LOSING MY FREEDOM: THE COURT IN *WEBER* ERRED BY ADOPTING THE EXCLUSIVE JURISDICTION MODEL FOR *CHARTER* CLAIMS ARISING FROM COLLECTIVE AGREEMENTS

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Introduction

Canadian labour law is predicated on the *Wagner Act* model and its twin pillars of majoritarianism and exclusivity.[1] This means that once a union has proven majority support within a bargaining unit, "it becomes the exclusive bargaining agent for that unit".[2] In these circumstances, unionized employees lose their individual bargaining rights, and the union is the only bargaining partner with management. Individual freedom is suspended for the utility of the collective.

Similar principles govern disputes concerning individual employee rights under a collective agreement. The *Wagner Act* model also prescribes that when a dispute concerning the interpretation or application of a collective agreement arises, it is to be resolved by way of grievance and potentially labour arbitration.[3] This *Wagner Act* model principle appears in collective agreements,[4] labour statutes,[5] and the jurisprudence articulating these principles.[6]

Consequently, unionized employees lose the freedom to enforce many of their individual rights in the courts.[7] This loss of individual freedom is even more troubling because individuals may be denied access to the courts when they seek

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[1] *National Labor Relations Act*, 29 USC §§ 151–169 [*Wagner Act*], originally passed in 1935. Canadians persist in calling this statute the "*Wagner Act*", after its key sponsor, Senator Robert F Wagner.

[2] The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary*, 8th ed (Toronto: Irwin Law, 2011) at 589.

[3] *Ibid* at 495.

[4] See e.g. *Industrial Relations Act*, RSNB 1973, c I-4, s 55 [*IRA*], which references that most collective agreements include, or are deemed to include, a clause that disputes regarding the interpretation, violation, or application of the collective agreement must follow a prescribed grievance and arbitration process.

[5] *Ibid*, s 55.

[6] See generally *Weber v Ontario Hydro*, [1995] 2 SCR 929, 24 OR (3d) 358 [*Weber*].

[7] Ray Brown & Brian Etherington, "*Weber v. Ontario Hydro*: A Denial of Access to Justice for the Organized Employee?" (1996) 4:1 CLELJ 183 at 183.

redress for *Charter* rights, the most fundamental individual rights we have as Canadian citizens.[8]

In its landmark decision on judicial deference for labour arbitration, *Weber v Ontario Hydro*, the Supreme Court of Canada (the "Court") was incorrect to hold that if a dispute regarding *Charter* rights expressly or inferentially arises from a collective agreement, labour tribunals and arbitrators have exclusive jurisdiction.[9] For *Charter* claims, the Court in *Weber* should have adopted the overlapping model of jurisdiction. The overlapping model of jurisdiction allows unionized employees to commence a civil action if the issues raised thereunder go beyond the traditional subject matter of labour law. If adopted for *Charter* claims, this option would respect judicial deference for labour arbitration, but at the same time protect individual *Charter* rights. Under this model of jurisdiction, if a union denied an employee representation for a *Charter* claim, that employee could still pursue the matter in the courts.

The Court erred by adopting the exclusive model of jurisdiction for three reasons. First, in adopting the exclusive jurisdiction model, the Court overlooked important considerations about the nature of *Charter* rights. Second, the Court's reasons to support the exclusive jurisdiction model are contradictory and do not fully justify the model. And finally, in adopting the exclusive jurisdiction model, the Court improperly balanced respecting *Charter* rights against judicial deference for labour arbitration. All these mistakes of the Court in *Weber* demonstrate why it should have adopted the overlapping model of jurisdiction for *Charter* claims arising from collective agreements. This paper will examine all of these issues.

1. *Weber v Ontario Hydro*

Mr. Weber was employed by Ontario Hydro ("Hydro"). As a result of back problems, he took an extended leave of absence. Hydro paid him sick benefits stipulated by the collective agreement. As time passed, Hydro began to suspect that Mr. Weber was malingering. Hydro hired investigators to substantiate its concerns. The investigators came to his property and entered his home. With the information it obtained, Hydro suspended Mr. Weber for abusing his sick leave benefits.

Mr. Weber responded by taking the matter to his union, which filed a grievance. The grievance alleged that Hydro's hiring of the private investigators violated terms of the collective agreement. The union asked the arbitrator to require Hydro to pay Mr. Weber and his family damages for mental anguish and suffering arising out of the surveillance. The union subsequently settled the arbitration.

Mr. Weber also commenced a court action in contract, tort, and for breach of his *Charter* rights – claiming damages for the surveillance. Mr. Weber's claims under

[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Brown & Etherington, *supra* note 7 at 183.

[9] *Weber*, *supra* note 6.

the *Charter* were for breaching his rights under sections 7 and 8. In response, Hydro applied for an order dismissing Mr. Weber's court action. The motions judge dismissed the claim because "the dispute arose out of the collective agreement depriving the court of jurisdiction, and was moreover a private matter to which the *Charter* did not apply. The Court of Appeal agreed, except with respect to the *Charter* claims, which it allowed to stand".[10]

The Court had to address the issue of labour arbitration as a forum of original jurisdiction for the resolution of common law and *Charter* disputes under a collective agreement.[11] In its ruling, the Court denied Mr. Weber access to the courts to pursue claims based on contract, tort, and alleged violations of his *Charter* rights based on different employment issues and privacy violations.

The Court had to pick the appropriate model of jurisdiction for disputes arising out of a collective agreement. It had three options. The "concurrent" model "contemplates concurrent regimes of arbitration and court action: if an action is recognized either at common law or by statute, the action may proceed and the collective agreement cannot deprive a court of jurisdiction."[12] Under the "overlapping jurisdiction" model, a civil action may be brought "if the issues raised go beyond the traditional subject matter of labour law."[13] The final view is the "exclusive jurisdiction" model. Under this model, if the differences between the parties arise from the collective agreement, they must proceed by way of arbitration, and the courts have no jurisdiction to entertain an action.[14] After discussing the three possible models of jurisdiction, the Court endorsed the exclusive jurisdiction model.[15]

In her reasons for the majority, Justice McLachlin (as she then was) relied on the *St Anne-Nackawic Pulp & Paper Co v CPU, Local 219* decision, and the mandatory arbitration clause in the *Ontario Labour Relations Act*.[16] She articulated that exclusive jurisdiction is given to labour tribunals and arbitrators to decide all disputes between the parties arising from the collective agreement.[17] Thus, the *Weber* analysis proceeds in two parts. First, the "essential character" of the dispute must be determined, "in the sense that the *form* in which it is cast is to be eschewed in favour

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[10] *Ibid* at para 35.

[11] Brian Etherington, "*Weber*, and Almost Everything After, Twenty Years Later: Its Impact on Individual *Charter*, Common Law, and Statutory Rights Claims" in Elizabeth Shilton & Karen Schucher, eds, *One Law for All?* Weber v Ontario Hydro *and Canadian Labour Law* (Toronto: Irwin Law, 2017) 25 at 25–26.

[12] *Ibid* at 29.

[13] *Ibid*.

[14] *Ibid*.

[15] *Weber*, *supra* note 6 at paras 63, 72.

[16] *Weber*, *supra* note 6 at para 63; [1986] 1 SCR 704, 73 NBR (2d) 236; *Labour Relations Act, 1995*, SO 1995, c 1, Schedule A, s 45 (the current version of the act).

[17] *Weber*, *supra* note 6 at para 72.

of a more searching analysis."[18] Second, the arbitrator or court must then decide "whether the matter comes within the ambit of the collective agreement, in the sense of whether it arises from the interpretation, application, administration or violation of the agreement, either implicitly or directly."[19]

The *Weber* analysis captures *Charter* and common law claims if the basis of the individual claim arises expressly or inferentially out of the collective agreement. This is contingent on the legislation or collective agreement in question empowering the arbitrator to hear the dispute and grant the remedies claimed. Justice McLachlin, however, limited her reasons and did not preclude all actions in the courts between an employer and unionized employee.[20] But the court has no jurisdiction over disputes that expressly or inferentially arise out of the collective agreement.

In a manner that is troubling, Justice McLachlin used the *Douglas College* decision to support her conclusion that *Charter* claims inferentially arising out of collective agreements are foreclosed to the courts.[21] In *Douglas College*, the Court held that the *Charter* applies to a public college's collective agreement. For these reasons, the Court agreed that this decision allowed labour arbitrators to make decisions on *Charter* claims.[22] Paradoxically, Justice McLachlin used a decision which recognised that the *Charter* could apply to collective agreements to support the conclusion that *Charter* claims are foreclosed to the courts when the dispute arises out of a collective agreement.[23]

To justify her reasons for this jurisprudential shift, Justice McLachlin commented that the exclusive jurisdiction model followed precedent and statute, eliminated the potential for the multiple proceedings, and conformed to a pattern of growing judicial deference for the arbitration and grievance process.[24] Another support for her reasons was that, where arbitrators lack expertise in an area of law, their errors can be corrected by way of judicial review.[25] Reviewing the decision, the driving force behind the Court's reasons in *Weber* appears to be access to justice concerns and the cost of litigation.

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[18] Donald JM Brown & David M Beatty, *Canadian Labour Arbitration* (Toronto, Thomson Reuters, 2017) (loose-leaf release 64, March 2018), ch 1 at 20.

[19] *Ibid*.

[20] *Weber*, *supra* note 6 at paras 58–59.

[21] *Ibid* at paras 65–66; Brown & Etherington, *supra* note 7 at 202.

[22] *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, 52 BCLR (2d) 68.

[23] *Weber*, *supra* note 6 at paras 65–66; Brown & Etherington, *supra* note 7 at 202.

[24] *Weber*, *supra* note 6 at para 63.

[25] *Ibid* at para 60.

2. *Weber*'s Main Defects

Subsequent treatment of *Weber* demonstrates that the exclusive jurisdiction model has only raised more issues. The Court's goal of simplifying the jurisdiction question for grievance arbitration in *Weber* has only led to more confusion, criticism, and questions.[26] Labour arbitrators and courts have often struggled to apply the reasoning of *Weber* to different contexts in which there is potential for jurisdictional overlap.[27] For these reasons, the decision is defective in certain respects.

One major defect in the *Weber* decision is that the two-factor test for exclusive jurisdiction developed by the majority is ambiguous and difficult to apply.[28] The question of whether a dispute arises "inferentially" from the collective agreement is heavily fact-dependent and subject to different interpretations. This weakness contributes to the confusion in applying the two-factor test. In a variety of decisions, arbitrators, tribunals, trial courts, and courts of appeal have reached different conclusions as to whether a dispute arises "inferentially" from a collective agreement.[29]

The lack of precision in the *Weber* test is troubling. Consider a situation in which an employee is denied the right to bring an action in the courts because the dispute arises from the collective agreement. If a labour arbitrator subsequently finds that the dispute does not arise out of the collective agreement, the employee has no forum or court with jurisdiction over the dispute.

Brian Etherington, a former labour law professor at the University of Windsor and current arbitrator, has highlighted some of the difficulties in applying the "*Weber* test".[30] In his recent paper, Etherington advocates that the Court should modify the "*Weber* test" and adopt a principled multi-criteria test that would enlighten the analysis.[31] As noted by Etherington, the subsequent treatment of the *Weber* decision indicates that the Court should have further contextualised the test.[32]

The biggest issue with the *Weber* decision is that it makes the protection and enforcement of individual constitutional rights contingent on collective union support. In *Weber*, the Court reiterated that unions are the gatekeepers for the enforcement of

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[26] Etherington, *supra* note 11 at 25–26.

[27] Labour Law Casebook Group, *supra* note 2 at 549; *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, [2003] 2 SCR 157; *Allen v Alberta*, 2003 SCC 13, [2003] 1 SCR 128; *Goudie v Ottawa (City)*, 2003 SCC 14, [2003] 1 SCR 141; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)* 2004 SCC 39, [2004] 2 SCR 185 [*Morin*].

[28] *Weber*, *supra* note 6 at para 72; Etherington, *supra* note 11 at 31.

[29] See especially *Morin*, *supra* note 27; Etherington, *supra* note 11 at 31.

[30] Etherington, *supra* note 11 at 81–86.

[31] *Ibid*.

[32] *Ibid* at 82.

individual rights under a collective agreement.[33] For example, if the union chooses not to represent a union employee, they may be left without a forum or opportunity to hear their individual rights case. *Weber* and its progeny leave an employee more dependent on a union's decision on whether to take a grievance forward on their behalf.[34] The justifications for this trade-off were the avoidance of multiple proceedings, efficiency (i.e. cost), and access to justice considerations. However, the Court overlooked other important policy considerations concerning *Charter* rights.

3. *Charter* Rights are not Collective Rights

The most remarkable feature of the majority decision in *Weber* is the extension of the exclusive jurisdiction model to cover individual *Charter* claims.[35] In selecting the exclusive jurisdiction model, Justice McLachlin "largely ignored the strong policy arguments cited by the Ontario Court of Appeal."[36] In its decision, the Ontario Court of Appeal referenced the importance of preserving access to the courts for unionized employees to protect their *Charter* rights.[37] Instead of following or discussing these issues, Justice McLachlin substituted her own policy reasons and emphasised access to justice issues.

Justice Arbour (as she then was) wrote the Ontario Court of Appeal's decision in *Weber*. She recognised that an arbitrator might have jurisdiction to apply the *Charter* in appropriate cases, but the mere fact that the matter is also arbitrable should not cause courts to refuse to entertain an action for the enforcement of *Charter* rights.[38]

In her decision, Justice Arbour correctly recognised that *Charter* rights are not collective rights. The Court in *Weber* notably failed to do this. Justice Arbour emphasised that *Charter* rights entitle an individual to challenge state legislation and actions.[39] She stressed that there "should be little impediment or restraint to the individual's right to seek constitutional redress in the courts."[40] The Court's decision in *Weber* fails to recognise or mention this extremely important policy consideration.

For these reasons, Justice Arbour held that labour arbitration has exclusive jurisdiction over non-constitutional matters, but concurrent or overlapping jurisdiction

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[33] *Ibid* at 81.

[34] Labour Law Casebook Group, *supra* note 2 at 549.

[35] Brown & Etherington, *supra* note 7 at 198.

[36] *Ibid*.

[37] *Ibid*.

[38] *Weber v Ontario Hydro* (1992), 11 OR (3d) 609, 1992 CarswellOnt 840 at para 20 [*Weber* (ONCA)].

[39] *Ibid*.

[40] *Ibid*.

for *Charter* claims. This is the correct model of jurisdiction as *Charter* rights are a distinct form of individual right that substantially differ from common law rights.

In *Weber*, the Court overlooked this important consideration and, instead, grouped *Charter* rights in a category with all other statutory and common law rights. This is perplexing when we consider the constitutional status attributed to *Charter* rights. Essentially, the Court held that *Charter* rights are no different than contractual rights and ignored a needed discussion to which Justice Arbour amply contributed. The nature and status of *Charter* rights need greater protection and favour the implementation of the concurrent or overlapping models of jurisdiction, where employees have the "safe-harbour" of the courts.

4. The Policy Reasons Cited by the Court to Support the Exclusive Jurisdiction Model are Paradoxical

As mentioned, the policy justifications for the exclusive model of jurisdiction were the avoidance of multiple proceedings, access to justice, and efficiency (i.e. cost) considerations. In 1995, all of these policy reasons were valid and are still issues in our current Canadian legal system.[41] Nevertheless, these reasons do not fully justify the exclusive model of jurisdiction and are to some degree contradictory. In *Weber*, the Court failed to consider the counter position to the policy reasons it cited as justifying the exclusive jurisdiction model.

(a) Multiple Proceedings

The concerns under this policy consideration were that an employee could obtain union representation in a labour arbitration, and then proceed to start some other form of legal action against his or her employer. This concern is certainly justified considering the facts of *Weber*, in which Mr. Weber had settled his arbitration and, in the meantime, commenced a civil action against his employer.[42] However, the Court overlooked the possibility of multiple proceedings within the exclusive jurisdiction model which it adopted.

The Court's decision in *Weber* fails to acknowledge the extremely important consideration of the union's duty of fair representation. Justice Arbour and the Ontario Court of Appeal's decision properly recognised the duty of fair representation.[43] Only the union can start a grievance procedure that leads to arbitration for a labour dispute

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[41] Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, Final Report (May 2013), online:

<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>.

[42] *Weber*, *supra* note 6 at paras 34–35.

[43] *Weber* (ONCA), *supra* note 38 at para 22.

on behalf of the employee.[44] If the union chooses not to proceed with the grievance containing the *Charter* claim, or not to include a *Charter* claim in the grievance, the employee is entitled to challenge the union's decision as a breach of its duty of fair representation.[45]

For example, consider a situation in which a union declines to proceed with a plaintiff's grievance that alleges that the collective agreement with his employer, the provincial government, violates the *Charter*. In all provinces, except New Brunswick and Prince Edward Island, the plaintiff will have to proceed to the applicable labour relations tribunal and bring a claim that their union breached its statutory duty of fair representation.[46] If successful, the labour relations tribunal has broad powers and will likely order that the union must proceed with the grievance arbitration.[47]

In New Brunswick and Prince Edward Island, there is even less protection. The plaintiff in these provinces will have to commence a civil action against the union for the breach of the duty.[48] Since the courts do not have the power to order the union to pursue the grievance and arbitration, the court can only award monetary damages.[49] In those provinces, instead of being able to enforce a *Charter* right, an employee can only be compensated as the union still has no obligation to carry the cause forward.

Therefore, regardless of the jurisdiction, if an employee is denied representation and wishes to further pursue a *Charter* claim, they must bring another proceeding to get representation or be compensated. In this scenario, there will be two proceedings as the duty of fair representation claim is a condition precedent.

Additionally, the application of the preclusive doctrines, which include *res judicata* (i.e. cause of action estoppel and issue estoppel), collateral attack, and abuse of process, minimize some of the issues raised by the multiplicity of proceedings policy consideration.[50] However, many of these preclusive doctrines are contingent on the rendering of a final award, or the decision of a legal issue in the previous or parallel

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[44] *Ibid*.

[45] *Ibid*.

[46] Halsbury's Laws of Canada (online), *Labour*, "Labour Relations: Rights, Remedies and Procedures: Unfair Labour Practices: Unfair Labour Practices by Unions: Duty of Fair Representation: Statutory Duty" (IV.3.(3)(b)(ii)) at HLA-334 "Unions' Statutory Duty of Fair Representation".

[47] Halsbury's Laws of Canada (online), *Labour*, "Labour Relations: Rights, Remedies and Procedures: Unfair Labour Practices: Unfair Labour Practices by Trade Unions: Complaints of Violation of Duty of Fair Representation by the Union: Remedies (IV.3.(3)(c)(iii)) at HLA-337 "Broad Remedial Powers Granted to Labour Boards".

[48] Halsbury's Laws of Canada (online), *Labour*, "Labour Relations: Rights, Remedies and Procedures: Unfair Labour Practices: Unfair Labour Practices by Unions: Duty of Fair Representation: Statutory Duty" (IV.3.(3)(b)(ii)) at HLA-334 "Unions' Statutory Duty of Fair Representation".

[49] *Ibid*.

[50] Halsbury's Laws of Canada (online), *Civil Procedure*, "Fundamental Remedies: Accrual Causes of Action: Collateral Attack: Collateral Attack Principle" (II.2.(6)(b)) at HCV-45 "Doctrine of Collateral Attack"; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422.

case. Therefore, the Court was right to conclude that if an employee commences a civil action against their employer when other proceedings are on-going, multiple proceedings can occur. But, if an arbitrator or tribunal renders a final decision on a dispute arising out of a collective agreement, the subsequent claim in the court is precluded.

In *Weber*, the Court was certainly aware of important issues in addressing the multiplicity of proceedings policy consideration. However, the Court overlooked the hurdles a unionized employee must jump over when a union denies them representation. The effect is that the exclusive jurisdiction model creates another form of multiple proceedings.

There is no denying that the overlapping or concurrent models of jurisdictions can create multiple proceedings for common law and statutory rights claims. But, given the constitutional status of *Charter* claims, the possibility of multiple proceedings is not a sufficient justification to foreclose access to the courts for unionized employees. If the union denies representation, unionized employees should equally have the procedural right to bring forward their *Charter* claim.

(b) Access to Justice – Dismissal from Pursing a Formal Legal Process

Although the Court sold *Weber* as a win for unionized employees to access forums to hear their claims, its core principles are also contrary to this objective. Yes, *Weber* gives unionized employees new forums to hear their *Charter* claims, but this bargain also diminishes access to justice for unionized employees.

The term "access to justice" can mean many different things. Karen Schucher has addressed whether *Weber* denies unionized employees access to justice. She begins by defining what is meant by the term "access to justice" in the labour context and notes that "access to justice is often equated with access to law, which in turn is equated with formal enforcement processes, popularly conceptualized as court battles."[51]

Interpreting Schucher's definition, "denying access to justice" is where a litigant is dismissed from pursuing a formal legal process to enforce their rights.[52] Following this definition, *Weber*'s foreclosing the courts for *Charter* claims arising out of collective agreements is a denial of access to justice for the unionized employee.[53] Brian Etherington and Bernie Adell, who was former Dean of Queen's

[51] Karen Schucher, "More Glue than Cracks? Rethinking *Weber* Gaps and Access to Justice for Unionized Employees" in Shilton & Schucher, *supra* note 11, 141 at 144–45.

[52] *Ibid*.

[53] *Ibid*.

Law and a highly respected labour scholar, share the viewpoint that *Weber* denies unionized employees access to justice.[54]

The judicial decisions applying *Weber* to *Charter* claims arising from the workplace indicate that our courts have taken the Supreme Court of Canada's concern for adjudicative efficiency seriously.[55] With very few exceptions, almost all *Charter* claims by unionized employees have been barred, following *Weber*.[56] Additionally, courts have often dismissed such claims with very few reasons.[57]

Since *Weber*, only two cases have allowed *Charter* claims arising out of collective agreements to proceed through the courts. In *Billinkoff v Winnipeg School Division No 1*, the Manitoba Court of Appeal allowed *Charter* claims arising out of a collective agreement to proceed through the courts, where Jewish teachers had to work on certain religious holidays.[58] The multiple unionized and non-unionized teachers brought applications that challenged the *Public Schools Act*. The teachers argued that the provisions in the *Public Schools Act* that designated certain days as public-school holidays violated their section 15 *Charter* rights. The Court of Appeal concluded that the motions judge erred by concluding that courts did not have jurisdiction over the section 15 *Charter* claims. The Court of Appeal allowed the *Charter* claims to proceed through the courts because some of the applications were by non-unionized teachers and officials on the same discrimination issues. Therefore, for efficiency reasons, it made sense to have all of the applications decided in one forum, to avoid unnecessary costs and inconsistent results.

Another decision that did not follow the *Weber* analysis for *Charter* claims is *Morin v Prince Edward Island School Board, Regional Administrative Unit No 3*.[59] In that decision, a teacher commenced a *Charter* claim for the violation of freedom of expression because of a restriction on his right to show a film in class. Arguably, the *Weber* standard applied to the *Charter* issue as it arose out of the collective agreement and relevant statutes that governed the employment relationship. However, the majority of the Prince Edward Island Court of Appeal failed to apply *Weber* to bar the *Charter* claims and proceeded to adjudicate on these issues.

The case law on this issue is more demonstrative of denials of access to justice for individual rights regarding *Charter* claims and the *Weber* ratio. For example, in *Brunet v Police Assn (Ottawa)*, a police officer was denied sick leave gratuity because he did not have ten years of service.[60] The police union refused to

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[54] *Ibid* at 141–45.

[55] Etherington, *supra* note 11 at 58.

[56] *Ibid*.

[57] *Ibid* at 59.

[58] *Billinkoff v Winnipeg School Division No 1* (1999), 134 ManR (2d) 99, 170 DLR (4th) 50.

[59] *Morin v Prince Edward Island Regional Administrative Unit No 3 School Board*, 2002 PESCAD 9, 212 Nfld & PEIR 69.

[60] *Brunet v Ottawa Police Assn*, 2005 CLLC para 220-009, 131 ACWS (3d) 445 (Ont Sup Ct).

pursue the grievance on his behalf. Subsequently, the police officer brought an action against his employer and supervisor for damages, alleging breaches of the *Charter*. The court dismissed the action as it lacked jurisdiction following the *Weber* decision. A similar holding was adopted in *McCaffery v British Columbia (Solicitor General)*.[61] In relation to this issue, there is a considerable amount of case law where courts have dismissed *Charter* claims after an arbitration has concluded or been settled. Nonetheless, the *Brunet* and *McCaffery* cases represent situations where the union denied representation, leaving unionized employees without a forum to hear the merits of their claims.

In reviewing the case law, a common theme emerges concerning *Charter* claims arising out of collective agreements. The *Weber* decision can and has precluded unionized employees access to justice by denying them a formal legal process to enforce *Charter* rights. This an affront to individual freedom and constitutional supremacy. Unionized employees must always have a forum to make claims regarding their constitutional rights. The *Weber* decision denies the right of an absolute forum to hear such claims, which results in a denial of access to justice.

(c) Access to Justice – Counter Position: Collective Social Benefits

In response to arguments that *Weber* denies employees access to justice, proponents of *Weber* assert that this argument is unfounded. They claim that a denial of access to justice is not only the denial of "a formal legal process to enforce rights". In her paper, Schucher also opines that access to justice is equally "access to concrete social benefits", and she sees unions as access to justice institutions.[62]

Schucher agrees that some cases post-*Weber* have denied employees access to justice where they were not able to pursue certain claims in any legal process.[63] Schucher, however, buttresses this concession by rejecting the claim that unionized employees as a class are denied access to justice because there may be cases where individual employees have been unable to pursue certain claims in any forum.[64] She argues that access to justice has a larger social context.[65] The Court in *Weber* agreed with this position.

Unionized employees losing their right to pursue individual claims was not created by *Weber*, but rather is a consequence of the *Wagner Act* model.[66] Collective

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[61] *McCaffery v British Columbia (Solicitor General)*, 2004 BCSC 176, 128 ACWS (3d) 725.

[62] Schucher, *supra* note 51 at 144–45.

[63] *Ibid.*

[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid* at 143.

action and rights are central themes in Canadian labour law.[67] Once a collective agreement has been negotiated, procedures are set forth that allow both the union and employer to enforce rights pursuant to the agreement. Therefore, unionized employees are in a better position than non-unionized employees to enforce their employment rights as they have access to a grievance process.[68]

Arbitration is the forum of choice for most, if not almost all, potential litigants if they can get union support. This is because arbitration is generally the least expensive and quickest route to a hearing. But union support is required for access to labour arbitration. Without it, there is no labour arbitration.

Although unionized employees may have access to the grievance process, the union generally has carriage of the grievance, controls how to argue the grievance, and what the grievance will include.[69] The union also generally controls when to settle the grievance.[70] The positive aspect of union control over individual rights arising from a collective agreement is that unionized employees who cannot otherwise afford legal services get representation.[71] Therefore, unionized employees get access to effective dispute resolution mechanisms. But the union, instead of the employees, owns the employees' rights.

Schucher is certainly correct that the *Weber* decision supports access to justice from a communal perspective.[72] Common law and statutory claims should proceed by way of the grievance and arbitration process, as it is more efficient and employees get quality representation. However, given the constitutional status of *Charter* rights that the Ontario Court of Appeal alluded to in *Weber*, more protection is required. Courts must retain jurisdiction over *Charter* claims. Unionized employees should not be denied access to the courts or other tribunals to enforce their constitutional freedoms on the sole basis that they are a member of a union, and the claims arise out of a collective agreement.

For example, in *Weber*, the Court held that Mr. Weber could not pursue his *Charter* claims in the Ontario courts. Now, consider a situation where Mrs. Weber lives in the same home and is a non-unionized employee of Ontario Hydro.[73] The investigators came to her house breaching some of her *Charter* rights. Her *Charter* claim could proceed through the courts, but Mr. Weber's *Charter* claim would be barred. This disparity of access to justice must be remedied.

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[67] *Ibid* at 151–52.

[68] *Ibid*.

[69] *Ibid* at 150–51.

[70] *Ibid*.

[71] *Ibid*.

[72] *Ibid*.

[73] Brown & Etherington, *supra* note 7 at 206–07.

Similarly, the Court in *Weber* overlooked the costs that an employee may have to incur if denied representation by the union for their *Charter* claim arising out of a collective agreement. First, there is the non-pecuniary loss for denial of a right. Second, if the unionized employee wishes to pursue the claim further, they must bring a duty of fair representation claim. In New Brunswick and Prince Edward Island, this requires commencement of a civil action that is costlier than arbitration, and for which no legal remedy can enforce the *Charter* right, as courts can only award damages. This leaves an aggrieved unionized employee without a just remedy.

The cost of denying an individual the procedural right to enforce their constitutional rights outweighs the collective union social benefits that *Weber* purports to yield. Yes, *Weber* has given unionized employees access to dispute resolution mechanisms and representation that non-unionized employees do not have. This is certainly a benefit of the *Weber* decision and unionization. But, the greater social benefits do not outweigh the cost of denying individuals their constitutional rights and freedoms.

As will be demonstrated, the overlapping jurisdiction model for *Charter* claims does not impair any of the perceived benefits of the exclusive jurisdiction model. The overlapping model of jurisdiction can equally respect judicial deference for labour arbitration and at the same time protect individual constitutional freedoms.

5. Solutions to *Weber*'s Defects – *Charter* Claims

Before proposing solutions to *Weber*'s defects, it is important to reiterate those defects. Fundamentally, the *Wagner Act* model and the *Weber* decision take away a unionized employee's right to enforce individual rights and freedoms. Both make the enforcement of individual rights contingent on union support which can result in denials of access to justice. This next section will discuss some solutions to remedy these defects.

Although the Court did examine the concurring and overlapping models of jurisdiction, it failed to see the how these models defer to labour arbitration and respect individual *Charter* rights. The Court reached the right conclusion that labour arbitration has exclusive jurisdiction over common law and statutory claims arising out of a collective agreement. However, given the nature of *Charter* rights, special protection is required which favours the concurring and overlapping models of jurisdiction for such claims arising from a collective agreement.

The Court does not have the power to amend or create new legislation, but the legislature does. In the interest of individual freedoms and constitutional protections, it may be time for the legislature to amend labour legislation to accommodate individual *Charter* claims arising from collective agreements. This next section will also propose potential amendments to the *Wagner Act* model and the labour arbitration process instilled thereunder.

(a) The Concurrent and Overlapping Models of Jurisdiction for Charter Rights

As mentioned, the "concurrent" model of jurisdiction contemplates concurrent regimes of arbitration and court action. This would mean that an aggrieved unionized employee could have their *Charter* claim heard at arbitration if represented by the union, or in the courts, if the union denies representation and the employee chooses to pursue the claim further. Under the "overlapping jurisdiction" model a civil action may be heard by the court if the issues raised go beyond the traditional subject matter of labour law. This would mean that if a *Charter* issue arises out of a collective agreement, it could proceed by way of arbitration with union support, or through the courts without union support.

In her reasons for the majority in *Weber*, Justice McLachlin dismissed the concurrent model as she interpreted that it did not follow precedent nor the wording of the relevant labour relations statute, and she voiced concerns over the practical effect of the rule.[74] Before dismissing the overlapping model, Justice McLachlin noted that it was more attractive than the concurrent model, but she was concerned about the characterization of the cause of action.[75] She was concerned that artful pleaders might evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action, thereby undermining the legislative purpose of the relevant provisions.[76]

Although Justice McLachlin's reasons for dismissing the concurrent and overlapping models of jurisdiction are valid, Justice Arbour's reasons in the Ontario Court of Appeal decision highlight important and informative points that challenge Justice McLachlin's conclusions. Justice Arbour correctly notes that the policy considerations for deferring to the labour relations forum do not apply with the same force when individual constitutional rights are involved.[77] For this reason, she stated that there should not be the same degree of judicial deference for labour arbitration when dealing with *Charter* claims.[78] A unionized employee's constitutional entitlement to apply to a court of competent jurisdiction for redress must prevail over the legislative or contractual schemes that otherwise curtail access to the court in favour of labour arbitrations.[79]

Justice McLachlin's concerns about unionized employees avoiding labour arbitration by artfully pleading around such dispute resolution mechanisms, at least for *Charter* claims, are mitigated by Justice Arbour reasons. Justice Arbour properly interprets that the relationship engaged in an action under the *Charter* is the

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[74] *Weber*, *supra* note 6 at paras 45–51.

[75] *Ibid* at para 54.

[76] *Ibid*.

[77] *Weber* (ONCA), *supra* note 38 at para 19.

[78] *Ibid*.

[79] *Ibid* at para 20.

relationship between the state and the individual, not the relationship between employer and employee.[80] Since *Charter* claims primarily deal with the relationship between the state and individual, it would be easy to characterize which claims are "true Charter" claims. Courts could, as a preliminary matter, dismiss claims that do not fall under this category.

The overlapping model of jurisdiction is the best model of jurisdiction for disputes arising out of collective agreements and should have been adopted by the Court in *Weber* for *Charter* claims. Not only does this model of jurisdiction encompass judicial deference for labour arbitration, but it also respects individual constitutional freedoms and facilitates access to justice. Justice Arbour agreed with this conclusion. Hopefully, the Court in the future will have the opportunity to adopt this model for *Charter* claims. Unfortunately, the appropriate test case has not reached the Court yet.

Although the concurrent model of jurisdiction has merits, it is the most apt model to create multiple proceedings and complicate the issue of judicial deference to labour arbitration. Two proceedings could be ongoing, resulting in headaches and costs for employers, who might have to defend an arbitration and civil action at the same time. For these reasons, the Court correctly dismissed this model of jurisdiction.

(b) Employees Represent Their Interests

If labour arbitration has exclusive jurisdiction over claims arising out collective agreements, why not allow employees to bring grievances on their own behalf without representation by the union? This issue could cover its own paper topic, but it is certainly a solution to some of *Weber*'s main defects. When we consider the topics of access to justice for unionized employees and the nature of *Charter* rights, it makes sense that employees could represent themselves (without union support) in labour arbitrations, defending their fundamental constitutional freedoms.

Schucher notes in her recent paper that former Chief Justice of the Supreme Court Bora Laskin, and labour law scholar Bernie Adell, agreed that unionized employees should have independent access to labour arbitration.[81] There are certainly positives and negatives for adopting this position.

Allowing unionized employees to bring forward labour arbitrations on their own behalf would facilitate access to justice, protect individual rights and freedoms, and allow employees to access cheaper dispute resolution mechanisms. The counter position is that allowing employees to represent themselves renders the union to some degree useless. What is the point of having a union to represent employees when they can represent themselves? Similarly, unions may be more apt to allow employees to

[80] *Ibid* at para 28.

[81] Schucher, *supra* note 51 at 143; Bora Laskin, "Collective Bargaining and Individual Rights" (1963) 6:4 Can Bar J 278 at 287 and 291; Bernard Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11:2 Queen's LJ 251 at 254.

represent themselves to preserve financial resources. The result is that some employees may be further denied access to justice if the union believes that the employees can represent themselves.

In the absence of legislative intervention or change in union practice, including amendments to collective agreements, this solution to *Weber*'s defects is unfortunately unattainable.[82] Although allowing employees to represent themselves in arbitrations promotes access to justice, it is not without risks. For these reasons, the overlapping model of jurisdiction continues to be the best solution to fix the access to justice issues presented by the *Weber* decision.

(c) Uniform Labour Court

Why not just create a statutory "labour court" if Canadian labour arbitrators have jurisdiction to enforce employment-related statutes and take account of constitutional rights in the course of carrying out their functions?[83] Other developed employment law systems use the unified labour court model, where it is the public courts and tribunals that typically enforce employment rights claims.[84] Canada and the United States are unique in how the employment rights of unionized employees are enforced almost entirely through private arbitration with access controlled by the union.[85]

In a recent article, Elizabeth Shilton examines whether a unified public tribunal with absolute jurisdiction over employment disputes would be more effective. Ultimately, Shilton advocates in favour of exploring the option of a unified public tribunal but suggests that many questions remain unanswered.[86] For these reasons, it is clear that this topic could comprise another paper, but some of Shilton's comments are persuasive and demonstrate some of the defects with the exclusive jurisdiction model of labour arbitration.

A single unified public tribunal hearing "workplace disputes" of whatever variety would be advantageous for many reasons. It would decrease jurisdictional overlap, minimize the potential for costly multiple proceedings and inconsistent decisions, and mitigate against denials of access to justice for unionized workers who choose the wrong forum.[87] Therefore, a unified public tribunal might be less

[82] *IRA*, *supra* note 4.

[83] Elizabeth Shilton, "Labour Arbitration and Public Rights Claims: Forcing Square Pegs into Round Holes" (2016) 41:2 Queen's LJ 275.

[84] *Ibid* at 276.

[85] *Ibid*.

[86] *Ibid* at 279.

[87] *Ibid* at 309.

expensive, decrease the duplication of proceedings, and ensure that employees can access forms of dispute resolution that integrate their public and private rights.[88]

The counter position is that denials of access to justice could still occur. Regardless of whether there is a unified forum, without legislative intervention, unions would remain the gatekeepers of individual employee claims. Similarly, unions and employers like to control the dispute resolution process and prefer choice when selecting who will hear their disputes. If this a public function, both groups lose this power as their once private dispute resolution mechanism becomes public, and beyond their control.

For these reasons, it is obvious that a uniform labour court is currently not at the forefront of labour law reform in Canada. Nonetheless, a uniform labour court could be an effective solution to some of the issues that the exclusive jurisdiction model presents. The uniform labour court model, however, still denies unionized employees access to justice. In the absence of legislative reform or union practice that permits employees to represent themselves, the union is still the gatekeeper of individual unionized employee rights.

(d) Impose a Higher Duty of Fair Representation

If the exclusive model of jurisdiction does not appropriately balance individual and collective rights, why not change the union's duty to balance these rights? Instead of imposing a blanket duty of fair representation, it might be more advantageous to enumerate which employee claims garner union representation. Similarly, if we impose a higher duty of fair representation on unions, perhaps individual rights will be more respected by unions.[89] It would make sense if certain individual claims had to be represented by a union. Claims such as those arising from the *Charte*r could be within this category.

Once again, this is another topic that could easily become another paper. More empirical research would be required to substantiate which individual employee claims are most frequently denied union representation. Similarly, a survey of what claims the union must represent would be required to properly determine the claims arising from a collective agreement that the union must represent. However, given the constitutional status of *Charter* rights and the important interests they protect, it is obvious that the union would have to represent such interests.

Legislative reform, or collective agreements, could stipulate that the union must represent *Charter* claims. However, aside from the duty of fair representation, unions do not have the positive obligation, either by statute or common law, to represent employees in all *Charter* claims. Therefore, reform is required and may be advantageous as it further protects individual rights and constitutional freedoms. In the absence of such reform, the overlapping model of jurisdiction is the best solution

[88] *Ibid* at 310.

[89] Schucher, *supra* note 51 at 173.

to balance the protection of *Charter* rights against judicial deference for labour arbitration.

6. Conclusion

The impact of *Weber* is that it transformed labour arbitration into a quasi-judicial function or "labour court". Not only can private law issues be decided by labour arbitrators, but now they have almost exclusive jurisdiction to decide public law issues that arise out of collective agreements. Interpreting the Court's reasons, it is clear the majority aimed to keep labour disputes out of the courts for efficiency and policy reasons. The result is that organized employees have been stripped of personal individual freedoms and rights.

In *Weber*, the Ontario Court of Appeal reached the right conclusion. Justice Arbour's reasons balance respect for *Charter* rights with the need for judicial deference. She supported the overlapping model and concurrent models of jurisdiction that achieve both of these goals. The Court failed to strike such a balance.

Constitutional rights need special protection, and there should be little impediment for individuals to seek redress in the courts. The policy considerations for deferring to the labour arbitration forum do not apply with the same force when individual constitutional rights are involved. Unionized employees have a constitutional entitlement to apply to a court of competent jurisdiction for claims arising out of violations of *Charter* rights. This must prevail over the legislative or contractual schemes that otherwise curtail access to the courts in favour of labour arbitration.

In effect, the Court's holding in *Weber* denies unionized employees access to justice. In the future, hopefully, the Court can get a test case that challenges *Weber*'s conclusions. In such a hypothetical test case, the Court should derogate from the exclusive jurisdiction model for *Charter* claims arising out of collective agreements. The exclusive jurisdiction model does not respect individual constitutional freedoms, impedes access to the courts, and precludes unionized employees from a formal legal process to enforce their individual rights.