

Toward a Theory of the Duty of Fair Representation

by Morgana Kellythorne

Morgana Kellythorne is completing her third year of law school at the University of Victoria. Following this, she will be clerking at the Supreme Court of Canada.

Introduction

The duty of fair representation (DFR) is expressly included in statutory labour law in British Columbia,¹ as it is in the United States and many other jurisdictions in Canada. Further, the DFR is an implied statutory term when it is not expressly included. The DFR is intended to hold unions to an acceptable standard of care in representing individual bargaining unit members. This appears to recognize individual rights in the collective bargaining framework, and attempts to secure and balance them against collective interests. However, broad recognition of the DFR, and indeed the very term itself, is misleading. First, although the DFR is a widespread feature of labour law, labour relations boards rarely grant DFR applications by complainants. Second, the DFR is not a positive duty to represent an individual member fairly, but instead, a more narrowly construed negative obligation to avoid the most egregiously culpable aspects of poor representation.

The aim of this paper is to illuminate the development of the DFR and the discourse surrounding it, in the wider context of pluralism ideology.

Overview

The paper focuses on the duty of fair representation in B.C., but draws on experiences elsewhere, because the development of the DFR has strong

similarities in all jurisdictions. First, I will set out the 'nuts and bolts' of the DFR: its historical origins and the broad outline of its jurisprudential interpretation. However, the 'macro' structures of the legal process are mediated and given concrete expression by lower-level engagements.² Thus, I will turn to the procedure governing processing of DFR complaints, their frequency and success rates, and the experience of complainants in the process. As it has developed, both the macro and the micro levels of the DFR have created a narrow obligation that is rarely enforced on application, despite the high number of complaints. The complainants are dissatisfied, and at the same time, mistrusted by the other players.

Second, I will examine academic comment on the DFR. Commentators have viewed the DFR through the paradigm of a conflict between collective and individual rights, and debated the correct balance between the two that is necessary to preserve the stability of the collective bargaining system. They have brought attention to pragmatic considerations underlying the desirability of either a broad or a narrow construction of the duty. This commentary, however, does not adequately explain the development of the DFR.

Third, I will step outside of the academic debate on the DFR to seek a fresh perspective on the role it plays and the dilemmas it poses in the collective bargaining system. To do so, I will draw on

¹ *Labour Relations Code*, R.S.B.C. 1996, c.244, s. 12 [LRC].

² Andrew Goldsmith, "Process, Power, and 'Consent': Some Notes Towards a Critical Theory of Collective Bargaining" (1987) 7 *Windsor Y.B. Access Justice* 21 [Goldsmith].

wider theoretical literature, particularly Andrew Goldsmith's 'processual' methodology. He suggests a framework for analysis that focuses on the material and ideological practices of power in the collective bargaining regime. In this light, the DFR has posed major strategic and symbolic dilemmas, which have led commentators to sometimes use extreme language. A further consequence has been distrust of the DFR's destabilizing potential, evinced by its infrequent application.

Historical Origins of the DFR

The DFR originated in the 1940s in the American case, *Steele v. Louisville & Nashville Railroad*.³ The U.S. Supreme Court stated that the DFR is an obligation inherent in the statutory grant of exclusive representation status to a trade union, because "the exercise of a granted power to act on behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf."⁴ The trade union in question excluded black members of the bargaining unit and denied them seniority rights. The Supreme Court was faced with a dilemma, as it sought to combat this blatant racism without the assistance of anti-discrimination legislation, which did not yet exist.⁵ Thus, the identification of an inherent statutory DFR was outcome-driven in the face of a concrete legal problem, and drew on elements of trust law.⁶

In the U.S., the DFR then expanded beyond providing protection from racial

discrimination in negotiation of collective agreements, and was applied to unions' processing of grievances and application of terms of existing collective agreements. By 1962, the National Labor Relations Board decided that a violation of the duty constituted an unfair labour practice.⁷ Finally, in 1967, the U.S. Supreme Court expressed the duty in a positive test in *Vaca v. Sipes*: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory, or in bad faith* [emphasis added]."⁸ The *Vaca v. Sipes* test remained a cornerstone of the DFR after its importation to Canada.

In Canada, enacting the DFR was first recommended in the Woods Task Force Report, which stated that a union should be able to show that it acted in good faith if it chose not to pursue a member's grievance or acted contrary to his or her interest.⁹ The first Canadian court to adopt the view that a union's exclusive representation rights impose a DFR was the B.C. Supreme Court in 1969, which in *Fisher v. Pemberton* cited *Vaca v. Sipes* approvingly.¹⁰ Ontario, however, was the first province to enact an express statutory DFR, in a 1971 amendment to the Ontario *Labour Relations Act*. B.C. followed suit in 1973.¹¹ Today, eight jurisdictions in Canada expressly include a DFR: Ontario, B.C., the federal jurisdiction, Alberta, Quebec, Saskatchewan, Manitoba, and Newfoundland.

³ *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) [*Steele*].

⁴ *Steele* at 202.

⁵ David Surmon, "Fair Representation in Canada: All for One and One for All" (1984) 22 Alta. L. Rev. 507 at 510 [Surmon].

⁶ James E. Jones, Jr., "The Origins of the Concept of the Duty of Fair Representation" [hereinafter "Jones"] in McKelvey, Jean T., ed., *The Duty of Fair Representation* (Papers from the National Conference on the Duty of Fair Representation, New York City, April 28 and 29, 1977), (Ithaca, N.Y.: New York State School of Industrial and Labor Relations, 1977) at 25 and 27 [McKelvey].

⁷ *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F. (2d) 172 (2d Cir. 1963).

⁸ *Vaca v. Sipes*, 386 U.S. 171 (1967) at 190.

⁹ *Woods Task Force Report* (Canadian Industrial Relations, 1968) at 104, cited in Surmon at 509.

¹⁰ *Fisher v. Pemberton* (1969), 8 D.L.R. (3d) 521 (B.C.S.C.) at 540-541 [*Fisher*].

¹¹ *Labour Code of British Columbia*, S.B.C. 1973, c.122, s. 7.

The Law

BC Statutory Law

Today, section 12 of B.C.'s *Labour Relations Code* states that:

(1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith

(a) in representing any of the employees in an appropriate bargaining unit, or

(b) in the referral of persons to employment whether or not the employees are members of the trade union or a constituent union of the council of trade unions.¹²

In 1993, s. 13 was added in response to recommendations from a Sub-Committee of Special Advisors appointed by the Minister of Labour to review the then-*Industrial Relations Act*. To screen out "unmeritorious" complaints,¹³ s. 13 established a gatekeeping requirement that complainants first establish a *prima facie* case that a contravention has "apparently occurred," prior to the Board serving a notice of complaint on the trade union and inviting a reply.¹⁴

Doctrine

The following outline of the doctrine of the DFR as it has developed jurisprudentially pertains particularly to B.C. However, there are few variations among Canadian jurisdictions or over time: it is remarkable how static the doctrine has been over the past 25 years. The purpose is not to provide a detailed exploration of the case law, but instead, a broad sense of when the

DFR comes into play, the substantive standard of care required, and the remedies available.

(a) Legal Context

In general, there is no direct civil action possible in the courts to bring grievances, as courts will not hear a claim that "depends upon the interpretation of [a] collective agreement."¹⁵ However, in B.C., courts in the early 1980s briefly began entertaining tort actions for negligent handling of grievances.¹⁶ This foray was reinforced when the Supreme Court of Canada found the existence of a common law DFR in *Canadian Merchant Service Guild v. Gagnon* ("Gagnon").¹⁷ However, developments in this area were halted in *Mulherin v. United Steelworkers of America, Local 7884*, when a five-member panel of the Court of Appeal held that there was no common law DFR in the province, since it was subsumed by the introduction of an express statutory DFR with an accompanying remedial mechanism.¹⁸ Subsequently, the Supreme Court of Canada in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, stated that, although the DFR exists at common law, it is ousted by statutory provisions that constitute a "complete and comprehensive scheme ... such that resort to the common law is duplicative"¹⁹ Thus, the DFR is not enforceable through the courts where express statutory provisions create both duty and remedial mechanism, as in B.C. The courts then defer to the labour relations board.

¹² LRC, s. 12.

¹³ Sub-Committee of Special Advisors, *Report and Recommendations on the Industrial Relations Act* (11 September 1992) at 1, cited in Thomas R. Knight, "Recent Developments in the Duty of Fair Representation: Curtailing Abuse in British Columbia" *Labour Arbitration Yearbook* (1996/97, 151) at 154 [Knight, "Abuse"].

¹⁴ LRC, s. 13. See exact phrasing and details ahead in discussion of the complaint process.

¹⁵ *Hamilton Street Railway Co. v. Northcott* (1966), 58 D.L.R. (2d) 708 at 710 (S.C.C.).

¹⁶ *Stoyles v. United Steelworkers of America, Local 7619* (1984), 55 B.C.L.R. 107 (C.A.).

¹⁷ *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 [Gagnon].

¹⁸ *Mulherin v. United Steelworkers of America, Local 7884* (1987), 37 D.L.R. (4th) 333 (B.C.C.A.).

¹⁹ *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298 at 1317.

(b) Circumstances

A variety of circumstances may create DFR scrutiny. A complainant may allege that the negotiation of collective agreement terms by the union and the employer favour one group over another. The DFR may also be used to scrutinize the practice of 'trading off' grievances during the contract negotiation. During reconciliation of seniority interests in mergers or layoffs, one group of employees may get the short end of the stick. A union may fail to pursue a policy or individual grievance. A union may have sought a sanction against an employee with the employer, for failing to fulfill union obligations. An unpopular member may feel wronged by a union or union official, whether in the grievance process or in other dealings.²⁰

In general, few reported cases exist in which an employee alleges that a trade union violated the DFR by discriminating on prohibited grounds: most DFR discrimination complaints are based on employment status or trade union membership.²¹ The largest group of complaints relates to grievance processing.

(c) Substantive Standard of Care

In *Gagnon*, the Supreme Court of Canada set out five principle features of the duty of fair representation:

1. The exclusive power conferred on a union to act as spokesperson for the employees in the bargaining units entails a corresponding obligation on the union to fairly represent all employees in the unit.
2. When the right to process a grievance to arbitration is reserved

to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. The union's discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and its consequences for the employee on the one hand and the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.²²

However, the criteria for finding a DFR are applied narrowly, and the union is entitled to balance political and strategic considerations in deciding not to pursue a grievance. The B.C. Labour Relations Board has adopted the statement that "... the union's function is to resolve ... competition by reaching an accommodation or striking a balance. The process is political. It involves a mélange of power, numerical strength, mutual aid, reason, prejudice, and emotion."²³ Thus, it is expected that employees unhappy with their union will access the union's political mechanisms to remedy the situation: they can seek election, vote out members, choose another union, or decertify.²⁴

In scrutinizing a union's accordance with the DFR, the labour relations board does

²⁰ This list of potential circumstances is found in Raymond Brown, "The Duty of Fair Representation and the Resolution of Conflicts under Section 68 of the Labour Relations Act of Ontario" (1984) 4 Windsor Y.B. Access Justice 3 at 7.

²¹ M.Kaye Joachim, "The Meaning of 'Discriminatory' in the Duty of Fair Representation" (1999) 7 Can. Lab. & Emp. L.J. 91 at 104 [Joachim].

²² *Gagnon* at 527.

²³ *Rayonier Canada (B.C.) Ltd.*, [1975] B.C.L.R.B. 40/75; 2 Can. L.R.B.R. 96 at 204 [*Rayonier*].

²⁴ *Board of Trustees, School District No. 39 (Vancouver)*, [1981] 1 Can. L.R.B.R. 267, B.C.L.R.B. 2/81.

not hold the union to a correctness standard. The union may be wrong about the merits of the employee's grievance, and can even be simply negligent in its handling of the grievance.²⁵ The test for *arbitrariness* is elastic. "Arbitrary" does not cover conduct that is inept, negligent, unwise, insensitive or ineffectual, but encompasses that which is "superficial, capricious, implausible or shows lack of interest."²⁷ The test for *discrimination* requires evidence of actions influenced by factors contrary to the *Human Rights Code*.²⁸ Finally, the test for an allegation of *bad faith* requires objective evidence that there is no reasonable explanation for a union's handling of a matter other than personal hostility, political revenge, or dishonesty.²⁹ Thus, the doctrinal bar for a breach of the DFR is a high one.

(d) Remedies

In brief, the remedy for a DFR breach is usually to order that the complainant's grievance be put through the grievance procedure on its merits, or for the union to take the claim to arbitration. This may be a hollow victory, since a union thus admonished might pursue the victorious complainant's grievance less than zealously, while carefully fulfilling pro forma requirements. However, the Federal Court of Appeal recently affirmed a labour relations board's use of the equitable remedy of requiring a union and employer to reopen contract negotiations on the point disputed by the complainants.³⁰

DFR Complaint Procedure in B.C.

The doctrine regarding the DFR appears to be somewhat narrow, but doctrine does not represent the concrete experiences of the rank-and-file with DFR claims, nor does it provide a total picture of DFR's role in the collective bargaining system. Further insight is provided by a description of the process followed by DFR complaints to the labour relations board.

When a worker makes a DFR complaint to the labour relations board, a file is opened and the Deputy Registrar requests particulars from the complainant, if needed. There is a one-year statutory limit on filing DFR claims. It may take time and correspondence before the file is considered complete enough to enter the case management system and move to the adjudication stage. A letter to the trade union and the employer confirms receipt of the complaint and gives them a copy of the application. At this point, a 'panel' of one Vice-Chair determines if there is a *prima facie* case, in accordance with s. 13. S. 13 states that:

(1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organizations has contravened s. 12, the following procedure must be followed:

(a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred;

²⁵ *Franco and Hospital Employees Union and North and West Vancouver Hospital Society*, B.C.L.R.B. B90/94, Case No. 13997 (reconsideration of IRC No. C244/92) at 293-294.

²⁶ *Adams et al., and IWA-Canada, CLC, Local Union 1-85 and Macmillan Bloedel Ltd.*, B.C.L.R.B. B213/94, Case No. 13289.

²⁷ *Charles Morgan and Registered Psychiatric Nurses' Association of British Columbia*, [1980] 1 Can. L.R.B.R. 441; B.C.L.R.B. 89/79 at 454 [Morgan].

²⁸ *Rayonier*.

²⁹ *Campbell (Re)*, [1997] B.C.L.R.B. 324; *Pepin (Re)*, [1997] B.C.L.R.B. 26.

³⁰ *Via Rail Canada Inc. v. Cairns*, [2001] 4 F.C. 139.

(b) if the panel considers that the complaint discloses sufficient evidence that the contravention has apparently occurred, it must

- (i) serve a notice of the complaint on the trade union, council of trade unions or employers' organization against which the complaint is made and invite a reply to the complaint from the trade union, council of trade unions or employers' organization, and
- (ii) dismiss the complaint or refer it to the board for a hearing.³¹

If a *prima facie* case is found, the complaint moves forward to a determination on its merits. Submissions are invited from the employer and the union. Most cases are adjudicated on the basis of file materials and written submissions, although a minority may receive an oral hearing if material facts are in dispute in the filed submissions. When a decision is issued, the parties are informed of appeal avenues via s. 141, which provides for reconsideration applications to be reviewed by a panel of three Vice-Chairs.³² The process is lengthy: the average time in B.C., from date of the complaint to initial decision (i.e., without reconsideration) is 236 days, compared to 74 days for s. 6 grievances of dismissals.³³ Overall, the process for DFR complaints in B.C. is cumbersome and

unusually lengthy. It is not a welcoming procedure for lay applicants.

The process varies in other jurisdictions, with B.C. at the far end of the spectrum when it comes to bureaucracy and length. Ontario and Alberta make more use of mediation, for example. In Alberta, there is a 90-day limitation period on filing complaints.³⁴ In Ontario, the average complaint takes just 57 days, while in Alberta the average is 161 days.³⁵ While commentators in these jurisdictions have also stated that the system is "cumbersome" and not suited to individuals, B.C. is an extreme illustration.

Frequency and Success of DFR Complaints

B.C. experiences a high volume of DFR complaints, which appears to be increasing. In 1990, the B.C. Labour Relations Board disposed of 94 DFR complaints;³⁶ in 1999, it disposed of 228 DFR complaints. In 1999, DFR applications accounted for 7.3% of those filed with the Labour Relations Board, not an insubstantial proportion.³⁸ However, DFR complaints account for an even higher proportion of reconsideration applications: 27.1% in 2000.³⁹ Thus, complaints are frequent and becoming more so, and one party or the other is dissatisfied enough in a high proportion of cases to apply for reconsideration.

The success rate of DFR complaints is consistently and dramatically low. From 1975 to 1994, between 0% and 7% of DFR applications were granted each year in B.C.⁴⁰

³¹ LRC, s. 13.

³² A description of the s. 12 process in B.C. is found in Ritu Mahil, "A Review of the Duty of Fair Representation Complaint Resolution Process of the British Columbia Labour Relations Board" [unpublished, archived at University of Victoria, Faculty of Law, Professor John Kilcoyne] (Draft, March 2000) at 10-12 [Mahil].

³³ Mahil 24 and 69.

³⁴ Mahil 26-27.

³⁵ Mahil 20.

³⁶ Knight, "Abuse" at 154.

³⁷ Mahil 53.

³⁸ British Columbia Labour Relations Board, "Application and Certification Data." online: <www.lrb.bc.ca/reports/application_certification_data.htm> [App Data].

³⁹ British Columbia Labour Relations Board, "2000 Annual Report" online: <www.lrb.bc.ca/reports/2000_report> [2000 Report].

⁴⁰ Knight, "Abuse" at 154.

Of 1,789 DFR complaints handled in those years, just 60, or 3%, were granted.⁴¹ The pattern has continued in more recent years: for example, of the 199 applications filed in 2000, three were granted.⁴² This differs from the Labour Relations Board's rate of granting other types of applications. On a range of unfair labour practice complaints filed in 2000, the success rate of applications was closer to 20%.⁴³ Furthermore, the Labour Relations Board is no more inclined to grant DFR applications on reconsideration. In 2000, 36 applications for reconsideration involved DFR complaints, but only two succeeded, or just over 5%.⁴⁴ By contrast, the general success rate of reconsideration's in 2000 was 16%.⁴⁵ Finally, this pattern accords with other jurisdictions. In Ontario, just two of 238 applications in 1990 succeeded.⁴⁶ In Alberta, between 1989 and 1994, 5% of applications were granted.⁴⁷ Clearly, most bargaining unit members who file complaints about the quality of their union representation have little chance of succeeding, although they may not initially be fully aware of that fact.

Experiences of Complainants

There is little information from complainants about their experiences with the DFR process, although commentators have speculated on their motives for filing DFR applications. The small amount of feedback available indicates strong disappointment and dissatisfaction, given that, after a lengthy and sometimes incomprehensible experience, most

complainants' applications were rejected. In a survey, former complainants stated that they had expected shorter processing times and were distressed at the deterioration of their relationship with the union as they waited for the matter to be resolved. The s. 13 *prima facie* case requirement was problematic, since many of them interpreted letters stating that they had met the burden as meaning that their complaint had been successful. Instead, there were months to go until a final, negative decision.⁴⁸ When asked why they believed there were so many s. 12 complaints, former complainants indicated the lack of good union jobs, and union representatives who were too busy to sit down and discuss the grievance process. From this, one can infer that complainants often were desperate to regain a union position upon layoff or firing, and that they found it upsetting when the union dropped or settled their grievance with little communication.⁴⁹ Finally, they pointed out that it was difficult for individuals to hire lawyers, or to deal with the application process without them.⁵⁰

Some commentators have speculated on the political motivations of DFR complainants.⁵¹ Others have suggested that labour relations boards have, for political reasons, come to the belief that most DFR complaints lack merit and are simply instances of manipulation by individual workers.⁵² Thomas R. Knight has argued that most complaints are without substance, and are made by individuals attempting to secure

⁴¹ Knight, "Abuse" at 154.

⁴² 2000 Report.

⁴³ Mahil at 53.

⁴⁴ Mahil at 24.

⁴⁵ 2000 Report.

⁴⁶ Joachim at 119.

⁴⁷ Howes at 138.

⁴⁸ Mahil at 38.

⁴⁹ Mahil at 39.

⁵⁰ Mahil at 39.

⁵¹ See for example, Knight, "Abuse."

⁵² Joachim at 120.

power in the grievance process or to inflict political damage within the union.⁵³ He speculated that the dramatic increase in the number of complaints abandoned by complainants after the enactment of s. 13 is due to their having had "their bluffs called."⁵⁴ It has been suggested that the low success rate of DFR complaints itself fuels a belief among labour relations boards that most applications lack merit and are an attempt to abuse the system.⁵⁵ Feedback from actual complainants, however, fails to demonstrate Machiavellian motives: it points, instead, to a layperson's frustration with an unhelpful process in the face of critical life changes.

Commentators on the Duty of Fair Representation

Academic and policy comment on the DFR has fallen into two basic camps: those who argue for a narrow construction of the duty, and those who would grant a wider construction or even individual carriage of grievances. The debate is generally framed in terms of the correct balance between collective and individual rights in the collective bargaining regime. Bernard Adell has noted an apparent paradox between the predominantly "anti-majoritarian" functions of the broader legal system and the "collective thrust of much of our modern labour law," which views minority legal rights as mere "verbal disguises for the preservation of economic privilege."⁵⁶ All commentators operate within the paradigm of the binary opposites of "collective" versus "individual," attempting to find the balance

between them. To aid their arguments, they marshal pragmatic considerations and point to the potential consequences of falling too far on the wrong side of the binary.

Arguments for a Narrow Construction of Individual Rights

Commentators who believe that the duty of fair representation should be narrowly construed argue that a broad recognition of individual rights is antithetical to collective bargaining, as a participatory form of democracy.⁵⁷ Furthermore, collective bargaining is only able to make gains for individual union members through union solidarity and the union's role as exclusive bargaining agent. Too much recognition of individual rights would impede good labour relations. It would undermine the union's role in developing a coherent jurisprudence on key collective agreement provisions, by leading to ad hoc claims and divergent rulings.⁵⁸ The prestige and authority of the union would be undermined, furthering dissenting factions and instability. If individual carriage of grievances were allowed, the union might look ineffective if individuals achieved better results at arbitration.⁵⁹ If the duty of fair representation were broadened, unions would be forced to carry to arbitration grievances that they knew lacked merit, to avoid a DFR complaint.

This view has been supported by the work of Thomas R. Knight, who surveyed union representatives about their experiences with DFR, and argued that

⁵³ Thomas R. Knight, "The Role of the Duty of Fair Representation in Union Grievance Decisions" (1989) 42 *Relations Industrielles/Industrial Relations* 716 [Knight, "Role"].

⁵⁴ Knight, "Abuse" at 158.

⁵⁵ Joachim at 120.

⁵⁶ Bernard Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11 *Queen's L. J.* 251 at 251 [Adell].

⁵⁷ See, for example, Lars Apland and Chris Axworthy, "Collective and Individual Rights in Canada: A Perspective on Democratically Controlled Organizations" (1988) 8 *Windsor Y.B. Access Justice* 44 at 77 [Apland and Axworthy].

⁵⁸ Archibald Cox, "Individual Enforcement of Collective Bargaining Agreements" (1957) 8 *Lab. L. J.* 850 [Cox], cited in Timothy J. Christian, "The Developing Duty of Fair Representation" (1991) 2 *Labour Arbitration Y.B.* 3 at 4 [Christian].

⁵⁹ Cox cited in Christian at 4.

individual workers threaten to proceed with DFR claims to extract political leverage in the union and that unions are forced to press unmerited grievances as a result.⁶⁰ One union representative suggested that individuals threaten and file DFR complaints for "nuisance value or perhaps getting even with whomever, *management or union* [emphasis added]."⁶¹ However, even in Knight's survey, 75% of those surveyed indicated that threats to file DFRs were "rarely" made, and only 3.4% of union representatives "often" or "very often" proceeded as a consequence to arbitration with a grievance that they would rather have withdrawn.⁶² Despite these not overly alarming statistics, this is a frequently cited concern, both with the current state of the DFR and with any suggested broadening of individual rights. The terms "abuse" and "manipulation" are often used to describe the results of increased individual rights in the DFR arena.⁶³

As viewed by these commentators, the ultimate result of broad individual rights in the collective bargaining regime is negative for both unions and management. The current collective bargaining regime encourages settlement of grievances prior to arbitration as the most efficient and effective result for both parties. With broader individual rights, more grievances would be arbitrated, whether carried by individuals or by half-hearted unions protecting themselves from complaints. This would clog the system, adding time and expense for both parties.⁶⁴ Employers could not assume that a grievance had been resolved after dealing

with the union about it, leading to commercial instability and uncertainty, which would undermine the collective bargaining regime.⁶⁵

Arguments for a Broader Construction of Individual Rights

Fewer commentators argue for a broad construction of individual rights vis-à-vis union representation in the grievance process, and they are divided as to the appropriate degree of individual autonomy. As a philosophical umbrella for those who would grant more weight to individual rights, Clyde Summers has stated that they should take precedence because "collective bargaining is not merely a private device to serve ... collective needs but also has the purpose of improving the dignity and worth of the individual."⁶⁶ Bernard Adell has recommended that any grievor covered by a collective agreement have the right to carry any grievance to arbitration independently if the union will not proceed with it. He argues that when the law grants somebody a substantive right, it ought to provide a procedural means of enforcing that substantive right.⁶⁷ Thus, where the union will not ensure compliance with the collective agreement, individuals need access to the grievance/arbitration process. Adell does recommend retaining the DFR as a potential claim against a union regarding negotiation of the collective agreement.⁶⁸ By contrast, Paul Weiler suggests the 'critical job interests' doctrine, whereby individual rights prevail in unjust dismissal claims, given

⁶⁰ Knight, "Role."

⁶¹ Knight, "Role" at 723.

⁶² Knight, "Role" at 723.

⁶³ An ever-popular Canadian argument also comes into play: holding up the example of a highly litigated American counterpart to be avoided in this country; see Surmon at 509-510.

⁶⁴ For example see Knight, "Role" at 718; Christian at 4. This phenomenon has also been observed in the U.S.: see Robert J. Rabin, "The Duty of Fair Representation in Arbitration" in McKelvey 84 at 85.

⁶⁵ Surmon at 510.

⁶⁶ Clyde Summers, "Individual Rights in Collective Agreements and Arbitration" (1962) 37 N. Y. U. L. Rev. 362 at 410, cited in Christian at 5.

⁶⁷ Adell at 255.

⁶⁸ Adell at 259.

dismissal's role as "a kind of industrial capital punishment."⁶⁹ Timothy Christian suggests that the involvement of critical job interests should attract a greater degree of scrutiny.⁷⁰ Adell finds the distinction unhelpful, pointing out that job tolerability and job-level grievances are also important to individuals. Raymond Brown does not step outside of the DFR framework, but recommends higher guarantees of procedural fairness, allowing self-financed access to arbitration to members who have been dismissed at the request of the union.⁷¹ He proposes expanding the DFR to serve as a penalty for union incompetence, since the duty is an institutional one and the union should bear responsibility for its personnel's negligence.⁷² Clearly, those arguing for a broader understanding of individual rights in the DFR context are scattered along a wide spectrum.

Pragmatic arguments raised by this group vary depending on where they fall on the spectrum of recommended solutions. Those who simply support a more inclusive DFR suggest that its enforcement will prod unions to improve their grievance-processing training for representatives. This is partially supported by Knight's survey results.⁷³ Trade unions would also be deterred from violating rights, and the integrity of collective agreement procedures would be maintained. Those who recommend individual carriage of grievances point out that it will decrease the need for trade unions to build up files to protect themselves.⁷⁴ Adell does not foresee a system packed with individual complaints, but not because he believes unions would

necessarily improve their responsiveness to their membership. Somewhat perversely, his argument for individual rights under the collective agreement is grounded in a reassurance that the system would not become overburdened because "aggrieved individuals" (the "persistent and cantankerous") would soon learn that the cards were stacked against them without union support, and would be deterred from pursuing grievances by the cost of self-financing.⁷⁵

As Adell's deterrence argument underscores, the proponents of greater individual rights in the grievance and/or the DFR process largely share similar discursive strategies and material priorities as those arguing for a narrow construction of individual rights. A debate with an apparently broad spectrum of opinion in some ways is in fact as narrow as the current interpretation of the DFR itself.

Toward a Theoretical Framework for the Duty of Fair Representation?

Current academic literature on the duty of fair representation does not satisfactorily illuminate the following characteristics of its development and role, perhaps because the literature itself forms part of the problematic discourse surrounding the duty:

- The statutory language and jurisprudence related to the DFR set a narrow test for violations of the duty, and a high onus is placed on complainants.
- The process for bringing a DFR complaint is cumbersome, lengthy, and full of hurdles for the applicant.

⁶⁹ Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 138, cited in Christian at 6.

⁷⁰ Christian at 6.

⁷¹ Raymond Brown, "The Duty of Fair Representation and the Resolution of Conflicts under Section 68 of the *Labour Relations Act* of Ontario" (1984) 4 Windsor Y.B. Access Justice 3 at 44 [Brown, "Resolution"].

⁷² Raymond E. Brown, "The 'Arbitrary,' 'Discriminatory,' and 'Bad Faith' Tests under the Duty of Fair Representation in Ontario" (1982) 60 Can. Bar Rev. 412 at 439 [Brown, "Tests"].

⁷³ Knight, "Role" at 730.

⁷⁴ Adell at 255.

⁷⁵ Adell at 256.

- The labour relations board handles a high volume of DFR complaints, but the vast majority of applications are dismissed.
- Former complainants indicate the dissatisfaction that might be expected from laypeople disappointed both by the union's lack of communication and poor handling of a grievance, and by the unwelcoming and unhelpful process they thought would secure them a remedy. However, commentators frequently portray complaints as almost universally unmerited and brought by manipulative power-seekers.
- Academic comment on the DFR ranges along a spectrum, from advocating increased individual rights to arguing for an even narrower construction of the duty. However, commentators share similar preoccupations with the efficiency of the collective bargaining and arbitration regime, and similar characterizations of potential complainants.

For a helpful perspective on these factors, it is necessary to step outside the literature on the DFR and seek a broader theoretical framework. Andrew Goldsmith has suggested adopting a "processual methodology" to address the dialectic of control within the "potentially fluid, dynamic" management/labour relationship.⁷⁶ He argues for a fully theorized understanding of the workings of power in both its material and ideological practices, and warns us that employee 'consent' to the justness of collective bargaining is socially constructed and far from straightforward.⁷⁷ To investigate the shifting dialectic of control, it is necessary to focus on "low-level exchanges" as well as on the macro level of statutes and appellate jurisprudence. His analytical framework proves useful in the context of the evolution of the DFR. The DFR and its surrounding discourse can be

situated within an ideology that sets the limits of what is considered "fair, reasonable, possible at work," thus undermining "the possibility of alternative views of the enterprise."⁷⁸

Goldsmith identifies more than one type of power at work in the management/labour relationship, and suggests thinking about collective bargaining in terms of the "power outcomes" for the distribution of organizational power, arising in often mundane, cumulative ways.⁷⁹ The narrowness of the DFR and the dismissiveness of commentators regarding complainant concerns reinforce the funneling of potentially disruptive grievances through the management/labour relationship. Despite the invocation of a delicate balance between collective and individual rights, the cumulative effect of jurisprudence, statute provisions, labour relations board decisions, process concerns, and academic discourse is to minimize the concerns of individual workers and valorize the necessity of trust in their union representation.

A cornerstone of industrial pluralism ideology is the grant of exclusive bargaining agent status to democratic unions. This has benefits for the unionized employer in the form of commercial stability and certainty, which is preferable to dealing with a plethora of grievances brought by individual employees. However, Goldsmith points out the co-existence of more than one type of power, contributing to the construction of employee consent to the collective bargaining regime. 'Power over' is limited and can only be increased at another's expense. However, 'power to' is potentially expandable, allowing collective bargaining to deliver not only economic but political goods to employees, who achieve 'power to' in interstices of organizational 'space'.⁸⁰ At

⁷⁶ Goldsmith at 25-26.

⁷⁷ Goldsmith at 25.

⁷⁸ Goran Therbon, *The Ideology of Power and the Power of Ideology* (London: Verson, 1980) [Therbon] at 18, in Goldsmith at 38.

⁷⁹ Goldsmith at 29.

⁸⁰ Goldsmith at 34-35.

the same time, power can also be exercised subtly, through the "avoidance or limitation of express conflicts altogether, the 'mobilization of bias'."⁸¹ For example, one can identify the mobilization of bias against carriage of individual grievances that cumulatively could threaten the stability of the collective bargaining regime, in which the fundamental 'power over' remains with the employer. Thus, the power relations of collective bargaining promote the social construction of employee consent to industrial pluralism ideology.

Issues in the collective bargaining relationship fall into one or more of four categories, according to Goldsmith: (1) major strategic issues, which pose a "genuine challenge to the power resources of those who dominate the process that determines policy,"⁸² (2) minor strategic issues, (3) marginal issues, and (4) symbolic issues that are seen "subjectively by one or both parties... as significant to power relations."⁸³ The vehemence with which DFR complaints are negatively characterized and rejected is symptomatic of their position at the heart of major strategic and symbolic issues. The power resources of the union derive from its role as exclusive bargaining agent. In addition, it has received 'power to' in being granted discretion about whether or not to carry forward employee grievances. In effect, the union's role in the grievance process renders it a level of "secondary management" in workers' lives.⁸⁴ The power resources of individual union members also to a large extent reside in their ability to act collectively. Finally, the balance of 'power over' held by the employer could

be disrupted by validation of individual employees' rights to challenge the union's 'final say' on grievances. The intersection of major strategic and symbolic issues thus accounts for much of the stringently narrow construction of the DFR, and the shared discursive strategies of those who favour both a broader and a stricter definition.

It must be noted that while Goldsmith's framework focuses exclusively on the collective bargaining regime, in practice, bargaining unit members sit atop the hierarchy of Canadian workers. The determination of appropriate bargaining units and the certification process historically favoured full-time male breadwinners in large manufacturing and infrastructure sectors.⁸⁵ Thus, maintenance of exclusive bargaining authority through the narrowness of the DFR also has served to shore up the strength of unionized workers in the hierarchy by maintaining the benefit to the employer of dealing with a workforce that speaks with one voice. At the same time, maintenance of the hierarchy has also benefited the employer by preserving a pool of inexpensive labour that is predominantly female and often part-time.

Ideology in the workplace "offer[s] partial definitions of events which are supported by actual concrete circumstances and practices," narrowing the possibility of discussing alternatives.⁸⁶ Because they are "partial," ideological strategies are often unrecognized and contradictory, but appear to be common sense by according with experiences, even while obscuring the fundamental reality of 'power over' in the workplace.⁸⁷ Thus, the pragmatic

⁸¹ Goldsmith at 30.

⁸² Peter Bachrach & Morton S. Baratz, *Power and Poverty: Theory and Practice* (New York: Oxford University Press, 1970) at 47-48, cited in Goldsmith at 32.

⁸³ Goldsmith at 32-33.

⁸⁴ The term is from Ian Hunter, "Individual and Collective Rights in Canadian Labour Law" (1993) 22 Man. L.J. 145 at 145 [Hunter].

⁸⁵ Judy Fudge, "Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy" (1996) 60 Sask. L. Rev. 237. (QL) [Fudge].

⁸⁶ Therbon at 18, cited in Goldsmith at 38.

⁸⁷ Goldsmith at 34 and 38.

considerations marshaled by commentators on the DFR have a common-sense appeal that legitimizes their ideological function. At the same time, the explanations offered by commentators are partial and contradictory, as illustrated by the circular logic that views almost all complaints as politically motivated and unmerited *because* of the high rate of dismissal of applications, despite the fact that the narrowness of the test excludes many complainants who have been poorly represented. However, this partial explanation may appear to be a "descriptive account of workplace relations,"⁸⁸ according with some experiences of persistent and unjustified complainers. Because of the seemingly common-sense consequences of increasing individual rights for union members without disincentives, commentators are reluctant to disturb the balance of power and explore alternatives to industrial pluralism ideology.

Hegemony is an order in which "one concept of reality is diffused throughout society."⁸⁹ It is a process that requires constant repetition and reformulation, adjusting to challenges by recognizing conflicting subordinate demands and making limited concessions to form a "compromise equilibrium" that nevertheless does not jeopardize fundamental control.⁹⁰ Thus, Goldsmith identifies collective bargaining as an institutionalized mechanism for adjustments in support of hegemony, and at the same time, a limited source of challenges with the logical possibility of radicalness.⁹¹ This radical possibility accounts for some of the managerial distrust of collective bargaining.

Conclusion

Recognizing a narrow, negative obligation termed the DFR concedes to conflicting demands that challenge the hegemony underlying pluralism ideology: the DFR complaint process provides an institutionalized mechanism for limited readjustments. The rhetorical acknowledgment of the conflicting pulls of individual and collective rights in jurisprudence and commentary stops far short of jeopardizing the balance of power. Yet institutional and rhetorical recognition of the most basic duty of fair representation is necessary to the maintenance of hegemony, since the dissatisfaction of individual employees with their position in the hierarchy holds radical potential. In discussing judicial deferral to the union's perceived need for exclusive bargaining authority and internal solidarity, Ian Hunter has observed that "compelled solidarity is not real solidarity, and that unions in the long run do not gain from such compulsion."⁹²

The power dynamic of the collective bargaining regime thus functions ideologically and materially to avoid utilizing a broadly conceived DFR to prod unions to develop 'real solidarity,' which could threaten the fundamental 'power over' of the workplace.

⁸⁸ Goldsmith at 34.

⁸⁹ G. Williams, "Gramsci's Concept of 'Egemonia'" (1960, 4) *Journal of the History of Ideas* at 587 [Williams], cited in Goldsmith at 40.

⁹⁰ Williams at 161, cited in Goldsmith at 41.

⁹¹ Goldsmith at 43.

⁹² Hunter at 145.