

# Employment Law and Employment Tribunals: Where Should we be Heading?

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## **I. THE DIVERSITY OF EMPLOYMENT LAW: MANY REGULATORY REGIMES, MANY TRIBUNALS**

We often hear rhetoric to the effect that the employer-employee relationship should not be highly legalized, and that the parties ought to be encouraged to settle their differences through some softer, more user-friendly process than third-party adjudication. However, few if any relationships in Canadian society are the target of more regulatory regimes than the employment relationship, or have given rise to a more imposing array of adjudicative tribunals.

The oldest of those regulatory regimes is the common law of master and servant, largely created and enforced by the courts. The law of wrongful dismissal for unorganized employees is the main contemporary remnant of that law -- but, anomalously, it is a remnant which is growing rapidly.

The second oldest type of regulation, dating back to the nineteenth century, consists of individual employment statutes designed to provide a floor of decent substantive terms. Labour standards and workers' compensation legislation were the first of those statutes. They have been joined more recently by occupational health and safety statutes, by the prohibitions in human rights legislation against intentional discrimination on various grounds, and by pension benefits legislation. These individual employment law statutes are enforced by a range of tribunals which vary from province to province, the Ontario assortment being fairly typical -- employment standards referees, a Workers' Compensation Board and a Workers' Compensation Appeal Tribunal, an occupational health and safety adjudicator, human rights boards of inquiry, a Pension Benefits Commission, and in a more marginal way, the Labour Relations Board and the courts. Many of the issues I mention in this paper have arisen from the rapid recent growth in statutory individual employment law and in the number of tribunals administering it.

The third oldest regulatory regime, dating back roughly to the Second World War, is collective bargaining law. It revolves around a labour relations statute administered by a labour

relations board, and around collective agreements negotiated under that statute and enforced by grievance arbitrators. The collective bargaining regime is the first class car on the employment law train. Not many new passengers are managing to move up from the coach seats these days.

The most recent arrivals on the regulatory scene -- a fourth generation of employment law, if you like -- are the "disparate impact" and affirmative action provisions of human rights legislation, pay equity statutes in a few jurisdictions and, in fewer yet, employment equity legislation. Some of the adjudication under these statutes is done by human rights tribunals, some by specialized pay equity bodies, and some by the courts.

Each new wave of employment law was supposed to help those categories of workers who most needed help. However, as so often happens with legal reforms, the greatest benefits have usually gone not to the worst-off workers but to those who were already more fortunate or more strategically placed. In part, this is because the substantive rights themselves have not been well adapted to the needs of very disadvantaged employees, and in part because it has been hard for such employees to enforce their rights. The topic of this panel is process-oriented, so I will try to focus on the process by which substantive rights are applied, both at the workplace level and in adjudication, rather than on the substantive rights themselves. However, because the borderline between substance and process is often unclear, I will at times be talking about both. I will begin by spending a bit of time on the important matter of the theoretical underpinnings of competing agendas for reform.

Before going any farther, I should note that in 1990 and early 1991 I served as director of the Ontario Law Reform Commission's project on the adjudication of workplace disputes. The study which I submitted to the Commission a few months ago looked at the structure and functioning of most of the tribunals which adjudicate employer-employee disputes in Ontario, and recommended quite a few changes. The Commission is now mulling over what I wrote, and although I am free to discuss the problems as I see them, I cannot disclose my specific recommendations until the Commission has completed and released its report. I am therefore very

limited in what I can say about particular reforms which might respond to the concrete problems discussed in parts 3, 4 and 5 below.

## **II. THE MOVE FROM PERSPECTIVES OF POWER TO PERSPECTIVES OF PRINCIPLE, AND ITS IMPLICATIONS FOR EMPLOYEE REPRESENTATION IN THE WORKPLACE**

In the few years since I began to write about different theoretical perspectives on Canadian labour law,<sup>1</sup> there has been a perceptible shift in emphasis among academic writers and also, I think, among lawyers in practice and in government, from what I call the perspectives of power to the perspectives of principle.

From the perspectives of power, suggestions for reform to improve the job rights of unorganized employees have generally concentrated on making it easier to unionize and bargain collectively. In contrast, the perspectives of principle have placed less emphasis on collective bargaining, focusing instead in recent years on the use of the legal process to give employees a voice in the workplace.

Perspectives of power are based on a line of political and legal theory which is linked with nineteenth and twentieth century legal positivism. This current of thought holds that social conflict cannot be resolved on the basis of reason or principle, but only through the clash of competing wills and competing interests -- through the interplay of power, in other words. Perspectives of principle, in contrast, draw on a different line of theory which places more faith in human rationality and in the role which reason can play in the design and operation of social institutions. This current of thought owes a great deal to eighteenth century Enlightenment writers such as Locke and Rousseau, and has lately been rejuvenated by contemporary liberal theorists, the best known of whom are probably John Rawls and Ronald Dworkin.

### **A. Perspectives of power**

There are three perspectives of power which can be identified in Canadian labour law writing. Two of them are at the extremes of right and left, and are not very helpful, in my view, in working out reform proposals. One is what I call "unchained entrepreneurship", or what has recently been described as "neo-classical economic isolation[ism]".<sup>2</sup> This perspective sees unobstructed employer economic power as the root of all social good. It also sees most of our current labour law as unnecessary -- except, of course, laws restricting strikes -- because the market gives individual employees nearly all the protection they need. There is not much in this perspective that I would want to put into any program of labour law reform.

At the opposite extreme from the unchained entrepreneurship perspective is another power-oriented perspective which rejects liberal democratic political theory as being a mere rationalization of the dominance of employer power. This perspective sees Canadian society as being in a state of perpetual conflict between two irreconcilable classes, with the employer class long having been able to subjugate the working class. I call it the "unchained collective action" perspective because its basic prescription for reform is to free the non-violent use of employee collective power from all legal restraints. From this perspective, employees not only **should** always win economic struggles with employers; they **would** always win, if the law would just back out of the way and let them get on with it. Again, I do not see this perspective as a source of particularly promising ideas for reform.

The third power perspective, I think, is more helpful. It is the perspective taken by such writers as Bora Laskin, Harry Arthurs and Paul Weiler, and it has dominated Canadian labour law over the past few decades. I call it "regulated countervailing power", because it sees the main role of labour law as enabling employees to marshal their economic power through unionization and collective bargaining and to use that power, in a controlled way, as a counterweight to employer economic power. Substantive statutory regulation -- employment standards and the like -- is seen largely as a backup to protect workers whom collective bargaining cannot or will not reach.

Those who take the regulated countervailing power perspective have been critical of the traditional reluctance of the courts either to accept the full legitimacy of collective employee action or to give labour relations tribunals enough leeway to administer collective bargaining legislation effectively. From this perspective, the remedy for the courts' tendency to support rear-guard actions in the area of labour law is to exclude them from any role in that area, insofar as that is constitutionally possible. Because there are far more employees than employers, employees should look to the political process rather than the judicial process for help in redressing the shortfall in their economic power.

The preference, from the regulated countervailing power perspective, for the transfer of adjudicative power from the courts to specialized tribunals is based not only on scepticism about the ability of judges to decide difficult cases on the basis of principle rather than personal preference. It is also based on the perception that dispute resolution in labour relations is a power-oriented process where principles cannot be of much help. The Supreme Court of Canada appears to have adopted these perceptions to some extent in recent years, in deciding that various legislative restrictions on collective bargaining and on strikes do not violate freedom of association under the *Canadian Charter of Rights and Freedoms*.<sup>3</sup>

The regulated countervailing power perspective, it seems to me, is clearly correct in holding that the right to organize and the right to bargain collectively are needed to balance power relationships in the workplace, and that the state of legal protection of those rights has to be kept continually under review. Reforms, I think, are long overdue to remedy the fact that our certification rules, based as they are on the requirement of proof of majority support, make it so difficult for employees to have a collective voice in the workplace. The *Labour Relations Act* endorses collective bargaining in principle, but puts what often are overwhelming practical obstacles in the path of employees who seek it. Perhaps most unfortunately of all, those obstacles are highest for employees who need a collective voice the most - poorly paid employees in small, isolated workplaces. I still think, as I did several years ago, that "[t]he collective representation of employee interests is so important to our public policy, and plays so central a part in improving

employees' working lives, that the burden should be shifted from the shoulders of those who want it and placed with those who would reject it."<sup>4</sup>

The search for an appropriate reform strategy is complicated, however, by the fact that the disadvantages of majoritarianism in the certification process are partly offset by some undeniable advantages. The requirement of majority support has generally kept collective bargaining from becoming a remote process hovering far above the workplace, as often happens in some other countries, and it has limited fragmentation by putting bargaining rights in the hands of one union. Also, it has kept unions more accountable to the workers they represent than they might otherwise be.

However, the rules of our certification process carry that accountability too far in one way. The "open season" provisions in the *Labour Relations Act* enable a legal challenge to be brought to a union's bargaining rights during a two-month period almost every year. This encourages non-stop decertification campaigns, and compels all but the most securely implanted unions to emphasize not long-term strategies but instant gains which will bolster short-term popularity. Against this sort of statutory background, it is little wonder that many of our unions seem uninterested in cooperating with employers to work out more flexible and efficient methods which will help the long-run performance of the enterprise. Imagine how short-sighted our politicians would be if they had to face the electorate almost every year.

Can the majority vote concept be modified to make it less difficult to establish collective bargaining, without losing too many of those advantages? Perhaps, but it is not easy to figure out how to do it. For example, George Bain, a Canadian with long experience in British industrial relations, suggested the following in 1978:

*[T]he criterion of representativeness [might be] applied, as it is in some countries, so that employers were compelled to recognize and bargain with that union which was "most representative" of the employees in a particular bargaining unit regardless of whether it represented a majority of them. Such a procedure would mean that a majority which did not want collective bargaining could not deny it to a minority which did [...]. Hence the*

*question arises as to whether the rights of a minority which feels that its members' interests can be safeguarded only by collective bargaining are more important than the rights of a majority which feels that its members are able individually to defend their interests.<sup>5</sup>*

Simply giving bargaining rights to the union with the most support would bring a collective voice to any workplace where a substantial number of employees wanted it, and would remove much of the incentive for anti-union pressures from employers. However, as Bain indicates in the passage above, it would often have the serious disadvantage of giving a union bargaining rights extending far beyond its organized support.

It is hard, I believe, to stay within the regulated countervailing power perspective and work out reforms which would enable employees to have an effective voice in workplaces where most of their coworkers were unwilling to support the demand for collective bargaining. The task may, however, be more manageable if approached from a different perspective.

## **B. Perspectives of Principle**

As I have said above, perspectives of principle, in the sense in which I am using the term, are those which look to considerations of principle to resolve workplace disputes, rather than looking to the interplay of economic or political power. To those who take a perspective of principle, power is simply too arbitrary a criterion for allocating control over people's working lives. The rights and interests of the parties should be protected not by adjusting their relative power in one direction or the other and letting them fight it out in the marketplace, but by setting up enforcement processes which are independent of the power balance which prevails for the moment in their relationship. The question, as is perhaps obvious, is whether it is ever possible to have a system for the protection of workplace rights and interests which is really independent of the power balance in the particular workplace.

Two scholarly writers on the Canadian labour law and industrial relations system, Roy Adams and David Beatty, have over the past few years put forth fundamental and quite well-



developed reform arguments from perspectives of principle. More recently, they have been joined by Paul Weiler, a partial convert from the "regulated countervailing power" ranks.

Roy Adams' basic approach is to hold our industrial relations system up to the standards which we expect our governmental system to meet.<sup>6</sup> By those standards, he finds it to be sadly lacking. The ground rules of our political system, he points out, never allow citizens to reject democratic governance and opt for authoritarian rule, and he argues that it is wrong for our labour law system to allow that sort of choice in the workplace.<sup>7</sup> Instead of merely offering such a choice to employees, what the law should do, in Adams' view -- and I believe he was the first Canadian writer to make an explicit argument along these lines -- is to implant in every workplace of any substantial size some form of joint employer-employee body, similar to works councils in Germany and in certain other European countries. As I have explained elsewhere,<sup>8</sup> I have some difficulty with Adams' analogy between the state and the enterprise, but I am impressed by his analysis of why even a majority of employees in a workplace should not be allowed to prevent the establishment of a representative process in that workplace.

David Beatty, in his well-known book, *Putting the Charter to Work: Designing a Constitutional Labour Code*,<sup>9</sup> starts from the egalitarian liberal principles articulated in John Rawls' *Theory of Justice*,<sup>10</sup> and uses those principles to work out the implications of the *Canadian Charter of Rights and Freedoms* for our system of labour law. I have discussed Beatty's argument in a bit more detail elsewhere,<sup>11</sup> and I will only refer to two aspects of it here. One is his insistence that however bad a job the courts may have done in labour law in the past, we should not be unhappy about the fact that the Charter gives them such a broad new jurisdiction, because they deal in principles rather than in considerations of power and are therefore more likely than the political process to listen to the needs of the worst-off members of society. The political process, Beatty says, does not serve "those who have the fewest resources, both material and personal, with which to influence the legislative and executive branches of government [...]."<sup>12</sup> Elegant though the argument is, I remain sceptical that the courts can or will take on the role of front-line protectors of the disadvantaged, Charter or no Charter.

More central to my concerns in this paper are Beatty's arguments against the constitutionality of our certification rules. He claims, in brief, that the law as it now stands violates freedom of association because a union chosen by the majority may require dissenting employees to join or support it against their will. More important, in my view, is his related point that the certification process is unsatisfactory because of "[a]ll of the debilitating and expensive efforts of organizing a majority of workers to choose a system of collective bargaining and resisting any unfair practices by the employer [...]"<sup>13</sup> In place of the certification process, Beatty, like Adams, recommends a system modelled largely on certain features of the German system -- no exclusive bargaining rights, no compulsory union membership, but compulsory representative councils in every workplace of any size.

Paul Weiler, at the time of his move to the United States in the late 1970's, was a leading Canadian advocate of the regulated countervailing power perspective. His very important recent book on the American labour law system<sup>14</sup> shows that although he has not lost interest in detailed reform of collective bargaining law in the United States, he has come around to the view that tinkering with that law is unlikely to bring about reforms that will be of much use to ordinary workers. So he goes on to propose more sweeping reforms, much along the lines of those recommended by Adams and Beatty. In a paper on the Canadian situation,<sup>15</sup> Weiler argues that many of the American system's faults are also found in Canada, though usually in lesser degree, and that the same reform proposals should be considered here.

In his book, Weiler offers a wide range of specific criticisms of American labour law, many of which are relevant in whole or in part to Canadian law. For example, by allowing employers to mount campaigns against unionization, the existing law, he says, exaggerates the importance of unionization and encourages employers and employees to think that the environment in a workplace after unionization will be drastically different from what it was before.<sup>16</sup> As well, American unionism, he argues, has generally become so bureaucratic and so remote from workplace life as to be very unattractive to many workers, and he sees little likelihood of improvement in that respect. And, he believes, the chances of reducing employer defiance of

unfair labour practice laws are slight, because American legal culture does not allow two-fisted enforcement of collective bargaining rights.<sup>17</sup> All of those points, I think, apply to some degree in Canada.

Echoing the same basic point made by Roy Adams, Weiler says:

*My own pessimistic judgment is that if we are ever to provide American workers meaningful involvement and influence in their workplaces, unmediated by the kind of hierarchical union organization that a good many workers would rather not have, it is necessary to take away from the employees (and also the employer) the choice about whether such a participatory mechanism will be present.*

*[...] Public policy [should] require not collective bargaining, secured with great difficulty, unit by unit, but a guarantee to all employees of easy access to a basic level of internal participation in a specified range of decisions in all enterprises."<sup>18</sup>*

Every workplace above a certain size, Weiler recommends, should have what he calls an employee participation committee, modelled after the German works councils. He proposes quite detailed rules on the financing of such committees,<sup>19</sup> on their powers, and on the possibility of their replacement by a union.<sup>20</sup> Under the existing American law, unlike the Canadian law, employees do not have to unionize in order to be able to strike legally, so a non-union employee committee in the United States would be able to use the strike weapon.<sup>21</sup>

Now that three such highly respected writers as Adams, Beatty and Weiler have all come out in support of introducing into North America the idea of universal representation machinery in the workplace, perhaps it will be taken more seriously by governments in Canada -- as it should be. The system of works councils, in the form in which it operates in Germany, has a number of apparent advantages over the Canadian system of certified bargaining agents, the most important of which is the far more widespread presence of those councils in contrast to the limited coverage of collective bargaining in Canada. However, as we will undoubtedly be hearing a lot about the German works council system in the years ahead, let us look a little more closely at some of its features, with an eye to any difficulties that might arise in trying to adapt it to the Canadian scene.

According to the *German Works Constitution Act* of 1972, which is the major statute dealing with works councils, every workplace with at least five permanent employees must have such a council (s. 1), although I gather that many small employers manage to evade the requirement. The works council consists of representatives elected by all employees at three-year intervals, and the Act attempts to ensure adequate representation for women, young workers and other minority groups. The size of the council varies with the size of the workplace (s. 9). Employees cannot vote a works council out of existence or otherwise abolish it, although they may apply to the Labour Court for an order removing some or all of its members from office for "grave dereliction of [...] statutory duties", in which case new members must be elected immediately (s. 23).

The works council has decision-making (or "codetermination") power on a fairly wide range of workplace issues, but only a consultative role on other important matters of enterprise governance. Perhaps the most important of the so-called "social matters" on which a works council has codetermination power are "matters relating to the orderly operation of the establishment and the conduct of employees in the establishment" (s. 87.1.1) - in other words, discipline and discharge. On matters subject to codetermination, disagreements between the works council and the employer are settled by arbitration; the *Works Constitution Act* prohibits works councils from calling strikes (s. 74.2).

In Germany, as in other European countries, there are quite a few legal and structural factors, without clear parallels in Canada, which restrict the impact of the works council on a number of fronts<sup>22</sup> - its impact on the individual employee, on the employer -employee relationship, on the employer's freedom of action in the workplace, and on the employer's competitive position in the industry.

For one thing, works councils do not negotiate major terms and conditions of employment. That is usually done by collective bargaining on a regional or industry-wide level, between a union or an alliance of unions and an employers' association. The *Works Constitution Act* makes clear

that works councils are to operate within the framework of collective agreements and not in disregard of them. It provides that "[w]orks agreements [between employer and works council] shall not deal with remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreement", unless the collective agreement "expressly authorises the making of supplementary works agreements" (s. 77.3).<sup>23</sup> Thus, the extra costs and constraints which a German works council can impose on a particular employer, over and above those which collective bargaining imposes on all employers in the industry, appear relatively much less important than the extra costs and constraints generally imposed on an individual employer by plant-level collective bargaining in Canada. The unionized Canadian employer constantly has to look over its shoulder at its non-unionized domestic competitors. The German employer is largely relieved of that concern, but more by the collective bargaining system than by the works council system.

The German employer's worries about its competitive position within the industry can be further allayed by the legal extension of collective agreements. If a collective agreement is negotiated for most but not all of the employers in an industry, that agreement can be extended by government action to cover the remaining employers.

*The original rationale of [the extension] procedure was the need to avoid unfair competition from non-unionised enterprises; however, other considerations regarding the promotion of collective bargaining and the pursuit of more egalitarian and solidaristic goals were later taken into account.<sup>24</sup>*

There are other factors still which help to explain the high degree of acceptance of works councils by German employees and employers. One, already mentioned above, is that works councils are not allowed to use the strike weapon, but can instead invoke compulsory arbitration on certain issues which are often not arbitrable even in unionized enterprises in Canada. Another such factor is the absence of rigid seniority systems based on date of hire and the absence of narrow, rigid job classifications,<sup>25</sup> both of which are widespread in Canadian collective agreements and are resented not only by employers but by many employees as well. German industrial

relations experts who look at the Canadian system are struck by how much less flexibility our unionized employers have, in comparison to German employers, in reassigning employees to different kinds of work in order to meet changing production needs.<sup>26</sup> Yet another factor is the principle that collective agreements in Germany, as in most countries outside North America, set only minimum terms and conditions and not maximums. This leaves an employer legally free to give better terms to particular employees who are thought to be worth more,<sup>27</sup> and it may have something to do with the fact that highly ambitious employees seem less reluctant than in Canada and the United States to throw their lot in with their fellow workers.

Finally -- a most important point -- German works councils often rely heavily on the services and other support usually provided to them by trade unions. Most of the employees elected to works councils are nominated by unions. The *Works Constitution Act* gives unions guaranteed access to workplaces where they have members (s. 2.2). In larger workplaces, unions commonly have representatives who, although they are independent of the works council, usually work more or less closely with it.<sup>28</sup> It is by no means clear that works councils could function effectively without help from unions, as they would obviously have to in many Canadian workplaces.

Despite these various concerns, I believe that Adams, Beatty and Weiler are unquestionably on the right track when they suggest that Canadian workplaces need compulsory employee representation machinery, and I also agree that the German works councils are perhaps the most useful model to start from in designing something appropriate to our own circumstances. I think we should go for it, but not until we have carefully considered such fundamental issues as the extent of decision-making authority of such bodies, their relationship to unions, and how impasses with the employer will be resolved. And, because workplace representation machinery itself will not resolve all of the problems with our labour law and industrial relations system, we also have to keep working toward other reforms.

### **III. INTERFACES BETWEEN ADJUDICATIVE FORUMS IN EMPLOYMENT LAW**

Under existing Canadian employment law, there is an almost infinite variety of situations in which two or more adjudicative tribunals may have jurisdiction over the same dispute. For example, where a unionized employee claims to have been discharged without just cause and also alleges that union activity was a motive for the discharge, a labour relations board and an arbitrator will both have jurisdiction. Another example, of more recent vintage, is where an employer and a union try to negotiate a collective agreement and a pay equity plan at the same bargaining table. In that situation, in Ontario at least, a labour relations tribunal and a pay equity tribunal may both have jurisdiction.

For brevity, I will take just one statutory regime -- the human rights regime -- and discuss a few of the issues which have arisen along its interfaces with other employment law regimes.

According to the Supreme Court of Canada and to human rights statutes themselves, those statutes have primacy over any conflicting legislation which does not expressly provide otherwise. Which tribunals can enforce that primacy? What happens when an arbitrator, a labour relations board, a labour standards adjudicator, or any other employment law tribunal, encounters a situation where the statute or collective agreement from which it derives its jurisdiction is inconsistent with a human rights statute?

#### **A. The interface between human rights legislation and arbitration**

In 1974, the Supreme Court of Canada held that an arbitrator had not only the power but also the duty to refuse to give effect to a provision in a collective agreement which offended a limitation on overtime hours set out in the *Ontario Employment Standards Act*.<sup>29</sup> That decision established that arbitrators must not apply collective agreement language which contravenes a statutory **prohibition**, but it did not address the situation where a statute creates a **positive right** above and beyond the rights set out in the collective agreement. Arbitrators have usually declined to enforce that sort of statutory right. Examples are now frequently arising where human rights legislation requires reasonable accommodation of an employee's particular needs (for example,

job design needs in the case of a disabled employee, or scheduling needs in the case of an employee with a religious objection to working on certain days), but where the collective agreement does not require such accommodation. If the employee has used the arbitral forum rather than the human rights forum to try to enforce the employer's statutory duty to accommodate, arbitrators have generally treated the claim as being outside their jurisdiction.<sup>30</sup> The employee must thus bring another proceeding in the human rights forum.

This arbitral reluctance to enforce statutory rights which do not have an anchor in the collective agreement seems to have persisted even in British Columbia, where legislative efforts have been made to overcome it. The *British Columbia Industrial Relations Act (B.C. Act)* expressly gives arbitrators the power "to provide a final and conclusive settlement of a dispute arising under a collective agreement", including the power to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement notwithstanding that its provisions conflict with the terms of the collective agreement."<sup>31</sup> This apparently broad statutory mandate has been narrowly interpreted. For example, an arbitrator recently refused to entertain an equal pay for equal work grievance because, although the *Human Rights Act* had an equal pay requirement, the collective agreement did not. He could only rely on a statute, the arbitrator said, if it was "necessarily incident to a question that arises under the collective agreement", and not if the grievance alleged a breach of the statute "independently of the collective agreement".<sup>32</sup>

Even in the absence of express statutory language like that in the B.C. Act, some Ontario arbitrators, taking a cue from the courts of their province,<sup>33</sup> have been quite resourceful in trying to avoid a multiplicity of proceedings. In *Rothmans, Benson & Hedges Inc.*,<sup>34</sup> the injured grievor used the arbitral forum to press her claim that she was entitled to return to work. She relied not only on the terms of the collective agreement but also on the Human Rights Code's prohibition of discrimination on the ground of disability. Arbitrator Richard Brown rejected her claim under the collective agreement, holding that its provisions on disabled employee rights did not require the employer to accommodate the grievor by modifying the job so that she could do it. However, the



Human Rights Code did require such accommodation as long as no undue hardship resulted to the employer. Arbitrator Brown noted the standard view that an arbitrator should not enforce a statutory right on which the collective agreement is completely silent, but he found that the situation before him was distinguishable because the statute and the collective agreement took "inconsistent approaches to the same matter".<sup>35</sup> He held that he had the authority to order the employer to comply with the statutory duty, to avoid the "senseless waste of resources" which would result from having to hear the matter all over again in the human rights forum.<sup>36</sup>

A related question, on which the recent jurisprudence in both the human rights and arbitral forums is clearer though perhaps less satisfactory in the result, is whether adjudicators in either forum will defer to proceedings brought in the other forum. As for arbitrators, although they do not deny the preeminence of human rights legislation over labour relations legislation, they have been holding that they will not and probably cannot stay arbitration proceedings pending the completion of a parallel human rights proceeding.<sup>37</sup> Among the reasons they give are the possibility that the issues in the two forums will not overlap completely, the somewhat broader remedial powers of human rights tribunals, and the notorious slowness of the human rights forum.

Human rights tribunals, for their part, appear even less likely to defer to arbitration proceedings, even where an arbitration award has already been released by the time the human rights proceeding reaches adjudication. An Ontario human rights board of inquiry recently said, in blunt terms, that the arbitral and human rights forums "differ dramatically in their function, purpose and process", arbitration being "designed for private parties" and "privately bargained labour agreements", whereas the human rights process is "designed to promote the broad public interest in the elimination of discrimination".<sup>38</sup>

From their own institutional perspectives, arbitrators and human rights adjudicators each have more or less plausible reasons for refusing to defer to proceedings in the other forum. However, the result is unfortunate in at least one respect. Because no forum can deal conclusively

with a complaint which alleges breach of both a collective agreement and a human rights statute, there is a persistent danger of a multiplicity of proceedings.

In a pioneering 1982 paper, Swinton and Swan argued that arbitrators should be given the statutory authority to resolve such complaints once and for all, and that human rights adjudicators should defer to the arbitral forum "if the procedure followed in the arbitration was fair, the discrimination issue was raised and argued, and the result was consistent with the policies of the [human rights] statute".<sup>39</sup> There is considerable overlap, the argument ran, between the people who serve as grievance arbitrators and those who serve as human rights boards of inquiry, and these people, when acting as arbitrators, have the expertise and independence to be able to apply the provisions of human rights legislation in the proper spirit.<sup>40</sup>

As noted above, human rights adjudicators have not taken up this invitation to defer to arbitration, and the recent performance of arbitrators in handling human rights issues has been sufficiently mixed that it is easy to see why not. A good number of arbitration awards have indeed treated human rights considerations just as sensitively as any human rights board of inquiry would have.<sup>41</sup> However, other awards have shown a tendency to subordinate those considerations to the values of the collective bargaining process, and one very recent award has expressed open hostility toward the broad, purposive interpretation which courts and human rights adjudicators have given to human rights legislation.<sup>42</sup>

## **B. The interface between human rights and pay equity legislation**

Extensive legislative efforts to reduce the differential in rates of pay between men and women have led to overlap, in Ontario at least, between human rights, pay equity and employment standards legislation. The *Pay Equity Act* embodies the principle of equal pay for work of equal value, while the *Employment Standards Act* sets out the narrower principle of equal pay for equal work and the *Human Rights Code* contains a broader prohibition against discrimination on the ground of sex.<sup>43</sup>

In a recent Ontario case which is of particular interest in jurisdictions without pay equity statutes, the Ontario Human Rights Commission had decided that it had no jurisdiction over a complaint of unequal pay for work of equal value which had been brought under the *Human Rights Code* before the *Pay Equity Act* was passed. In setting aside the Commission's decision, the Divisional Court said that neither the equal pay provisions of the *Employment Standards Act* nor the subsequent enactment of the *Pay Equity Act* should be taken to have excluded the Human Rights Code's applicability to cases of sex discrimination with respect to pay.<sup>44</sup> This has led an employer counsel to ask the following hard question:

*[W]hat is the purpose of the legislature enacting [pay equity] legislation that is designed to be a comprehensive scheme of redressing wage discrimination on the basis of gender if the Human Rights Code can override the legislature's comprehensive design on a case-by-case basis?*<sup>45</sup>

### **C. The interface between human rights and occupational health and safety legislation**

The rapid development, under human rights legislation, of the employer's duty to accommodate the needs of disabled workers has recently made the interface between human rights and occupational health and safety legislation very important. The Ontario Human Rights Commission has taken the position that despite the requirements of the *Occupational Health and Safety Act*, the duty to accommodate may at times require employers and other workers to accept some degree of safety risk in the workplace.<sup>46</sup> Thus, the two statutory regimes appear to be pulling in different directions in that context, and employers understandably object that they should not have to bear the responsibility of resolving such conflicts in specific cases -- at least not without more guidance from the law.<sup>47</sup>

## **IV. DELAY IN EMPLOYMENT LAW ENFORCEMENT**

How long do cases take to get through employment law enforcement processes? Ontario is the only jurisdiction for which I have gathered any figures, and most of them, though not overly alarming, are not particularly reassuring either. I can only mention a few here.

The one forum where time frames are indeed alarming is the human rights forum. A look at the 18 most recent Ontario board of inquiry decisions in the Canadian Human Rights Reporter, as of September 1990, discloses that an average of over 43 months elapsed in those cases between the bringing of the complaint and the release of the decision. In Saskatchewan, a time lag of roughly that length in a human rights proceeding was held to violate the respondent's right to security of the person under section 7 of the Charter.<sup>48</sup> In Ontario, according to the Office of Arbitration in the Ministry of Labour, the average time in 1986 between the appointment of a board of inquiry and its decision was 7.6 months. This indicates that most of the delay is in the pre-adjudication stages, administered by the Human Rights Commission, rather than at the board of inquiry stage.

How fast is grievance arbitration? Goldblatt's study of arbitration cases in the 1971-1973 period found that single-arbitrator cases took a total of about 8 months (34 weeks) from beginning to end, and tripartite board cases nearly 9 months (38 weeks).<sup>49</sup> Winter's study of 1983 cases found that the expedited arbitration procedure under section 45 of the *Ontario Labour Relations Act* was disposing of cases in an average of under 4 months (17 weeks), while other single-arbitrator cases were taking about 9 months (39 weeks) and tripartite board cases nearly 14 months (59 weeks).<sup>50</sup> Barnacle's recently published analysis of discharge cases in the 1983-1986 period found that section 45 cases took 3.67 months, other single-arbitrator cases 8.34 months, and tripartite board cases 12.84 months.<sup>51</sup> Barnacle's figures have to be looked at in light of the fact that parties and arbitrators usually give discharge cases top priority. Great speed in grievance arbitration, it seems, is more folklore than fact, although the section 45 procedure, which now accounts for over a third of all arbitrations in Ontario, has improved the picture significantly.

As for the Ontario Labour Relations Board, its time lines seem to be relatively short, despite persistent complaints to the contrary from some parties. Among the O.L.R.B.'s quite diverse caseload, unfair labour practice cases most resemble the matters dealt with by other employment law tribunals, and those cases took a total of about 8 weeks on average in 1989-1990. That may, however, be somewhat misleading, as over half of the cases closed by the O.L.R.B. appear to be settled or withdrawn without a hearing.

Employment law practitioners commonly believe that a major cause of delay in many tribunals lies in the increasingly frequent need to schedule additional hearing days because the time initially set aside for a hearing turns out not to be enough. The problem is worse for ad hoc tribunals than for standing tribunals, and worse for tripartite boards than for single adjudicators. Barnacle found that where an arbitration hearing was not completed on the date originally set, it took a further 2.63 months, on average, to complete.<sup>52</sup>

In most employment law forums, the time needed to bring cases to a hearing and on to a decision will continue to increase because of the growing complexity of the law on all aspects of the employment relationship, because practitioners and adjudicators are becoming busier, and because people are increasingly determined to enforce their legal rights. The recent confirmation by the Supreme Court of Canada that in many circumstances adjudicative tribunals can and must give Charter scrutiny to applicable statutory provisions<sup>53</sup> means that more and more hearings will be lengthened by extensive evidence and argument on Charter issues. These factors make it all the more pressing to work out and implement strategies for reform which will facilitate fast, high-quality decision-making.

## **V. PREHEARING AND HEARING PROCEDURES**

### **A. Mediation**

Academic writers on employment dispute adjudication are generally enthusiastic about government mediation and its effects. In particular, mediation appears to have been very

successful under the statutory expedited grievance arbitration process in Ontario<sup>54</sup> and in the resolution of unjust dismissal claims from unorganized employees under sections 240-246 of the *Canada Labour Code*.<sup>55</sup>

Nevertheless, there is a downside. Mediation can be very time-consuming. It can also be overly coercive, especially when closely interwoven with investigation. With respect to the human rights process, for example, the view is widely held on both the employer and employee sides that human rights officers commonly try too long and hard to force one party or the other to settle, and that it would often be better to move the matter briskly to adjudication, so that the prospect of an early hearing could exert more objective pressures for settlement.

## **B. Other procedural matters**

Hearings before administrative tribunals are supposed to be faster and less formal than court trials. However, many lawyers familiar with both tribunals and courts feel that tribunal hearings are often dragged out needlessly, because neither party comes to the hearing with a clear enough idea of what evidence and arguments the other side is going to rely upon and because too much emphasis is placed on oral evidence and oral argument. These problems are especially serious where the parties lack the sort of relationship which enables them to communicate easily and to understand each other's needs. Not surprisingly, that is most often the case in human rights proceedings, where the parties usually have no ongoing relationship at all. However, it is more and more true in grievance arbitration as well. The conventional wisdom says that screening and disclosure occur during the various steps of the grievance procedure, but many union-employer relationships are so strained that the grievance procedure does not filter out overly strong and overly weak claims and does not tell either side enough about the case it will have to meet.

Civil courts have developed a variety of pretrial devices designed to make each side aware of the other side's case well before the trial begins. Examples include written pleadings, discovery and production of documents, and the filing of written offers to settle. Such devices may save trial time, but often make the pretrial stages much longer and more expensive, and their use has to be approached with great caution.

At the hearing stage, a step (among others) which might save time is the regular use of in-camera conferences called by the tribunal, shortly before or after the beginning of the hearing, with a view to encouraging settlement. Should we consider abandoning the traditional common lawyers' qualms about allowing settlement conferences to be presided over by the same person who will adjudicate if the settlement attempt fails? No one else is in quite as good a position to make each party come to grips with the weaknesses of its case, and there may be ways to limit the danger of bias which, according to the conventional wisdom, always arises from unsuccessful attempts by the adjudicator to persuade the parties to settle.

Another device which might bring significant time savings later on in the process is the written argument. When it is used, it generally shortens hearings, and it may speed up decision writing by putting the parties' arguments to the adjudicator more clearly and cogently. The downside is the extra time which counsel usually need to reduce their submissions to writing.

Such devices would undoubtedly have some costs in increased formality and a greater air of legalism. The question which must be considered, and which I cannot address here, is whether those costs might be outweighed by the advantages of having the parties (and the adjudicator) know more and know it sooner, by an increased likelihood of settlement, and by the saving of time.

## **CONCLUSION**

I have tried to identify a few of the principal problems of process, in the broad sense of that term, in our current system of employment law. I think it is clear that we need to provide a more solid and more broadly available infrastructure for the balancing of employer and employee rights in the workplace, and to improve existing arrangements for the adjudication of employment rights disputes. Legislatures, courts and administrative tribunals all have important parts to play in working out and implementing the necessary reforms.



## FOOTNOTES

1. My most detailed discussion of the various theoretical perspectives is in my paper, "Perspectives of Power and Perspectives of Principle in Canadian Labour Law Scholarship" in I. McKenna, ed., *Labour Relations into the 1990's* (CCH Canadian, 1989) at 27.
2. M. Clarkson, "In praise of the stakeholder concept" *The [Toronto] Globe and Mail* (28 December 1990) at B4.
3. See the so-called "right to strike trilogy" - *Reference re Public Service Employee Relations Act (Alberta), Public Service Alliance of Canada v. The Queen*, and *Retail, Wholesale and Department Store Union v. Government of Saskatchewan* (1987), 38 D.L.R. (4th) 161, 249 and 277 (S.C.C.), especially the judgment of McIntyre J. in the *Public Service Employee Relations Act* case, at 232-233. See also *Professional Institute of the Public Service v. Commissioner of the Northwest Territories* [1990]. C.C.H. Can LLR para 14,031 (S.C.C.).
4. B. Adell, "Establishing a Collective Employee Voice in the Workplace: How Can the Obstacles Be Lowered?" in G. England, ed., *Essays in Labour Relations Law* (CCH Canadian, 1986) 3 at 5.
5. G. S. Bain, *Union Growth and Public Policy in Canada*, (Labour Canada, 1978) at 41.
6. Two of Adams' more recent pieces are: R.J. Adams, "Two Policy Approaches to Labour-Management Decision Making at the Level of the Enterprise: A Comparison of the Wagner Act Model and Statutory Works Councils" in C. Riddell, ed., *Labour-Management Cooperation in Canada* (Toronto: U of T Press, 1986) at 87; and R.J. Adams, "The Role of Management in a Political Conception of Industrial Relations under Different Labour Market and Employment Systems", in *Management Under Differing Labour Management and Employment Systems* (de Gruyter, 1988) at 178.
7. R.J. Adams, "Two Policy Approaches to Labour-Management Decision Making at the Level of the Enterprise: A Comparison of the Wagner Act Model and Statutory Works Council", *ibid.* at 94.
8. "Perspectives of Power and Perspective of Principle in Canadian Labour Law Scholarship", *supra* note 1 at 44-47.

9. McGill-Queen's U. Press, 1987.
10. Harvard U. Press, 1971.
11. "Perspectives of Power and Perspective of Principle in Canadian Labour Law Scholarship" *supra* note 1 at 37-43.
12. *Supra* note 10 at 50-53.
13. *Ibid.* at 153.
14. P. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Harvard U. Press, 1990).
15. P. Weiler, "The Representation Gap in the North American Workplace", Sefton Memorial Lecture (Toronto: University of Toronto, 1989).
16. *Supra* note 14 at 262.
17. *Ibid.* at 241.
18. *Ibid.* at 282.
19. *Ibid.* at 289.
20. *Ibid.* at 292.
21. *Ibid.* at 290.
22. D. Beatty has discussed some of these factors. *Supra* note 9 at 157-179.
23. In addition, the *Works Constitution Act* provides that it "shall not affect the functions of trade unions and employers' associations [...]" (s. 2.3).
24. E. Cordova, "Collective Bargaining" in R. Blanpain ed., *Comparative Labour Law and Industrial Relations* (Kluwer, Deventer, 1982) 220 at 236. The extension of collective agreements is of practical importance mainly in industries dominated by small enterprises, including construction and retail trade. M. Weiss, S. Simitis and W. Rydzy, "The Settlement of Labour Disputes in the Federal Republic of Germany" in T. Hanami and R. Blanpain, eds., *Industrial Conflict Resolution in Market Economies* (Kluwer, Deventer, 1984) 81 at 95.

25. P. Weiler adverts to these matters. *Supra* note 14 at 187-193.
26. Presentation by Udo Mayer, Institute for Economics and Politics, University of Hamburg, at Queen's University, October 9, 1990.
27. This is often called the "advantage principle", because it only allows collective agreements to work to the advantage of employees and not to their disadvantage. However, its importance may be limited by the fact that fractional bargaining is relatively uncommon in German workplaces, as unions, works councils, and employers all have a strong interest in suppressing it. I. Maitland, *The Causes of Industrial Disorder: A Comparison of a British and a German Factory* (London: Routledge & Kegan Paul, 1983) at 112-114.
28. A German labour ministry officer quite recently told me that his department was having great difficulty in making the works council system (which existed only in West Germany before unification) operate in what was formerly East Germany. The reason, he said, was that workers in the eastern part of the country are reluctant to join West German unions, because they distrusted the state-dominated unions under the old East German regime. Conversation with H. P. Viethen, Federal Ministry of Labour and Social Affairs, Federal Republic of Germany, November 10, 1990. Compare H. Hartmann, "Works Councils and the Iron Law of Oligarchy" (1979) 17 Br. J. Ind. Rel. 71 at 78-81. Hartmann says of works councils, at 79: "As a rule, they dominate the local trade union scene."
29. *McLeod v. Egan*, [1975] S.C.R. 517 at 518-519.
30. *Lancia-Bravo Foods* (1990), 11 L.A.C. (4th) 59 at 68 ff. (Burkett).
31. *Industrial Relations Act*, R.S.B.C. 1979, c. 212, s. 98(g).
32. *Vancouver Police Board* (1991), 15 L.A.C. (4th) 25 at 31 (Larson).
33. *Re Queen's University and Fraser* (1985), 19 D.L.R. (4th) 240 at 251 (Ont. Div Ct.), White J.
34. *Re Rothmans, Benson & Hedges Inc. and Bakery, Confectionary & Tobacco Workers' Union, Local 325-T* (1990), 10 L.A.C. (4th) 18 (R.M. Brown).

35. *Ibid.* at 35.
36. *Ibid.* at 31.
37. *Hamilton Spectator* (1990), 8 L.A.C. (4th) 415 at 422-23 (Springate); *Geiger International* (1990), 10 L.A.C. (4th) 120 at 127-128 (O'Shea).
38. *Dennis v. Family and Children's Services of London and Middlesex* (1990), 12 C.H.R.R. D/285 at D/288 (Backhouse).
39. K.E. Swinton and K.P. Swan, "The Interaction between Human Rights Legislation and Labour Law", in Swan and Swinton, eds., *Studies in Labour Law* (Toronto: Butterworths, 1983) 111 at 141.
40. *Ibid.* at 139-140.
41. For example, *supra* note 34 and *Re Marianhill and Canadian Union of Public Employees, Local 2764* (1990), 10 L.A.C. (4th) 201 (R.M. Brown).
42. *Quality Inn (Altadore) Woodstock* (1991), 14 L.A.C. (4th) 414 (Welling), where a long course of gross and critical comments by a male manager to female employees about their sexual morality and other sexual matters was held not to be sexual harassment, in part because the manager had made some similar comments to male employees. The arbitrator was also of the view that even if such conduct was sexual harassment, it did not amount to sexual discrimination, despite what the Supreme Court of Canada said in *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. (4th) 352.
43. With respect to some of the potential conflicts between pay equity and other employment legislation, see N. Weiner and M. Gunderson, *Pay Equity: Issues, Options and Experiences* (Toronto: Butterworths, 1990) at 101-103.
44. *Re Nishimura and O.H.R.C.* (1990), 70 O.R. (2d) 347, Gray J.
45. L. Bevan, "The Regulatory Umbrella: An Overview" (C.B.A.O. 1991 Institute, January 1991) Constitutional/Labour binder at 35-36.
46. Ontario Human Rights Commission, *Guidelines for assessing accommodation requirements for persons with disabilities under the Ontario Human Rights Code, 1981, as amended, 1989*, Guideline 4 and commentary (Toronto: Ontario Human Rights

- Commission, 1989) at 12-15.
47. C. E. Humphrey, "Competing Obligations in the Workplace: Confusing Signals to Employers" C.B.A.O. 1991 Institute, January 1991 Constitutional/Labour binder at 28-29.
  48. *Kodellas v. Saskatchewan Human Rights Commission* (1989), 77 Sask. R. 94 (Sask. C.A.).
  49. H. Goldblatt, *Justice Delayed: The Arbitration Process* (Toronto: Labour Council of Metropolitan Toronto, 1974) at 11-12.
  50. C. Winter, "Grievance Arbitration Awards in Ontario, 1983" in Ministry of Labour, 1985, cited by J. B. Rose, "Statutory Expedited Grievance Arbitration: The Case of Ontario" (1986) 41 Arb. J. 30 at 43.
  51. P. J. Barnacle, *Arbitration of Discharge Grievances in Ontario: Outcomes and Reinstatement Experiences* (Kingston: Queen's Industrial Relations Centre, 1991) at 147.
  52. *Ibid.*
  53. *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario Labour Relations Board* (1991), 91 C.L.L.C. para. 14,024 (S.C.C.); *Tetreault-Gadoury v. Canada Employment and Immigration Commission* (1991), 91 C.L.L.C. para. 14,023 (S.C.C.).
  54. Rose, *supra* note 50 at 42.
  55. G. Eden, *Unjust Dismissal in the Canadian Federal Jurisdiction* (Toronto: University of Toronto, 1990) at 243 [unpublished Ph.D. thesis].