJ 365 at 376.
[63] *Morin supra* note 25 at para 63.

Perhaps the best demonstration of the uncertainty inherent in the *Weber*/*Morin* analysis is the Supreme Court of Canada's decision in *Bisaillon v Concordia University*,[64] where the Supreme Court split 4-3 on a dispute's essential character. The dispute concerned a class-action initiated by a unionized employee in connection with the administration and use of a pension fund provided by the employer university to eight unions with whom it had collective bargaining relationships. The question was whether the class-action could proceed in the courts or whether the dispute was properly within the exclusive jurisdiction of labour arbitration.[65] A majority composed of Justices Lebel, Deschamps, Abella, and Charron held that the Superior Court had no jurisdiction to hear the matter as the essential character of the dispute arose from the interpretation, application, and administration of a collective agreement.[66] Meanwhile, Chief Justice McLachlin along with Justices Bastarache and Binnie delivered a dissent which concluded that "the pension plan at issue… transcend[ed] any single collective agreement or employment contract and, therefore, falls outside the exclusive jurisdiction of the labour arbitrator."[67] While I will not delve into the reasoning underlying the two positions, it is difficult to conclude that the "essential character" test is sufficiently certain and predictable when even the Supreme Court of Canada continues to be sharply divided on its application to a dispute.

Notwithstanding the Supreme Court's good intentions, the uncertainty produced by the *Weber*/*Morin* analysis hinders labour arbitration's ability to fulfill its mandate. As Alexandrowicz observes, the "haphazard growth of precedents in which decision-makers attempt to apply the elusive and inadequate concepts espoused in *Weber* can only undermine the very objectives which the Supreme Court sought to achieve."[68] Uncertainty produces inefficient litigation and adjudication that hinder the expedient

---

[64] 2006 SCC 19, 1 SCR 666 [*Bisaillon*]. For more discussion concerning the uncertainty created by *Morin* and its successor cases, see J-Anne Pickel, "*Isidore Garon* and *Bisaillon*: More Complications in Determining Arbitral Jurisdiction" (2006-2007) 13 CLELJ 329.
[65] *Ibid* at para 1.
[66] *Ibid* at para 47.
[67] *Ibid* at para 67.
[68] Alexandrowciz *supra* note 39 at 316.

operation of the labour arbitration regime. However, the criticisms leveled at *Weber* and its successor cases do not end there. Even if the jurisprudence provided sufficient certainty, many argue that it assigns arbitrators more responsibility than their institutional competence warrants.

II. Labour Arbitrators' Institutional Competence

Many commentators have suggested that labour arbitration is ill-suited to resolving the wide array of disputes for which it is responsible after *Weber* and *Parry Sound*. For these critics, *Weber*'s expansion of arbitral jurisprudence forces labour arbitrators to adjudicate disputes they are not competent to resolve, while impeding their ability to succeed in their traditional role. This is to the detriment of all parties in industrial relations.

Some critics believe that *Weber* forces individual claims into a collective process, thereby undermining labour arbitration's ability to fulfill its intended goal of facilitating effective dispute resolution between employers and unions. As Etherington notes, grievance arbitration's "primary role is not to deal with issues of individual rights but to recognize collective interests without undue disruption of production."[69] In shifting labour arbitration towards an individual-rights model, Alexandrowicz has argued that "*Weber*… places an inordinate strain on the institution of grievance arbitration and on relationships between unions and employers by requiring them to arbitrate interpersonal disputes in which they have no direct interest."[70] For example, where courts decline jurisdiction over a claim brought by individual employees against other employees, they force "the employer and the union to arbitrate a personal dispute in which they [have] no independent interest."[71] Nonetheless, to the extent that such claims involve sensitive emotional differences, "the union [may] be required to support the

[69] Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000-2001) 26 Queens LJ 43 at 60.
[70] Alexandrowciz *supra* note 39 at 270-71.
[71] *Ibid* at 299.

grievor's allegations… [in a manner which] destabilizes the union-employer relationship."[72] For MacDowell, the litigation of individual rights in the traditionally collectivity-oriented forum of arbitration raises issues labour arbitration is ill-suited to address, and can increase tension between individuals and their unions.[73]

Perhaps the most troubling consequence of rendering individual rights arbitrable is its impact on the coffers of both employers and unions. Both parties must expend resources on the litigation of individual rights which may possess a tenuous connection to the workplace. Unions are forced to advance such claims even when they view such litigation as beyond their mandate and an inappropriate use of their funds, lest they find themselves subject to a complaint concerning their duty of fair representation.

Both employers and unions likely suffer from an increased volume of grievances as a result of the arbitrability of individual rights, and the lack of financial disincentive to pursue union-funded litigation. [74] As resources are inevitably finite, *Weber* potentially hurts both the financial position of the enterprise on which employees rely for their livelihood, and the quality of justice enjoyed by union members in respect of more traditional workplace disputes. Etherington observes that unions have been unhappy with the demands placed on their resources by developments which make them responsible for enforcing individual rights. They lament that these developments may have the effect of increasing union dues and decreasing unionization.[75] There is concern that if unions are to assume responsibility for all individual claims arising from a workplace relationship, the strain on their resources could threaten the existence of some unions.[76]

---

[72] *Ibid* at 313.
[73] MacDowell *supra* note 38 at 123.
[74] Alexandrowicz *supra* note 39 at 312.
[75] Etherington *supra* note 69 at 59.
[76] Alexandrowicz *supra* note 39 at 316.

Another problem with expanded arbitral jurisdiction is labour arbitration's shortcomings, both procedural and substantive, with respect to the adjudication of civil and human rights claims. Procedurally, labour arbitration is designed to be a quick and informal process which does not provide the same procedures and safeguards provided by our civil courts.[77] Consequently, both employees and employers litigating civil claims before labour arbitrators may lack access to such amenities as discovery, jury trials, official transcripts, broad rights of appeal,[78] and the strict application of evidence rules.[79] This may mean that arbitrators sometimes lack the procedural tools to effectively dispose of a civil dispute.[80] Further, arbitrators' lack of judicial independence calls into question arbitration's appropriateness as a forum for the adjudication of individual rights such as *Charter* rights and quasi-constitutional human rights.[81]

Substantively, arbitrators' expertise for adjudicating *Charter* disputes and civil claims has been questioned,[82] as has arbitrators' ability to provide meaningful remedies in *Charter* and civil actions.[83] The adjudication of civil claims such as tort claims is arguably beyond the comfort zone of arbitrators who primarily interpret and apply collective agreements, and this calls into question their ability to process such claims effectively. It also raises questions about their ability to provide meaningful remedies. This is particularly true where the claim concerns a dignitary interest rather than economic interests which arbitrators generally deal with.[84]

---

[77] *Ibid* at 314.
[78] *Ibid* at 295. For an arbitrator's articulation of her concerns regarding the lack of such rights in labour arbitration, see *Seneca College v OPSEU (Olivo)*, (2001) 102 LAC (4th) (PC Picher) cited in Alexandrowicz at 294.
[79] Ray Brown & Brian Etherington, "*Weber v Ontario Hydro*: A Denial of Access to Justice for the Organized Employee?" (1996) 4 CLELJ 183 at 197.
[80] Carter *supra* note 51 at 251. This is particularly important for actions such as defamation claims, for which statutes often provide additional procedural protections. See Alexdrowicz *supra* note 39 at 314.
[81] Faraday *supra* note 46 at 357.
[82] Alexandrowicz *supra* note 39 at 315.
[83] Carter *supra* note 51 at 234.
[84] *Ibid* at 234 and 251.

The concern with institutional competence is particularly acute where the rights at issue are not civil rights, but *Charter* and quasi-constitutional human rights. With respect to these public rights, Carter argues that "[a]rbitration's lack of any formal system of *stare decisis*, its narrowly focused expertise, its use of non-lawyers as adjudicators, and its essentially private nature, are all characteristics that make grievance arbitration less suitable for the resolution of public issues [than human rights tribunals]."[85] One can understand Carter's concerns, particularly with respect to arbitral adjudication of *Charter* rights. It is difficult to accept that some of Canadians' most cherished fundamental rights should be defined by a private arbitrator who holds their position at the pleasure of the parties, and who may enjoy no human rights expertise. Further, there appears to be no principled reason why constitutional rights, at the very least, should not be enforced through a strong adherence to *stare decisis*.

From a remedial standpoint there is some question whether arbitrators' general approach to remedies promotes and protects human rights as sufficiently as human rights tribunal jurisprudence. Faraday suggests that while "the traditional approach to remedies at arbitration is reactive… compensatory… [and] seeks to place the greivor in the position he or she would have been in had the collective agreement not been breached… [h]uman rights remedies aim not only to make the complainant whole, but also to eliminate future discrimination."[86] For Faraday, the "transformative" remedies awarded by human rights tribunals are superior to the "compensatory" remedies awarded by labour arbitrators, and "'strike at the heart' of systemic discrimination" by aiming to prevent future discrimination.[87] In comparison, compensatory measures are relatively impoverished and ill-suited to rectifying human rights violations. However, notwithstanding this concern, arbitrators have been slow to move from

[85] *Ibid* at 251.
[86] Faraday *supra* note 46 at 366.
[87] *Ibid* at 366-67.

remedies that are reactive and compensatory to remedies that are systemic and transformative, even in the wake of *Parry Sound*.[88]

All of the concerns outlined in this section suggest that *Weber* and its successor cases may have hurt labour arbitration's ability to deliver decisions that are expedient, expert, and fair. To the extent that arbitrators work less efficiently with areas of law that are beyond their expertise, such as claims concerning defamation and other torts, it is expected that their expediency will be hindered. Expediency may also be adversely affected by the broad range of arbitrable individual claims which may bog down the arbitration process. Additionally, arbitrators' lack of familiarity with some areas of law for which they have responsibility may affect their ability to deliver expert decisions, while arbitration's procedural and substantive shortcoming may adversely impact arbitrators' ability to render decisions that are fair and appropriate.

III. The Jurisprudence's Impact on Access to Justice

Another problem identified with *Weber* and the cases following it is the potential for a denial of unionized employees' access to justice.[89] The union serves as the gatekeeper to the grievance arbitration process. If individual civil and human rights claims are found to be within the exclusive purview of a labour arbitrator but a union elects not to pursue a grievance concerning that claim, employees may find themselves with no way forward but a duty of fair representation complaint, which is difficult given the high threshold for succeeding in such a claim.[90] While union control over the grievance process may be warranted where claims are closely related to the collective agreement, it appears less justified where the claims relate to individual rights which exist independently of the

[88] *Ibid* at 366.
[89] Alexandrowicz *supra* note 39 at 270-71.
[90] The union must simply not act arbitrarily, discriminatorily, or in bad faith. See *Canadian Merchant Guild v Gagnon*, [1984] 1 SCR 509.

collective bargaining relationship.[91] Further, even were unions to diligently pursue individual grievances, the uncertainty of the *Weber*/*Morin* analysis creates the real possibility that a court and an arbitrator both find they have no jurisdiction, a result which would at best postpone the delivery of justice, and at worst create a jurisdictional vacuum that denies a litigant remedies for wrongs.[92]

A denial of access to an adjudicative forum is not the only denial of access to justice that may occur. Employees who are able to access a forum may nonetheless be denied access to quality justice. Even where unionized employees successfully bring their grievances before an arbitrator, they may find themselves disadvantaged by limitations on arbitrators' remedial capacity.[93] Carter suggests that employees' continued efforts after *Weber* to access the courts for adjudication of civil claims demonstrates that "grievance arbitration may not provide a satisfactory forum for the resolution of certain types of workplace issues".[94] To the extent that *Weber* potentially denies unionized employees access to justice, either in precluding access to the best forum or recourse to any forum, it hinders labour arbitration's ability to produce fair results. Significantly, it may also discourage unionization and weaken the institution of collective bargaining.[95]

C. Recommendations for Reform

Despite the concerns noted above with respect to labour arbitration's potential deficiencies, there are some who endorse an even greater role for arbitrators in the adjudication of disputes arising inferentially from a collective bargaining relationship. Gall, Zwack, and Bayne have argued that arbitrators should enjoy exclusive jurisdiction over all human rights complaints except where a union is

[91] Carter *supra* note 51 at 234.
[92] Lokan and Yachin *supra* note 23 at 6
[93] Carter *supra* note 51 at 238.
[94] *Ibid* at 246.
[95] Alexandrowicz *supra* note 39 at 216.

"a co-respondent along with an employer, to a human rights claim."[96] For these authors, the exclusive jurisdiction model prevents redundant and inefficient re-litigation, and properly respects the union's statutory role as employees' exclusive bargaining agent.[97] Further, they submit that union resources allow for highly- developed arguments regarding workplace human rights, while arbitral expertise ensures the proper recognition of the workplace setting in the resolution of human rights disputes.[98]

In light of the considerable concerns with arbitration's appropriateness as a forum for civil and human rights claims, it is submitted that arbitrators' exclusive jurisdiction should be qualified rather than expanded, and that recommendations such as those of Gall, Zwack, and Bayne should be approached with caution. Before arbitrators are given exclusive jurisdiction over a dispute, a principled analysis should be conducted which will ensure that arbitration is an appropriate forum that respects the interests of both parties and the dimensions of the claim at issue. Canadian private international law jurisprudence already embraces such an approach in the context of the *forum non conveniens* analysis. In *Anchem v British Columbia (WCB)*,[99] the Supreme Court affirmed that the test for whether a dispute should be tried in a foreign court or a Canadian court was which forum was most just and convenient for pursuing that action and securing the ends of justice.[100] In determining whether a forum is appropriate, regard is had to considerations such as the location of witnesses, the governing law, and the locations where the parties reside or carry on business.[101] Similarly, analysis of a dispute's essential character pursuant to *Weber* and *Morin* should consider whether arbitration is the appropriate forum having regard to its institutional appropriateness for the claim at issue, and the forum's potential impact on the parties' rights. While the Supreme Court hinted in *Morin* that its decision was informed by an appreciation of institutional competence, such concerns should be placed transparently at the forefront

[96] Gall *et al supra* note 48 at 397-98.
[97] *Ibid* at 394.
[98] *Ibid* at 397-98.
[99] [1993] 1 SCR 897, 1993 Carswell BC 47 [*Anchem* cited to WL Can].
[100] *Ibid* at para 36.
[101] *Ibid* at para 33.

of the essential character analysis, in such a manner that enables it to be applied rationally, consistently, and predictably.

The final parameters of a reformed "essential character" test require further consideration. Alexandrowicz has proposed an approach where "the primary criteria are whether it would be appropriate for an arbitrator to consider the type of dispute at issue and whether the arbitrator could grant effective remedies."[102] Lokan suggests that exclusive arbitral jurisdiction should be grounded in the parties' intentions.[103] Meanwhile, Brown and Etherinrgton suggest that courts should only decline jurisdiction where:

> the issue raised by the plaintiff is one that is traditionally referable to the master-servant relationship;…the incident or conduct about which the plaintiff complains is referable to the collective agreement as defined by the appropriate provincial or federal labour relations statute; … the essential character of the dispute implicates the skill and expertise of the labour arbitrator;... the arbitrator can provide an appropriate and adequate remedy for the resolution of the dispute; and … the issues raised by the dispute do not include allegations of violations of constitutional rights.[104]

While it is not suggested that any of these approaches are perfect or that they should be adopted without hesitation or modification, they illustrate the type of transparent analysis that will better determine arbitration's appropriateness as a forum for a dispute than the vague and difficult to apply "essential character" test as it currently exists. Alexandrowicz's proposed approach places the question of arbitrators' institutional competence at the forefront of the jurisdictional analysis. The approach contemplated by Brown and Etherington does likewise. At the same time, both approaches also consider whether arbitrators can provide appropriate remedies which respect a party's right to access justice. Thus, they call for the express evaluation of criteria which most will agree are important considerations in any determination of jurisdiction, without shrouding them with the vague language of "essential character." Lokan's approach is less prescriptive. Under his approach, questions of institutional competence and access to justice are determined by the parties' contractual relationship.

---

[102] Alexandrowicz *supra* note 39 at 271-72.
[103] Lokan *supra* note 23 at 28.
[104] Brown and Etherington *supra* note 79 at 206.

Notwithstanding what may appear to be the open-textured character of his approach, the fact that it is informed by a cohesive and understandable logic provides transparency which can in turn produce efficiency, predictability, and fairness in determinations of jurisdiction.

The Supreme Court adopted the "essential character" test and deference to arbitration for the purpose of promoting efficiency and the other aims of labour arbitration. However, it appears that the current framework has potential prejudicial effects on employers, unions, and employees. As such, it is time for a transparent and principled approach that will enhance labour arbitration's ability to produce decisions that are efficient, expedient, expert, and fair. The formulation of a better framework requires further consideration of what we value in the administration of industrial justice. It may be the case that what we desire from the law will change as social and economic conditions evolve. Our expectations may also shift as additional considerations of industrial justice bring themselves to our attention. However, the law concerning arbitral jurisdiction should seek at the very least to transparently canvas the questions of institutional competence, efficiency, and access to justice in a manner which allows all workplace parties a sense of certainty.