Individual vs. Collective Employment: Substantive and Procedural Differences and Similarities

*E. Wayne Benedict, LL.M, JD (Distinction), B.HRLR (Great Distinction), is an Alberta Barrister and Solicitor with the E. Wayne Benedict Professional Law Corporation, providing legal services to various clients including the Calgary firm McGown Johnson. Mr. Benedict was an editor of the Saskatchewan Law Review (2004-05) and the Alberta Law Review (2005-06), and he was Law Clerk to The Honourable Mr. Justice Kenneth Mackenzie and The Honourable Mr. Justice Allan Thackray of the British Columbia Court of Appeal (2006-07). E. Wayne Benedict PLC is Sessional Instructor of Labour Law with the University of Calgary Faculty of Law. Mr. Benedict holds certifications in locomotive operations, building construction, and industrial relations & human resources, and he is former president of the Canadian Union of Transportation Employees, Local 1 and its successor the Canadian Auto Workers, Local 110. Mr. Benedict acts for individual employees, labour unions/professional associations, and non-union employers in various negotiations, judicial and administrative dispute resolution forums. E. Wayne Benedict practices predominantly in labour law and employment law, and peripheral areas of civil litigation including: constitutional law (Charter of Rights and Freedoms and Division of Powers), human rights law, privacy law, administrative law (tribunal advocacy and judicial review), and appellate law. This paper was presented at the Canadian Bar Association's 2014 Alberta Law Conference, Calgary, 31 January 2014.

Abstract

The law applicable to individual contracts of service (employment law) is fundamentally different from the law applicable to collective agreements (labour law). This is largely due to differences in kind between the nature of employment contracts, and the nature of collective agreements; the former falling within a subset of the general common law of contract, the latter being a sui generis form of statutory agreement. Part II of this paper discusses these differences.

Certain legal principles that have developed under employment law or labour law have been applied—correctly and incorrectly—in the corresponding area of law. Principles from one of these areas of the law may be applied in a principled manner that is, or can be made to be, legally coherent in the corresponding area. However, some principles from one of these areas of the law applied in the corresponding area result in absurdities when examined in light of the fundamental differences between employment contracts and collective agreements. Part III of this paper discusses some of these legal principles, and how they may be correctly (and incorrectly) applied in the corresponding area of law.

The process of adjudicating disputes arising out of collective agreements (generally, grievance [rights] arbitration) is also fundamentally different than the process available to adjudicate disputes over breach of (employment) contract claims (generally, the civil courts). The remedies available through those venues are different as well. Part IV of this paper discusses some of these procedural differences, and how parties to employment contracts may stipulate in their contract the form of dispute resolution familiar in labour law—arbitration—thus avoiding the civil courts.

Part V of this paper concludes with the observation that there is an undeniable overlap between the principles of employment law and labour law, and there are principles that have arisen in one legal context that have been imported into the corresponding area that are conducive to a better fit than others. Legal counsel practicing in employment law can glean valuable insights into their practices through labour law; and visa-versa.

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I. Introduction

The law applicable to individual contracts of service (employment law) is fundamentally different from the law applicable to collective agreements[1] (labour law). This is largely due to differences in kind between the nature of employment contracts, and the nature of collective agreements; the former falling within a subset of the general common law of contract, the latter being a *sui generis*[2] form of statutory agreement. Part II of this paper discusses these differences.

Certain legal principles that have developed under employment law or labour law have been applied—correctly and incorrectly—in the corresponding area of law. Principles from one of these areas of the law may be applied in a principled manner that is, or can be made to be, legally coherent in the corresponding area. However, some principles from one of these areas of the law applied in the corresponding area result in absurdities when examined in light of the fundamental differences between employment contracts and collective agreements. Part III of this paper discusses some of these legal principles, and how they may be correctly (and incorrectly) applied in the corresponding area of law.

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[1] " 'collective agreement' means an agreement in writing between an employer or an employers' organization and a bargaining agent containing terms or conditions of employment, and may include one or more documents containing one or more agreements": *Labour Relations Code*, RSA 2000, c L-1, s 1(f).
[2] "Of its own kind or class": Bryan A. Garner, ed, *Black's Law Dictionary*, 7th ed (St. Paul: West Group, 1999) at 1448 [Black's].

in employment law can glean valuable insights into their practices through labour law; and visa-versa.

II. Employment Contract versus Collective Agreement

An individual contract of service,[3] more colloquially known as an "employment contract", falls within a subset of the general law of contract developed at common law and evolved from the archaic law of master-servant relationships. Employment contracts are subject to the same legal principles as are all contracts, including the doctrines of frustration[4] and fundamental[5] (or "repudiatory"[6]) breach. Thus where an employee dies, neither she nor the employer has terminated their employment contract, but it self-terminates by operation of law upon the employee's death—the employment contract has been frustrated due to impossibility of performance. Employment contracts are also frustrated in cases where the employer falls into bankruptcy.[7]

Classic examples of fundamental/repudiatory breach in the context of employment law occur, to use the vernacular, where an employee is "fired for cause" and where an employer has "constructively dismissed" an employee. In the former example (termination for cause), an employee shows through his or her conduct (i.e. workplace theft, fraud, assault of manager, etc.) that he no longer intends to be bound by the fundamental term (implied as a matter of law, if not expressed[8]) in the employment

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[3] As distinguished from a "contract *for* services", which apply to "independent contractors", not to "employees."

[4] "The doctrine that, if the entire performance of a contract becomes fundamentally changed [or impossible] without any fault by either party, the contract is considered terminated": Black's, *supra* note 2 at 679.

[5] "A fundamental breach occurs 'Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract' (emphasis added). … Fundamental breach … gives to the innocent party an additional remedy, an election to 'put an end to all primary obligations of both parties remaining unperformed'...": *Hunter Engineering Co. v. Syncrude Canada Ltd*., [1989] 1 S.C.R. 426, [1989] S.C.J. No. 23 at para 137 (QL), per Wilson and L'Heureux-Dubé JJ. (dissenting in cross-appeal) ["*Hunter Engineering*"]. See also *De Monte Centre Management Inc. v. Spooner*, 2011 BCSC 1124, [2011] B.C.J. No. 1580 at para 57 (QL).

[6] "Repudiation…A contracting party's words or actions that indicate an intention not to perform the contract in the future; a threatened breach of contract": Black's, *supra* note 2 at 1306.

[7] "[E]mployment is terminated by operation of law as a result of the bankruptcy of the employer": *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 at para 42 (QL).

[8] E. Wayne Benedict, "Arbitral Collective Agreement Interpretation: The Modern Approach", Rev 4 (Paper delivered at the 30th Annual Labour Arbitration Conference, Calgary, 31 May 2012), online: JD Supra <http://www.jdsupra.com/post/fileServer.aspx?fName=fe278987-b930-494b-9ac1-97582ffcf1d9.pdf> at 21-22.

contract that he owes the employer a duty of good faith, fidelity and loyalty.[9] The employee has repudiated the employment contract.[10] The repudiation "gives to the innocent party [the employer] an election to 'put an end to all primary obligations of both parties remaining unperformed."[11] The employer can either elect to accept the employee's repudiation and summarily terminate the employment contract, or not, in which case it has "condoned" the continuation of the employment contract notwithstanding the employee's fundamental breach.

In the latter example (constructive dismissal), an employer shows through its conduct that it no longer intends to be bound by one or more fundamental terms of the employment contract.

> In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. …where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms -- the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed.[12]

When faced with the employer's fundamental breach, the employee has an election to make: either accept the employer's repudiation and summarily terminate the employment contract (quit and sue for constructive dismissal damages), or not, in which case she has "condoned" the continuation of the employment contract (under the unilaterally altered terms and conditions) notwithstanding the employer's fundamental breach.

However, collective agreements are different in kind than employment contracts, and legal principles that apply under the common law of employment do not fit comfortably (or in some cases at all) under the statutory law of labour. In the seminal decision of *McGavin Toastmaster*[13] Chief Justice Laskin of the Supreme Court of Canada ("SCC") wrote:

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[9] E. Wayne Benedict, "Restrictive Covenants in Employment Contracts: Enforceability of Non-Competition, Non-Solicitation, Confidentiality & Fiduciary Obligations" (Paper delivered at the Canadian Bar Association Alberta, Alberta Law Conference 2013, Edmonton, 1 February 2013), online: JD Supra <http://www.jdsupra.com/post/fileServer.aspx?fName=b6974e84-9f0e-496f-a779-8c40e8006447.pdf> at 6-13.
[10] See eg *Kucera v. Qulliq Energy Corp*., 2014 NUCJ 2, [2014] Nu.J. No. 2 (QL).
[11] *Hunter Engineering, supra* note 5.
[12] *Farber v. Royal Trust Co*., [1997] 1 S.C.R. 846, [1996] S.C.J. No. 118 at para 33 (QL).
[13] *Ainscough v. McGavin Toastmaster Ltd*., [1976] 1 S.C.R. 718, [1975] S.C.J. No. 51 (QL) ["*McGavin Toastmaster*"].

> …individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto…
>
> [Labour Relations statutes] could operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists…
>
> …a collective agreement "is not that sort of contract that can be terminated by repudiation by one party merely because the other party has broken one of its terms"…

In *Paccar*[14] the SCC majority wrote:

> …individual contracts of employment no longer arise if the parties are in a collective bargaining relationship…
>
> The operative factor… is the ongoing duty on the parties to bargain collectively and in good faith. So long as that obligation remains, then the tripartite relationship of union, employer and employee brought about by the Code displaces common law concepts…
>
> The scheme of the Labour Code, requiring the union and the employer to bargain collectively as the expiry of a collective agreement approaches…does not leave any room for the operation of common law principles…

In *Isidore*[15] the SCC majority wrote:

> …in the context of the collective scheme. The individual contract does not cease to exist, but is simply suspended. When a union's certification is revoked, the individual contract becomes effective again and once again becomes the only tool for managing the employment relationship. If it no longer existed, the employee would have to be rehired, which is not the case. When the collective scheme ends, this does not terminate the employment relationship. During the term of the collective agreement, however, the individual contract of employment cannot be relied on as a source of rights.[16]

Therefore, once a union obtains "bargaining rights"[17] (as the exclusive bargaining agent of a collective of employees) in relation to an employer, the relevant statutory labour relations scheme displaces the employees' individual contracts of employment—which

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[14] *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, [1989] S.C.J. No. 107 (QL) ["*Paccar*"]; emphasis added.

[15] *Isidore Garon ltée v. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc.*, 2006 SCC 2, [2006] S.C.J. No. 3 (QL) ["*Isidore*"].

[16] *Ibid* at para 27.

[17] " 'bargaining rights' means those rights held by a trade union with respect to a unit of employees of an employer, arising out of a certification granted by the Board, or arising as a result of the employer's having voluntarily entered into a collective agreement with the trade union, and any subsisting obligation to bargain with the trade union arising as a result of any notice to bargain given pursuant to this Act or the collective agreement, unless the employer has given notice of the em-ployer's intention to terminate recognition pursuant to section 43(1), and only insofar as the dispute arising out of any notice to bargain continues": *Labour Relations Code*, *supra* note 1, s 50.

are "suspended"—until such time as those bargaining rights are lost through revocation/decertification or otherwise. During that time there is no "room for the operation of common law principles", including the doctrines of fundamental/repudiatory breach or frustration.

There are no factual circumstances that could possibly amount to a "frustration" of a collective agreement, such that would result in the collective agreement terminating—collective agreements only terminate in accordance with the provisions of the applicable labour relations statute. Similarly, there is no possible conduct on the part of an employer or union (the parties to a collective agreement), or on the part of one or more employees (who are bound by and governed by a collective agreement) that could amount to a fundamental/repudiatory breach of a collective agreement that would give rise to an election to the "innocent party" to accept the repudiation and summarily terminate the collective agreement. These common law contractual employment law principles are inapplicable under labour law, where employees' individual contracts of employment are suspended.

However, some labour law adjudicators have erroneously applied the common law doctrine of frustration in the context of collective agreement grievance arbitrations. For example, in the *Dimitriu Grievance*,[18] Arbitrator Hunter wrote:

> What really happened here, as I see it, is that the contract of employment was frustrated by the intervention of a third party: namely U.S.C.B.P.. When U.S.C.B.P. determined (wrongly, as it turned out) that the Grievor could not cross the U.S. border they rendered it impossible for the Grievor to provide the County with the work he had contracted to perform. The County had no reasonable alternative but to terminate the Grievor's employment. As soon as the County learned that this obstacle to the Grievor's employment had been removed by the same agency (U.S.C.B.P.) that had imposed it, the County took steps to reinstate the Grievor's employment contract.[19]

Similarly, in *Emrick Plastics*,[20] Arbitrator Crljenica considered "whether Ms. Katkic's employment has been frustrated as a result of her hand/wrist injury"[21] and held "Ms. Katkic became entitle[d] to severance pay … when the employment relationship was frustrated."[22] In the very recent decision in *Pharma Plus*,[23] Arbitrator Marcotte equated

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[18] *Canadian Union of Public Employees, Local 2974.1 v. Essex (County)*, 192 L.A.C. (4th) 276, [2010] O.L.A.A. No. 85 (QL) ["Dimitriu Grievance"].
[19] *Ibid* at para 38.
[20] *Emrick Plastics, division of Windsor Mold Inc. v. CAW-Canada, Local 195*, 202 L.A.C. (4th) 150, [2010] O.L.A.A. No. 575 (QL) ["*Emrick Plastics*"].
[21] *Ibid* at para 5.
[22] *Ibid* at para 17.

the labour law doctrine of just cause termination for "innocent absenteeism" with the common law doctrine of frustration of contract: "an employer's right to dismiss an employee for innocent absenteeism, i.e., 'an application of the doctrine of frustration' (*Port Colborne*, para. 24) may be fettered by provisions of the collective agreement."[24] *Port Colborne*,[25] was a pre-*Paccar*[26] arbitral decision in which the parties had agreed (the proposition was not contested) that "discharge for innocent absenteeism is an application of a doctrine of frustration of contract."[27]

From the above discussion we know that this proposition is incorrect—*Port Colborne* and the decisions that follow it are wrong in law. An employee working under the terms of a collective agreement is not working pursuant to a "contract" that is subject to the doctrine of frustration. Any such contract is suspended while her trade union bargaining agent's bargaining rights are extant. The labour law doctrine of just cause termination for "innocent absenteeism" requires that four elements be met before the employer can prove non-culpable "just cause" to terminate the employee's employment *relationship* (dismiss her, not terminate her employment contract). In *AltaLink*,[28] although the employer argued the common law doctrine of frustration, Arbitrator Sims correctly wrote:

> …termination for non-culpable reasons such as excessive absenteeism is justified in certain circumstances…
>
> The Employer cites, as an appropriate and succinct summary of the legal test, the following extract:
>
> > …the proper analytical approach is for the arbitrator to determine whether the tests for a non-culpable dismissal for excessive innocent absenteeism have been met. These tests, which are well supported by the authorities, are: 1) was the absenteeism excessive; 2) was the employee warned that his or her absence was excessive and failure to improve could result in discharge; 3) was there a positive prognosis for regular future attendance at the time of dismissal; and 4) if the absenteeism was caused by an illness or disability, did the employer attempt to accommodate the employee to the point of undue hardship prior to dismissal…

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[23] *Pharma Plus Drugmarts Ltd. v. United Food & Commercial Workers Canada, Local 175*, [2013] O.L.A.A. No. 241 (QL) ["*Pharma Plus*"].
[24] *Ibid* at para 43.
[25] *Port Colborne & Dist. Ambulance Service (677700 Ontario Inc.) v O.P.S.E.U.*, 33 L.A.C. (3d) 30, [1988] O.L.A.A. No. 68 (QL) ["*Port Colborne*"]
[26] *Paccar, supra* note 14.
[27] *Port Colborne, supra* note 25 at para 24.
[28] *AltaLink Ltd. v. United Utility Workers' Assn*., [2012] A.G.A.A. No. 16 (QL) ["*AltaLink*"].

> …the Employer's termination for non-culpable absenteeism does not meet the test the parties agree applies… [29]

In the federal context, Arbitrator Slotnick wrote:

> I also disagree with the company's argument that the doctrine of frustration of contract applies here to exempt the company from what would otherwise be its obligation to retain Mr. Sears's employment status pursuant to Section 239.1. Even assuming the doctrine has some general application in labour relations it cannot apply to an employee under the *Canada Labour Code* whose absence from work is due to work-related injury or illness. This is because Section 168 of the *Canada Labour Code* -- which says Part III of the *Code*, including Section 239.1, applies notwithstanding any other law—overrides the common-law doctrine of frustration.[30]

In light of the SCC's dicta discussed above, one should not even assume that the common-law doctrine of frustration of contract has any "general application in labour relations" law, because the applicable statutory collective bargaining regimes from which collective agreements derive their legal status and enforceability *do* override the common-law doctrine of frustration of contract. And yet, a *similar* principle does apply to employment *relationships* under collective agreements. For example, where an employee bound by a collective agreement dies, neither she nor the employer has terminated their employment *relationship*, but it self-terminates by operation of law upon the employee's death—there is no employment contract to have been "frustrated" due to impossibility of performance (the collective agreement continues in full force and effect), yet the individual's employment *relationship* has come to an end (and the individual's "suspended" contract of employment concomitantly terminates). This is a fine distinction, but one with important implications to the outcomes of disputes.

Employment contracts and employment law are fundamentally different from collective agreements and labour law, and as we have seen from the above discussion, some principles imported from one area of the law into the other do not fit very well. And yet there is an undeniable overlap, and there are principles that have arisen in one legal context that have been imported into the corresponding area that are conducive to a better fit. Some of those principles are discussed in the next Part of this paper.

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[29] *Ibid* at paras 3-4, 186.
[30] *Kingsway Transport v. Teamsters Local Union 91*, [2012] C.L.A.D. No. 124 at para 37 (QL) ["*Kingsway Transport*"].

III. Use of Employment Law & Labour Law Principles in the Corresponding Area

Flowing from the marked differences between individual contracts of employment and employment relationships under collective agreements, discipline of employees under employment law versus labour law have different implications. At common law, an employer that unilaterally imposes an unpaid suspension (disciplinary or otherwise) on an employee has committed a fundamental/repudiatory breach of the employment contract—the employer has constructively dismissed the employee.[31] Non-union employers can avoid this result by reserving in the contract of employment the right to discipline employees for misconduct falling short of "just cause" for termination of the contract (a fundamental breach by the employee), including unpaid suspensions, without such discipline amounting to a constructive dismissal. Of course, the employee would have to agree to such a term upon entering into the employment contract.

Under labour law, the norm and expectation is that employers are entitled to discipline employees, including unpaid suspensions, without triggering an end to the employment relationship, following the principle of "progressive discipline."[32] The progressive discipline concept, developed in the labour law arbitral jurisprudence, has been considered in the employment law wrongful dismissal context. For example, in *Henson*[33] Justice Greckol wrote: the employer "did not use a progressive discipline approach to performance issues";[34] there was an "absence of a policy of progressive discipline";[35] the employer's "approach to his performance and conduct deficiencies was not one of corrective progressive discipline";[36] "The theoretical basis for the progressive discipline approach has been amply developed in the arbitral jurisprudence";[37] "The necessity for warnings and progressive discipline, in order to establish cumulative

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[31] "[A]n employee on whom an administrative suspension without pay -- to which the employee has not consented -- is imposed might, as a rule, properly regard that measure as a constructive dismissal": *Cabiakman v. Industrial Alliance Life Insurance Co*., 2004 SCC 55, [2004] S.C.J. No. 14 at para 72 (QL) ["*Cabiakman*"].

[32] "[P]rogressive discipline…is widely accepted by arbitrators and considered when discipline is imposed": *Calgary Co-Operative Assn. v. Union of Calgary Co-Op Employees*, 220 L.A.C. (4th) 329, [2012] A.G.A.A. No. 27 at para 86 (QL).

[33] *Henson v. Champion Feed Services Ltd*., 2005 ABQB 215, [2005] A.J. No. 323 (QL) ["*Henson*"].

[34] *Ibid* at para 11.

[35] *Ibid* at para 23.

[36] *Ibid* at para 28.

[37] *Ibid* at para 53.

misconduct, is linked to the fact that each employer has a unique set of expectations and standards";[38] "it is fatal to [the employer's "just cause"] case that it did not invoke a system of progressive discipline to deal with any concerns it had."[39]

In the employment law sphere the leading decision on "just cause" for an employer to summarily terminate an employment contract is *McKinley*,[40] where the unanimous SCC wrote:

> When examining whether an employee's misconduct - including dishonest misconduct - justifies his or her dismissal, courts have often considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.[41]
>
> … whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.[42]
>
> In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.[43]

The *McKinley* "contextual approach" has recently been applied in the labour law sphere,[44] although the longstanding approach to "just cause" for dismissal of an employee under a collective agreement has been the *Wm. Scott*[45] analysis:

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[38] *Ibid* at para 56.
[39] *Ibid* at para 61.
[40] *McKinley v. BC Tel*, 2001 SCC 38, [2001] S.C.J. No. 40 (QL) ["*McKinley*"].
[41] *Ibid* at para 29.
[42] *Ibid* at para 48.
[43] *Ibid* at para 49.
[44] "…theft is and of itself not necessarily sufficient to justify termination. It is necessary to consider the context: *McKinley*": *Finning International Inc. v. International Assn. of Machinists and Aerospace Workers, Local Lodge 99*, [2013] A.G.A.A. No. 22 at para 39 (QL).
[45] *Re Wm. Scott & Co.*, [1977] 1 Can. LRBR 1, [1976] B.C.L.R.B.D. No. 98 (QL) ["*Wm. Scott*"], citing *Re United Steel Workers of America, Local 3257 and the Steel Equipment Co. Ltd.*, 14 L.A.C. 356, [1964] O.L.A.A. No. 5 (QL) ["*Steel Equipment*"]. *Wm. Scott* has been favorably referred to by the Alberta Court of Appeal: *Calgary (City) v. International Assn. of Fire Fighters, Local 255*, 2003 ABCA 136, [2003] A.J. No. 496 at para 41 (QL), leave to appeal to SCC refused, [2003] S.C.C.A. No. 304 (QL).

> In evaluating the immediate discharge of an individual employee, the arbitrator would take account of "the employee's length of service and any other factors respecting his employment record with the Company in deciding whether to sustain or interfere with the Company's action' (at p.117). The following is an oft-quoted, but still not exhaustive, canvass of the factors which may legitimately be considered:
>
> 1. The previous good record of the grievor.
> 2. The long service of the grievor.
> 3. Whether or not the offence was an isolated incident in the employment history of the grievor.
> 4. Provocation.
> 5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
> 6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
> 7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
> 8. Circumstances negativing intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
> 9. The seriousness of the offence in terms of company policy and company obligations.
> 10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.

It can be seen that the labour law *Wm. Scott* factors represent an application of a "contextual approach" that is not in conflict with the employment law *McKinley* approach to "just cause."

The unilateral imposition of a policy or "work rule" by an employer (extraneous to the collective agreement) is dealt with under labour law through the foundational arbitral decision in *KVP*.[46]

> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.
> 4. It must be brought to the attention of the employee affected before the company can act on it.
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.

[46] *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537,* 16 L.A.C. 73, [1965] O.L.A.A. No. 2 (QL) ["*KVP*"].

Effect of Such Rule re Discharge

1. If the breach of the rule is the foundation for the discharge of an employee such rule is not binding upon the board of arbitration dealing with the grievance, except to the extent that the action of the company in discharging the grievor, finds acceptance in the view of the arbitration board as to what is reasonable or just cause.
2. In other words, the rule itself cannot determine the issue facing an arbitration board dealing with the question as to whether or not the discharge was for just cause because the very issue before such a board may require it to pass upon the reasonableness of the rule or upon other factors which may affect the validity of the rule itself.
3. The rights of the employees under the collective agreement cannot be impaired or diminished by such a rule but only by agreement of the parties.[47]

In relation to the *KVP* analysis, the SCC majority in *Irving Pulp*[48] wrote:

> The scope of management's unilateral rule-making authority under a collective agreement is persuasively set out in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson). The heart of the "*KVP* test", which is generally applied by arbitrators, is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable (Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), vol. 1, at topic 4:1520).
>
> The *KVP* test has also been applied by the courts. Tarnopolsky J.A. launched the judicial endorsement of *KVP* in *Metropolitan Toronto (Municipality) v. C.U.P.E.* (1990), 74 O.R. (2d) 239 (C.A.), leave to appeal refused, [1990] 2 S.C.R. ix, concluding that the "weight of authority and common sense" supported the principle that "*all* company rules with disciplinary consequences must be reasonable" (pp. 257-58 (emphasis in original)). In other words:
>
> > The Employer cannot, by exercising its management functions, issue unreasonable rules and then discipline employees for failure to follow them. Such discipline would simply be without reasonable cause. To permit such action would be to invite subversion of the reasonable cause clause.[49]

In the employment law sphere the analysis is similar, but different due to the contractual nature of the employment:

> If the terms of the policy are to be binding on Mr. Nardulli, the court must conclude that the policy has contractual force. In order to have contractual force, there must be a concluded agreement, consideration, and contractual intention. See McLachlin J. (as she then was) in *Rahemtulla v. Vanfed Credit Union* (1984), 51 B.C.L.R. 200 at 207-208 (S.C.). In addition, where an employer alleges that an employee's breach of company policy constitutes just cause, the court must be satisfied that:
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> 1. the policy has been distributed to employees;
> 2. it is known to the employee affected;
> 3. it is unambiguous;
> 4. it is consistently enforced by the employer;
> 5. employees are warned that they will be dismissed should they breach the rule or policy;

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[47] *Ibid* at para 34.
[48] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] S.C.J. No. 34 (QL) [“*Irving Pulp*”].
[49] *Ibid* at paras 24-25.

6. it is reasonable; and
7. a breach of the policy is sufficiently serious to justify dismissal.[50]

Thus, while the factors considered are similar, under labour law, a unilaterally imposed policy or work rule is not part of the collective agreement—the union did not agree to it. But under employment law, a unilaterally imposed policy or work rule will not be binding on the employee unless the employer has reserved the right to implement such policies "from time to time" in the employment contract, and the employee agreed to the term at the time of the contract's formation. Of course, if the employee and employer agreed to specific discipline terms in their employment contract at its formation, such terms have not been "unilaterally imposed" by the employer.

As discussed above, some legal principles jibe across employment law and labour law, while others conflict. This is due to the disparate nature of employment contracts versus collective agreements. These differences also drive dispute resolution forums and their respective remedial powers, a topic that is discussed in the next Part of this paper.

IV. Venues & Remedies in Employment Law & Labour Law

Under labour law, labour arbitrators generally have jurisdiction if "the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement."[51] Further, "the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction";[52] "human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract";[53] "If an arbitrator is to enforce an employer's obligation to exercise its management rights in accordance with the statutory provisions that are implicit in each collective agreement, the arbitrator must have the power to interpret and apply human rights and other

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[50] *Nardulli v. C-W Agencies Inc*., 2012 BCSC 1686, [2012] B.C.J. No. 2363 at para 311 (QL), citing *Roney v. Knowlton Realty Ltd*., 11 C.C.E.L. (2d) 205, [1995] B.C.J. No. 1251 at para 8 (QL) (SC). See also *Poirier v. Wal-Mart Canada Corp*., 2006 BCSC 1138, [2006] B.C.J. No. 1725 at para 61 (QL); *Hawkes v. Levelton Holdings Ltd*., 2012 BCSC 1219, [2012] B.C.J. No. 1708 at para 71 (QL).
[51] *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59 at para 52 (QL) ["*Weber*"].
[52] *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, 2003 SCC 42, [2003] S.C.J. No. 42 at para 28 (QL) ["*Parry Sound*"].
[53] *Ibid* at para 28.

employment-related statutes."[54] Thus, normally all aspects of a workplace dispute may be adjudicated before a labour arbitrator appointed pursuant to a collective agreement and the governing labour relations legislation; including conventional discipline/dismissal disputes, but also statutory disputes such as human rights discrimination claims,[55] occupational health and safety legislation breach allegations,[56] minimum employment standards legislation breach allegations,[57] and even tortious claims.[58] The practical result of this means that, in the labour law context, one forum can normally be resorted to for the adjudication of all issues arising out of a dispute.

The same is not true in the employment law context. While the civil courts have jurisdiction over breach of contract and tortious claims; as between the courts and labour arbitrators,[59] human rights tribunals,[60] and other statutory tribunals, jurisdiction is generally exclusive. The practical result of this means that, in the employment law context, one forum often cannot be resorted to for the adjudication of all issues arising out of a dispute; where, for example, the factual context combines causes of action in contract (wrongful termination) and/or tort (defamation, battery, assault, etc.) with statutory breaches (human rights discrimination, occupational health and safety, etc). The civil courts enjoy exclusive jurisdiction over the contract and tort claims, while the relevant administrative tribunal enjoys exclusive jurisdiction over the dispute arising out of its enabling legislation.

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[54] *Ibid* at para 49.
[55] *Ibid*. Labour arbitrators and the Alberta Human Rights Commission/Tribunal have "concurrent" jurisdiction over disputes alleging discrimination prohibited under the *Alberta Human Rights Act*, RSA 2000, c A-25.5: *Amalgamated Transit Union, Local 583 v. Calgary (City)*, 2007 ABCA 121, [2007] A.J. No. 374 (QL).
[56] "The Arbitrator found that, by not acting sooner, Safeway had failed to ensure DM's health and safety as required under s. 2(1) of *the Occupational Health and Safety Act*, RSA 2000, c O-2 (the "OHSA"). It is undisputed that the OHSA is incorporated into the collective agreement (the "Collective Agreement") between Safeway and the United Food & Commercial Workers Union, Local 401 (the "Union")": *United Food & Commercial Workers' Union, Local 401 v. Canada Safeway Ltd.*, 2013 ABQB 687, [2013] A.J. No. 1307 at para 3 (QL).
[57] See eg *First Truck Centre Edmonton Inc. v. Christian Labour Association of Canada, Local 56*, 217 L.A.C. (4th) 363, [2012] A.G.A.A. No. 13 (QL).
[58] See eg *Ferreira v. Richmond (City)*, 2007 BCCA 131, [2007] B.C.J. No. 373 (QL); *Haight-Smith v. Neden*, 2002 BCCA 132, [2002] B.C.J. No. 375 (QL).
[59] See eg *AUPE v Alberta*, 2014 ABCA 43.
[60] *Hamilton v. Rocky View School Division No. 41*, 2009 ABQB 225, [2009] A.J. No. 449 at paras 18-24 (QL), affirmed, 2010 ABCA 217, [2010] A.J. No. 748 (QL), leave to appeal to SCC refused, [2011] S.C.C.A. No. 104 (QL).

However, it is possible for parties to an employment contract to incorporate a dispute resolution process into their contract as an alternative to the civil courts—one that would have jurisdiction over all aspects of a dispute; for example, arbitration pursuant to the *Arbitration Act*, RSA 2000, c. A-43 expressly granting the arbitrator the same powers as a labour arbitrator appointed pursuant to the *Labour Relations Code*.[61] Such provisions are a double-edged sword, however, in that on the one hand it may avoid multiplicity of proceedings if a dispute does arise, but on the other hand arbitration can be more expensive than civil litigation,[62] which may make enforcement of the contract prohibitively expensive for the employee.

Another difference between litigation in the civil courts and adjudication before many administrative tribunals—including labour arbitrators—are the remedies that they are respectively empowered to award. Courts are generally restricted to the awarding of monetary damages for breach of (employment) contract and tortious conduct. However, administrative tribunals are often empowered with a plethora of remedial alternatives more suited to make a person more whole than money alone can do. For example, a grievance arbitrator appointed pursuant to the *Labour Relations Code*[63] enjoys the following powers:

> 136 If a collective agreement does not contain the provisions required under section 135, the collective agreement is deemed to contain those of the following provisions in respect of which it is silent:
>
> > (j) If the arbitrator by the arbitrator's award determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator may substitute any penalty for the discharge or discipline that to the arbitrator seems just and reasonable in all the circumstances.
>
> 143 (1) The arbitrator or the chair of the arbitration board or other body may
>
> > (a) at any reasonable time enter any premises, other than a private dwelling, where work is being done or has been done by employees or in which an employer carries on business or where anything is taking place or has taken place concerning any difference submitted to the arbitrator or the chair of the arbitration board or other body and inspect and view any work, material, machinery, appliance or article in the premises and question any person under oath in the presence of the parties or their

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[61] *Labour Relations Code*, *supra* note 1.
[62] While the state pays the salary of judges and statutorily appointed adjudicators, the parties pay for privately appointed arbitrator themselves, and arbitration clauses often contain "loser pays" 100% of the costs of the arbitral proceedings (including the winner's legal fees) provisions, which is even worse for the employee.
[63] *Labour Relations Code*, *supra* note 1.

representatives concerning any matter connected with the difference;

(b) authorize any person to do any things that the arbitrator or chair of the arbitration board or other body may do under clause (a) and to report to the arbitrator or arbitration board on them;

(c) correct in any award any clerical mistake, error or omission.

(2) An arbitrator, arbitration board or other body

(a) may accept any oral or written evidence that it considers proper, whether admissible in a court of law or not,

(b) is not bound by the law of evidence applicable to judicial proceedings, and

(c) may summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce the documents and things that the arbitrator, arbitration board or other body considers requisite to the full investigation and consideration of matters within the arbitrator's or its jurisdiction in the same manner as a court of record in civil cases.

A Human Rights Tribunal appointed pursuant to the *Alberta Human Rights Act*[64] enjoys the following powers:

32(1) A human rights tribunal

(a) shall, if it finds that a complaint is without merit, order that the complaint be dismissed, and

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(i) to cease the contravention complained of;

(ii) to refrain in the future from committing the same or any similar contravention;

(iii) to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;

(iv) to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the tribunal considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.

(2) A human rights tribunal may make any order as to costs that it considers appropriate.

[64] *Alberta Human Rights Act*, *supra* note 55.

Parties who are negotiating an employment contract would be wise to put their minds to the different dispute resolution venues available, their different remedial powers, and their respective pros and cons. It may be that express incorporation of a dispute resolution process alternative to the (default) civil courts (i.e. arbitration akin to the process available under labour law) would better serve the parties' interests and objective. Then again, especially from the employee's point of view, the civil courts and separate administrative tribunals may be a better choice; notwithstanding the potential for multiplicity of proceedings should a dispute arise.

V. Conclusion

The law applicable to individual contracts of service (employment law) is fundamentally different from the law applicable to collective agreements (labour law). This is largely due to differences in kind between the nature of employment contracts, and the nature of collective agreements; the former falling within a subset of the general common law of contract, the latter being a *sui generis* form of statutory agreement. Part II of this paper discussed these differences.

Certain legal principles that have developed under employment law or labour law have been applied—correctly and incorrectly—in the corresponding area of law. Principles from one of these areas of the law may be applied in a principled manner that is, or can be made to be, legally coherent in the corresponding area. However, some principles from one of these areas of the law applied in the corresponding area result in absurdities when examined in light of the fundamental differences between employment contracts and collective agreements. Part III of this paper discussed some of these legal principles, and how they may be correctly (and incorrectly) applied in the corresponding area of law.

The process of adjudicating disputes arising out of collective agreements (generally, grievance [rights] arbitration) is also fundamentally different than the process available to adjudicate disputes over breach of (employment) contract claims (generally, the civil courts). The remedies available through those venues are different as well. Part IV of this paper discussed some of these procedural differences, and how parties to

employment contracts may stipulate in their contract the form of dispute resolution familiar in labour law—arbitration—thus avoiding the civil courts.

Parties who are negotiating an employment contract would be wise to put their minds to the different dispute resolution venues available, their different remedial powers, and their respective pros and cons. It may be that express incorporation of a dispute resolution process alternative to the (default) civil courts (i.e. arbitration akin to the process available under labour law) would better serve the parties' interests and objective. Then again, especially from the employee's point of view, the civil courts and separate administrative tribunals may be a better choice; notwithstanding the potential for multiplicity of proceedings should a dispute arise.

There is an undeniable overlap between the principles of employment law and labour law, and there are principles that have arisen in one legal context that have been imported into the corresponding area that are conducive to a better fit than others. Legal counsel practicing in employment law can glean valuable insights into their practices through labour law; and visa-versa.