

The Role of the Duty of Fair Representation in Union Grievance Decisions

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Résumé de l'article

Le devoir de juste représentation des syndicats a évolué de façon à protéger les droits contractuels des salariés pris individuellement contre les atteintes à ceux-ci de la part des dirigeants syndicaux. Cet article rend compte des résultats d'une enquête auprès des dirigeants syndicaux au sujet de l'effet du devoir de juste représentation en matière de procédure de règlement de griefs. L'enquête a confirmé les résultats des recherches antérieures qui démontrent que les plaintes concernant la juste représentation reflètent l'existence de factions au sein des syndicats ou sont des mesures d'ordre économique qui touchent défavorablement les individus plutôt qu'un signe de représentation inadéquate de la part des dirigeants syndicaux. On a également découvert que le recours à cette doctrine de la part des plaignants a, à certaines occasions, incite les syndicats à présenter des griefs sans valeur, ce qui a eu pour conséquence l'augmentation du coût d'administration des conventions collectives.

Dans les négociations collectives, mais surtout lors de l'étude des griefs, les comportements ou les décisions du syndicat qui sont préjudiciables aux droits d'un individu ou effectuées de façon « arbitraire », « discriminatoire » ou de « mauvaise foi » violent le devoir de juste représentation. Antérieurement, la recherche sur l'obligation de représentation équitable insistait sur la jurisprudence mise au point dans des décisions touchant des plaintes spécifiques. La plupart des chercheurs en ont conclu (comme le prévoient la loi au Québec et la politique administrative en Colombie-Britannique) que l'on doit accorder davantage de protection aux personnes en généralisant la doctrine de façon qu'elle englobe la négligence « grossière » ou « sérieuse » de la part des représentants syndicaux. Il y avait aussi unanimité dans les milieux de l'enseignement pour que, pour des motifs d'ordre pratique, les commissions de relations du travail, au lieu des tribunaux, soient appelées à disposer des plaintes relatives au droit de représentation équitable et pour que la vérification de la juste représentation ne soit pas à ce point stricte qu'il faille s'attendre à ce que les représentants syndicaux se comportent comme des avocats.

Une étude expérimentale récente a exprimé l'avis que les individus et les factions syndicales cherchent parfois à utiliser la doctrine ou la théorie de la représentation équitable comme un instrument de pouvoir. Cette analyse de l'activité actuelle en ce qui a trait au nombre de plaintes enregistrées, tend à démontrer que celles-ci ne peuvent être que la partie vérifiable du recours « tactique » à la doctrine du devoir de représentation équitable et que cela peut de plus nuire au fonctionnement du mécanisme de règlement des griefs lui-même. Les dommages au régime de règlement des griefs peuvent résulter de la menace de porter des plaintes de représentation équitable et les plaintes effectives sont de nature à exercer une pression sur le processus de règlement des griefs ou à devenir un instrument de pouvoir lorsqu'elles proviennent de factions syndicales. Les conséquences négatives pour le mécanisme de règlement des griefs se rapportent aux coûts supplémentaires, aux délais et au formalisme, ce qui est de nature à miner les qualités traditionnelles du régime compare au règlement judiciaire des différends en matière de conventions collectives. D'un autre côté, les exigences de la théorie du devoir de représentation équitable peuvent avoir pour résultat, non seulement la protection des droits individuels, mais aussi une représentation syndicale généralement mieux formée et, possiblement, des relations entre employeurs et syndicats plus franches à tel point que les parties reconnaissent le partage de leurs responsabilités devant la loi.

À ce sujet, un instrument d'enquête a été mis au point et remis à un échantillon des dirigeants de neuf syndicats tant du secteur privé que public, représentatif de l'ensemble des syndicats en Colombie-Britannique. On a retourné 88 questionnaires utilisables. Regroupant au total 28 sujets ou questions, l'instrument d'enquête était constitué de questions graduées ainsi que de descriptions de caractère narratif relatif aux impacts positifs et négatifs du devoir de juste représentation sur le fonctionnement du mécanisme de règlement des griefs, soit les facteurs d'environnement et d'organisation qui peuvent être responsables des changements susceptibles de se produire dans le nombre de plaintes de même que des données de base relatives aux répondants et à leur syndicat respectif. Le questionnaire fut distribué par les syndicats participants et retourne par la poste.

Les résultats de cette investigation ont confirmé que les tentatives de recourir à la doctrine à l'obligation de représentation équitable exercent une influence sur le processus de règlement des griefs. Bien qu'elles ne soient pas générales ni même très fréquentes, les décisions des syndicats de retirer des griefs donnent lieu à des menaces de porter des plaintes de représentation équitable. Parfois, les syndicats y répondent en soumettant les griefs à l'arbitrage, même si l'on reconnaît que ceux-ci sont sans valeur. De plus, lorsqu'on s'enquiert des facteurs qui sont responsables d'une augmentation du nombre des menaces, on en attribue la cause aux mises à pied et aux politiques syndicales.

Ce qui ressort de cette enquête, c'est que aller à l'arbitrage uniquement pour éviter le recours à la Commission des relations du travail n'est pas d'une pratique fréquente, surtout depuis que cette dernière a cessé de fixer des auditions véritables automatiquement pour toute plainte de représentation équitable. Cependant, de fortes pressions de nature politique s'exercent de plus en plus à l'intérieur des syndicats d'où des arbitrages probables lorsqu'on redoute d'avoir à s'engager dans un processus judiciaire.

Plusieurs syndicats ont amélioré les méthodes de tamisage des griefs afin d'éviter le recours aux plaintes se rapportant à l'obligation de représentation équitable. Quelques-uns d'entre eux, qui faisaient partie de l'échantillon, se sont efforcés de donner une formation plus poussée aux représentants syndicaux et ils ont aussi procédé à certains changements dans leur façon de procéder. Toutefois, les répondants n'étaient pas d'accord pour considérer que la doctrine de la juste représentation a eu pour résultat d'assurer une meilleure protection aux travailleurs. De plus, la doctrine n'apparaît pas non plus favoriser davantage la franchise entre contremaîtres et représentants syndicaux dans la discussion des griefs.

L'auteur conclut que les syndicats, les employeurs et l'État peuvent aider à diminuer les effets secondaires négatifs de la théorie de la représentation équitable. Les enquêteurs de la Commission des relations du travail doivent être formés de telle façon qu'ils puissent avertir les plaignants, au début de l'enquête, que leur réclamation peut bien n'être pas légitime et que celle-ci peut être rejetée si elle est sans valeur. Les représentants des employeurs peuvent éviter de favoriser les plaintes frivoles et s'efforcer d'aider à les éviter, qu'elles soient réelles ou imaginaires. En s'efforçant d'accroître leur compétence dans la façon de disposer des griefs et aussi en établissant peut-être certaines procédures d'appel, les syndicats peuvent restreindre les occasions de recourir à cette doctrine ou à cette théorie en évitant qu'il y ait des réclamations bien fondées de la part des travailleurs.

The Role of the Duty of Fair Representation in Union Grievance Decisions

Thomas R. Knight

This article reports the results of a survey of union staff representatives regarding the impact of the duty of fair representation on grievance handling. The survey confirmed previous research results suggesting that fair representation complaints are frequently reflective of political factionalism within unions or a measure of economic decisions adversely affecting individuals rather than a sign of inadequate representation by unions. It was also found that grievors' exploitation of the doctrine does at times cause unions to process unmeritorious grievances, increasing the cost of contract administration to all parties.

The union's duty of fair representation evolved to protect the contractual rights of individual workers against infringement by union officers. In contract negotiations, but especially in grievance handling, union actions or decisions that adversely affect an individual's rights and were made in a manner that is «arbitrary, discriminatory, or in bad faith» would violate the duty of fair representation¹. Previous research on the duty of fair representation in Canada (Adell, 1970; Brown, 1983; Brown, 1984; MacIntyre,

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¹ The duty of fair representation is a common law doctrine in the U.S., though the National Labor Relations Board has also recognized its jurisdiction in the area. Five of eleven Canadian jurisdictions have statutory fair representation provisions and the other six rely upon the common law. See, for example, Section 7 of the *Labour Code of British Columbia*. Also see *Steele v. Louisville and Nashville R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 375 U.S. 335 (1964); and *Rayonier Canada*, BCLRB No. 40/75, June 16, 1975.

1974; McPhillips, 1981; Surmon, 1984; Zalos, 1978; Zwarts, 1982) has focused on the jurisprudence developed in the adjudication of specific complaints, with particular emphasis on the British Columbia, Ontario, Québec, and Federal jurisdictions. Most of these researchers have concluded (as Québec law and B.C. administrative policy now provide) that individuals should be granted further protection by broadening the doctrine to cover «gross» or «serious» negligence on the part of union representatives (Adell, 1970; Brown, 1983; McPhillips, 1981; Zalos, 1978; Zwarts, 1982).

Zalos (1978) has concluded, on the other hand, that the «arbitrary» standard is already broader in Canada than in the U.S. in that Canadian adjudicators have not required that personal animosity toward a grievor on the part of union officers be shown in order to find union conduct «arbitrary». There is also scholarly consensus, however, that for practical reasons the labour relations boards, as apposed to the courts, ought to handle individuals' complaints against their unions² and that the test of fair representation ought not to become so stringent as to expect lay union representatives to perform like lawyers.

In an ideal world, availability of the recourse provided to individuals by the duty of fair representation would provide a sufficient deterrent to union abuses and, collaterally, individuals would know when their rights have actually been violated and would seek legal redress only when this is the case. Recently, however, concern has been expressed that confusion over the fair representation doctrine's requirements and its possible abuse may be producing harmful side-effects in the grievance process. In the U.S., much of the scholarly analysis presented at a symposium on the duty of fair representation focused on concern that the «fog» surrounding court decisions about union obligations under the fair representation doctrine is a major cause of costly overuse of grievance arbitration (McKelvey, 1985). Canadian scholars have expressed similar concerns. Surmon (1984, p. 522) argues that:

If the fair representation duty were broadly construed, the individual could manipulate the union to use the grievance procedure to obtain benefits which the employer had already refused to give. The relationship between the employer and union as exclusive bargaining agent would be undermined, and consequently, the entire collective bargaining process would be jeopardized. Put plainly, the duty of fair representation should not be interpreted to be a circuitous way of obtaining arbitration of a grievance that is without merit.

² McPhillips (1981) and Weiler (1980) posed an exception to this view, arguing that a labour ombudsman, instead of the courts or the labour relations boards, ought to investigate and decide fair representation complaints. Part 8 of the *Labour Code of British Columbia*, which would have created such an office, was never proclaimed by the B.C. government.

Moreover, a recent Canadian empirical study supported the view that individuals and union factions sometimes seek to exploit the fair representation doctrine as a source of power (Knight, 1987). That analysis of actual complaint filing activity also suggested that such complaints may be only the observable portion of «tactical» use of the fair representation doctrine and that further damage may be occurring within the grievance process itself. This article reports the results of a study designed to examine the effects of the duty of fair representation on grievance handling and union grievance decisions.

THE DUTY OF FAIR REPRESENTATION AND THE GRIEVANCE PROCESS

On the basis of previous research, a number of propositions regarding the potential impact of the duty of fair representation on the grievance process can be stated. Damage to the grievance process could result from threats to file fair representation complaints and actual complaints lodged by individuals to gain leverage in the grievance process or, when initiated by union factions, as a source of political power (Knight, 1987). The potential negative consequences of exploitation of the duty of fair representation include the addition of delay, cost, and formality in the grievance process — undercutting the traditional virtues of grievance procedures as the preferred method of contract enforcement in the North American industrial setting (Craig, 1986, p. 244).

To the extent that union representatives accede to threats or tactical complaints, frivolous grievances will be pursued unnecessarily, expending scarce union resources and possibly damaging relations between union and management representatives. Ultimately, union officers may seek to head-off threats or costly legal proceedings by submitting to arbitration grievances that otherwise they would withdraw. This syndrome would be reinforced by uncertainty as to what the fair representation doctrine requires of unions and, perhaps more importantly, the political sensitivity of individual rights and the fact that the mere allegation of unfair representation may damage the image of elected union officers.

On the other hand, legal constraints can be beneficial both to the integrity of the grievance process and to union-management relations in contract administration (Knight, 1985a). As noted previously, the law could be passively influential by providing a deterrent to union violations of individual rights. Further, the law could provide a positive incentive to both union and management to ensure the integrity of contractual procedures. Union officers could respond to the doctrine by actively improving grievance investigation and screening procedures or even by creating special

internal appeal procedures through which individuals may challenge elected officers' decisions to withdraw grievances. Legal requirements such as the duty of fair representation may even result in more open relations between union and management officers — freer exchange of information, for example — to the extent that both parties recognize their shared liability to tactical use of the law.

The manner in which legal obligations such as the duty of fair representation influence conduct in the grievance process may depend significantly upon how the law is enforced. For example, fair representation complaints can be initiated, depending upon the jurisdiction, either through formal court pleadings or more informal investigations of administrative tribunals. In the latter case, the role played by the investigating officer may be an instructive one to the extent that an officer is able to resolve unmeritorious complaints, in turn limiting or reducing the incentive to individuals or union factions to press such grievances beyond a union investigation and decision to withdraw. It may also be that the informal exchange involved in an administrative investigation contributes to a more accurate understanding of all parties' rights and obligations under the fair representation doctrine, remembering, of course, that individual rights also present an administrative agency and its officers with politically sensitive matters. Each of these issues will be examined in the analysis of survey results which follows.

RESEARCH DESIGN

Survey methodology presented a direct approach to the research problem, though conducting a survey among union representatives on their duty of fair representation posed distinct challenges³. Nonetheless, a survey instrument was designed to examine the possible negative and positive influences of the fair representation doctrine on the grievance process as well

3 An ideal approach to empirical analysis of the relationship between the fair representation doctrine and grievance activity would be to collect data on fair representation complaints, grievances, arbitrations, and the outcomes of each and test the degree of correlation among these variables across unions. Though data on fair representation complaints were collected and analyzed previously (Knight, 1987), an effort to collect grievance and arbitration data from relevant unions failed. Though fragmentary data were assembled, grievance records were found not to be maintained consistently and often at the local union level only. This situation presented the researcher with the overwhelming task of collecting grievance data on *individual* grievances at each local union. This effort could not be mounted, and since analysis of the observable link between complaint filing activity and grievance behaviour would fail to capture «tactical» use of the doctrine within the grievance process and not related to specific formal complaints filed with the Labour Relations Board, a survey methodology was developed.

as the impact of the Labour Relations Board's handling of fair representation complaints. Union staff representatives (as opposed to stewards, for example) were targeted as the relevant population since their exposure to the grievance process encompasses all steps of the procedure and, in most cases, spans several local unions.

Given the sensitive nature of the research problem and the specific questions to be raised in the survey, an effort was made early to enlist the support and participation of the B.C. Federation of Labour. Meetings were held first with the Research and Education Committee and then with the full Executive Council of the Federation. These meetings amounted to pretests of the instrument in that most of the Federation officers involved are or formerly were staff representatives with a wide range of unions in B.C. These meetings generated some debate on the purpose and possible repercussions of the survey as well as detailed assessment of the specific questions asked. The one major substantive change made as a result of these meetings was the deletion of survey items addressing the gender of grievors and respondents as these were viewed as sexist by some members of the Executive Council.

Following final revision of the instrument, the Executive Council endorsed the survey and approved the inclusion of a cover letter encouraging participation in the survey signed by the Federation's Secretary-Treasurer. Agreement was also reached on how participant unions were to be approached and how distribution of the survey to staff representatives would be handled.

The Survey Instrument

The instrument had a total of 28 items, several of these calling for multiple responses. All of the scale items used a five-point response format with two types of verbal anchors, as well be detailed. Two items addressed the frequency of grievors' threats to file fair representation complaints if the union decides to withdraw a grievance, and the frequency with which the union responds to such pressure by submitting these grievances to arbitration regardless of the merits of the case. These items employed verbal anchors ranging from «never» to «always». Another item asked respondents whether such threats have decreased, increased, or remained the same in frequency over the past three years, years during which the British Columbia economy has remained in a deep recession. Respondents were also asked to indicate whether threats to file fair representation complaints are lodged at the first, middle, and/or top steps of the grievance procedure. Respondents were then asked to rate seven substantive grievance

issues as being from «very likely» to «very unlikely» to provoke a grievor's threat to file a fair representation complaint during the grievance process.

Four open-ended items were also included regarding the causes and consequences of threats or actual fair representation complaints. One asked respondents to identify factors that might be responsible for any increase or decrease in the number of threats to file fair representation complaints. Another asked what characteristics might result in one local generating a larger number of threats or actual complaints than other locals serviced by the respondent. Respondents were asked to describe any changes in the union's internal procedures or grievance handling that have resulted from fair representation complaints or threats and, finally, were provided an opportunity to make any additional comments on the fair representation issue they wished to. These items were included as an open-ended supplement to the scaled items and will be used as such in presenting the survey results.

Thirteen Likert items utilized response options ranging from «strongly disagree» to «strongly agree». These items addressed the three aspects of the influence of the fair representation doctrine on the grievance process discussed above, namely, the potential negative and positive effects of the doctrine on the grievance process and experience with Labour Relations Board officers and procedures in the handling of actual complaints.

With renewed assurances of anonymity (the first was on the cover page), respondents were asked to answer five items about themselves. These included the identity of their union; the number of locals serviced as a staff representative; whether they were elected or appointed to their present position; the number of years they have held their present position; and their total years of experience as a union representative. These were included to allow examination of response variance across sample unions and individual respondent characteristics.

Procedure

Consultations with officers of the B.C. Federation of Labour resulted in a list of nine industrial unions⁴ in B.C. that would represent well the population of unions in the Province with respect to size, private and public sectors, and membership distributions by gender. The latter characteristic was judged important as previous research results had established gender-

4 Craft unions were excluded from the sample as the grievance procedure is generally quite limited in scope and use in the craft setting, as compared with use of the process within industrial union jurisdictions. All of the sample unions are affiliated with the B.C. Federation of Labour.

based differences in fair representation complaint activity (Knight, 1987). For each union, a contact person — president, regional director, or business agent — was consulted as to the union's participation in the survey and number of staff representatives. The contact officers were then responsible for distributing the surveys, a procedural compromise necessary to receive the endorsement of the B.C. Federation of Labour.

Three weeks after the survey packages were sent, a letter stating the number of questionnaires sent and received to date (and further encouraging participation in the survey) was sent to each contact officer. This resulted in a second, albeit smaller, wave of survey returns. Once it was determined that no further survey returns were forthcoming, feedback on all survey items was provided to those respondents who requested a copy of survey results on a cover sheet that was separated from the questionnaires as they were received.

Sample

Table 1 reports that of a total of 145 questionnaires distributed, 88 were returned for an overall return rate of 61%. Only one large union returned less than 50% of the questionnaires distributed. Hence, the sample of unions is representative of the population of unions in the Provincial jurisdiction in terms of sector, size, and gender distribution of membership. It is also noteworthy that one each of the public and private sector unions included in the sample has a formal internal appeal procedure that workers may use to challenge union officers' grievance decisions with which they disagree.

Table 1
Union Sample and Survey Return

Union	Sector	Size ^a	Surveys Distributed	Surveys Returned	* Returned
1	Private	33,719	60	22	37%
2	Private	8,920	10	5	50%
3	Public	18,624	10	10	100%
4	Public	5,220	5	5	100%
5	Public	28,112	20	13	65%
6	Both	7,935	9	5	56%
7	Public	41,081	9	9	100%
8	Private	23,579	10	5	50%
9	Private	14,521	12	12	100%
(Union not Identified)				2	
Total:			145	88	61%

^aSource: *British Columbia Labour Directory, 1985*, Victoria, B.C., Ministry of Labour, 1986.

RESULTS

Survey results reported in Table 2 reveal that grievors' threats to file fair representation complaints occur with moderate frequency, though they have been increasing over the past three years in the view of a majority of respondents. Nonetheless, many respondents described narratively tactical uses of fair representation threats or charges. Commented one:

There seems to be a feeling of possibly getting something for nuisance value or perhaps getting even with whomever, management or the union. The individuals seem not to want to take responsibility for their actions or inaction.

Table 2
Frequency, Change in Frequency, Grievance Steps, and Impact of Threats to File Fair Representation Complains in the Grievance Process

1. In your experience, how often do grievors *threaten* to file a fair representation complaint if the union wants to withdraw their grievance?

	1	2	3	4	5	<i>Mean = 2.08</i>
	<i>Never</i>	<i>Rarely</i>	<i>Often</i>	<i>Very Often</i>	<i>Always</i>	<i>S.d. = .49</i>
n	7	66	14	0	0	
%	(8.0%)	(75.0%)	(15.9%)	—	—	

2. Over the past three years, the number of *threats* to file fair representation complaints has:

	<i>Decreased</i>	<i>Increased</i>	<i>Remained Same</i>
n	3	54	26
%	(3.4%)	(61.4%)	(29.5%)

3. At what step(s) in the grievance process before artibration are any such threats *most* frequently made?

	<i>First Step</i>	<i>Middle Steps</i>	<i>Top Step</i>
n	14	15	52
%	(15.9%)	(17.0%)	(59.1%)

4. How often does the union proceed to arbitration with a grievance it would prefer to withdraw, once a grievor threatens to file a fair representation complaint?

	1	2	3	4	5	<i>Mean = 1.90</i>
	<i>Never</i>	<i>Rarely</i>	<i>Often</i>	<i>Very Often</i>	<i>Always</i>	<i>S.d. = .82</i>
n	28	45	8	1	2	
%	(31.8%)	(51.1%)	(1.1%)	(2.3%)		

It is also clear that explicit threats to file complaints are far more likely to occur at the top step, as opposed to first or middle steps, of the grievance procedure. Item number four indicates that, for the sample as a whole, such threats are only moderately successful in forcing union officers to take grievances to arbitration. Moreover, Table 3 shows that threats to file complaints tend to be concentrated on major job security grievance issues, namely, terminations, suspensions, and layoffs. The other four grievance issues received substantially lower ratings on this than did the top three.

Table 3

Rank Order and Mean Rating of Substantive Grievance Issues as to Likelihood of Provoking Grievor's Threats to File a Fair Reprisement Complaint (1 = Very Likely, 5 = Very Unlikely to Provoke Threat)

<i>Grievance Type</i>	<i>Rank</i>	<i>Mean Rating</i>	<i>S.d.</i>
Termination	1	1.81	1.15
Suspension	2	2.66	1.20
Layoff	3	3.04	1.43
Job Bids	4	3.86	1.24
Wages	5	3.96	1.35
Warnings	6	4.19	1.04
Work Assignments	7	4.30	.96

Tables 4a, b, and c report mean scores and standard deviations on Likertscale items regarding the possible negative influence of the fair representation doctrine on the grievance process; several possible triggering factors accountable for the level or changes in fair representation threats or complaints; and potential beneficial contributions of the fair representation doctrine. The mean scores on the five items covered by Table 4a approach the scale midpoint from the «disagree» side of the response scale. That is, as a whole, the sample respondents' views tend somewhat to disagree that the fair representation doctrine has a strong negative influence on union grievance decision making. It should be noted, however, that each item also has a substantial standard deviation, meaning that a significant portion of the sample *agrees* that the doctrine is producing the negative effects addressed by the survey items.

Table 4a
Responses to Likert-Scale Items Regarding Negative Effects of the Duty of Fair Representation on the Grievance Process
(1 = Strongly Disagree, 5 = Strongly Agree)

<i>Item</i>	<i>(n = 88) Mean</i>	<i>S.d.</i>
1. The duty of fair representation causes the union to process frivolous grievances.	2.78	1.32
2. The union takes grievances to arbitration it would not otherwise because of the Labour Relations Board's tendency to hold formal hearings on fair representation complaints.	2.56	1.09
3. The duty of fair representation causes delays in the grievance process because undue time is spent on frivolous grievances.	2.90	1.06
4. The duty of fair representation makes grievance handling more costly because frivolous grievances are submitted to arbitration.	2.71	1.04
5. Even if the union believes a grievance lacks merit, taking the grievance to arbitration is preferable to having a fair representation complaint file.	2.06	1.01

Table 4b
Responses to Likert-Scale Items Regarding Triggering Factors in Fair Representation Threats or Complaints
(1 = Strongly Disagree, 5 = Strongly Agree)

6. I understand, in practical terms, what the duty of fair representation requires of unions in processing grievances.	3.86	.99
7. The number of fair representation complaints increases as unemployment in the Province increases.	3.80	.86
8. Even if the complaint lacks merit, having a fair representation complaint filed is politically damaging to elected union representatives.	3.34	1.09
9. Political factions within the union file fair representation complaints to make the leadership look bad.	3.14	1.15
10. Officers appointed by the Labour Relations Board to investigate fair representation complaints are able to resolve the frivolous ones.	3.23	.96

Table 4c
Responses to Likert-Scale Items Regarding Positive Effects of the Duty of Fair Representation on the Grievance Process
(1 = Strongly Disagree, 5 = Strongly Agree)

11. The union has learned to screen grievances better as a result of the duty of fair representation.	3.32	.95
12. The union does a better job of representing grievors as a result of the duty of fair representation.	2.67	.97
13. The duty of fair representation helps make relations between management and union representatives more open.	2.55	.99

The five survey items reported on Table 4b cover factors that may play an instrumental role in the exploitation of the fair representation doctrine in the grievance process. The survey respondents are in agreement that while they understand the practical requirements of the fair representation doctrine, environmental forces resulting in layoffs and unemployment act as a catalyst to fair representation complaint activity. The following statements typify many respondents' experience:

The large number of layoffs in the forest industry has increased the number of seniority grievances as seniority determines the order of layoff. The grievors tend to go for broke. ...members are fighting to retain their jobs even though their seniority may not entitle them to available work. ...«Desperate» people will grab at any straw — so in light of layoffs and high unemployment many individuals are attempting to save their jobs at any cost — especially when there is nothing to lose.

Somewhat less strongly and with greater variance, the respondents agree that individual rights and the fair representation doctrine are politically sensitive issues and that political factions do exploit this by filing fair representation complaints. Narrative responses describing the role of union politics in fair representation complaint activity included the following:

[Union officers] accept and fight frivolous grievances to avoid being accused of not caring, or lack of nerve etc., and they want to be reelected. ...Complaints are threatened or filed at the urging of radical, defeated, or unsuccessful union candidates... [or] political factions within union ranks and [in reaction to] opposition to certification by another union ...[If] a local takes issue with certain positions adopted by the union as a whole, they may respond by various shows of «muscle».

Scores on the final item in this group suggest that on the whole, however, investigating officers of the Labour Relations Board are fairly successful at resolving unmeritorious fair representation complaints. Nonetheless, narrative responses such as the following suggested further improvements in labour relations board handling of complaints:

The [investigating officer] should make it very clear to the worker *before* an investigation that he *may not* have a grievance. ...The member should have to prove his credibility before the officer recognizes the charges...[and officers] should be given greater latitude in resolving complaints... An expedited handling of the complaint from receipt to decision would prevent falsely raising the hopes of the complainant over a long period of time.

The final three items reveal a mixed assessment of the potential positive influence of the fair representation doctrine on grievance handling and union-management relations. Though the survey respondents provided some support for the view that unions have learned to screen grievances better as a result of the fair representation doctrine, the view that unions do a better job, in general, of representing workers as a result of the doctrine is not lent similar support. Many respondents described changes to union pro-

cedures that may be virtuous in themselves but which may result in unnecessary delays and costs in grievance handling if applied to all grievances regardless of merit:

The duty of fair representation has made the union representative do more paper work on each grievance so that if a hearing is necessary information on the grievance is readily available... I have become very thorough, as if every grievance and its handling will be scrutinized at a later date by lawyers. ...Because of the possibility of fair representation charges, all grievances are taken before the membership at a general meeting to be voted upon by the membership as a whole as to their final disposition.

The predominant view of the respondents is that the doctrine does *not* help reinforce openness between supervisors and union representatives. Indeed, the potentially damaging impact of the duty of fair representation on union-management relations was described in some narrative responses, including the following:

Even when a local's executives are aware that the grievor is wrong, they persist in processing the grievance because they are afraid of being charged. The net result is that they will go to the wall on everything before they back off which encourages the employer to deny even what is obviously a legitimate grievance.

On the basis of the inter-item correlations reported in Table 5, particularly the concentration of significant correlations among the first five, a single scale combining these five items was computed to analyze variance in the respondents' views of the negative impact of the fair representation doctrine on grievance handling across the nine sample unions and individual respondent characteristics. Coefficient alpha for the resulting five-item scale is .84, with the deletion of any one of the five items resulting in a lower coefficient.

Across individual respondents, the degree of perceived negative influence of the doctrine on grievance handling is positively and significantly correlated with the number of years a respondent has been in his or her present position ($r = .26$, two-tailed $p < .05$), but is not correlated with total experience as a union representative. Analysis of variance (ANOVA) comparing the responses of elected and appointed staff representatives revealed that no significant amount of sample variance may be attributed to this individual characteristic. Hence, it appears that the variance in survey responses is due less to individual respondent differences than to environmental or organizational factors.

ANOVA results also established, however, that inter-union variance on the perceived degree of negative influence of the fair representation doctrine is minimal. Referring to the results presented in Table 6, union 6, having the highest mean score on negative impact, is significantly higher on this

Table 5
**Intercorrelations among Likert-Scale Items Regarding Impact
of the Duty of Representation on the Grievance Process**

Items	1	2	3	4	5	6	7	8	9	10	11	12
2	.56***											
3	.52***	.46***										
4	.55***	.65***	.57***									
5	.42***	.60***	.51***									
6	-.22*	-.24*	-.29**	-.41***	-.18							
7	.20	.29**	.29**	.37***	.11	-.21*						
8	.28**	.21*	.25*	.28**	.32**	.10	.11					
9	.16	.19	.37***	.24*	.05	-.06	.37***	.30**				
10	-.16	-.20	-.12	-.07	-.11	.19	.05	.06	.08			
11	.05	-.01	.11	.10	-.03	.20	.15	.18	-.15	.21*		
12	-.16	.01	.00	-.14	-.07	.13	.02	-.07	-.08	.11	.38***	
13	-.03	-.06	-.18	-.08	-.29**	.15	-.01	-.17	-.25	.11	.27**	.29**

*** Significant at the .001 level, ** 0.01 level, and * .05 level in two-tailed tests.

Table 6
**Sample Unions by Size, Proportion Female, Number and Rate
of Fair Representation Complaints (1975-83), and Mean Scores on Composite Measure
of Negative Effect of Duty of Fair Representation on the Grievance Process
(The higher the mean, the stronger the negative effect)**

Union	Size ^a	* Female ^a	Complaints ^b /Rate ^c	Mean
1	33,719	4%	114/.34	12.41
2	8,920	3%	13/.15	10.80
3	18,624	98%	6/.03	11.70
4	5,220	87%	2/.04	12.00
5	28,112	44%	63/.22	13.15
6	7,935	19%	12/.15	19.20
7	41,081	55%	27/.07	9.89
8	23,579	57%	13/.06	17.00
9	14,521	10%	21/.14	13.67

^a Source: *British Columbia Labour Directory, 1985*, Victoria, B.C., Ministry of Labour, 1986.

^b Source: Labour Relations Board of British Columbia.

^c Per 100 union members.

measure than the lowest seven unions, and union 8 is also significantly higher than the lowest-scoring union, union 7. Only three of the union characteristics are significantly intercorrelated (in part, given the small sample of unions involved), as shown in Table 7. The absolute number of actual fair representation complaints is positively correlated with union size, though complaint rate is not significantly correlated with size. The two measures of complaint activity are understandably highly correlated.

Table 7

Correlations among Size, Gender Composition, Number and Rate of Fair Representation Complaints, and Mean Score on Negative Effect of Doctrine on Grievance Process across Sample Unions

<i>Variables</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>
1. Size				
2. % Female	-.01			
3. Complaints	.61*	-.45		
4. Complaint Rate	-.31	-.74**	.90***	
5. Negative Effect	-.32	-.18	-.14	.04

*** Significant at the .001 level, ** .01 level, and * .05 level in two-tailed tests.

Reinforcing previous results (Knight, 1985b), the proportion of a union’s membership that is female was negatively correlated with the fair representation complaint rate. Mean scores on the survey scale regarding the negative impact of the doctrine on grievance handling were not significantly correlated with any of the union characteristic variables, though the relationship is negative on size, proportion of membership that is female, and, surprisingly, the number of actual complaints filed against the union. It is also worth noting that the two lowest-scoring unions on the negative effect of the fair representation doctrine are the only unions in the sample having formal grievance appeal procedures available to the workers represented.

DISCUSSION

The results of this study confirm that attempts to exploit the fair representation doctrine are a fact of life in the grievance process. Though not universal or *very* frequent, union decisions to withdraw grievances *are*

met with threats to file fair representation complaints. Sometimes unions respond to threats by submitting grievances to arbitration, despite a decision that the grievance lacks merit. These results provide additional support for the view that individuals and union factions make tactical use of the fair representation doctrine (Knight, 1987). Moreover, the dominant narrative responses of sample respondents to the questions of what factors might account for an increase in the frequency of threats and actual complaints or differences among locals of the same union were that economic layoffs and union politics are largely responsible. These findings also corroborate the conclusions of previous research (Knight, 1987). In essence, it appears that when the grievances-arbitration system is already under stress — such as coping with the effects of a sustained recession — the duty of fair representation may become an aggravating factor.

A separate question is the degree to which grievances are submitted to arbitration following the actual filing of a fair representation complaint with the B.C. Labour Relations Board simply to avoid the cost and embarrassment of a formal legal proceeding. Here again, the evidence provided by this study is that going to arbitration simply to avoid the Labour Relations Board is not a frequent practice, especially, according to narrative responses, since the Board stopped automatically scheduling formal hearings for all fair representation complaints⁵. However, strong political pressures within a union seem to increase the likelihood that grievances will be submitted to arbitration where the clear alternative is a legal proceeding.

Many unions have improved their grievance screening procedures in response to the duty of fair representation. Narrative responses on this issue offered further evidence that unions have provided better training to their grievance representatives in the areas of investigation and documentation and have made other procedural changes. Nonetheless, the survey respondents were not in agreement with a blanket statement that the presence of the fair representation doctrine resulted in generally better representation for workers. Moreover, the fair representation doctrine does not appear to promote openness between supervisors and union representatives in grievance negotiations. To the contrary, some narrative responses identified supervisors and other management officers, and many cited lawyers, as sources of encouragement to disgruntled workers to file fair representation complaints. While this may partly reflect the high level of antagonism characteristic of labour relations in British Columbia, it also suggests another form of mischief that may be played with the fair representation doctrine.

5 Both the relatively clear statutory requirement and the B.C. Labour Relations Board's responses to the increasing fair representation complaint load are virtues of designating a single forum for adjudicating fair representation complaints, as compared with the availability of multiple fora in the United States.

CONCLUSION

Previous research and the results of this study suggest that in both theory and practice the role of the duty of fair representation in the grievance process is complex. The present study revealed some positive consequences in terms of the care taken by union representatives in reaching grievance decisions. Representatives' perceptions of the degree of abuse of the fair representation doctrine by disgruntled workers and the negative impact of this on the grievance process varied, though the variance is not explained by whether the a representative is elected or appointed. If anything, experience strengthens the perception that the duty of fair representation results in the processing of unmeritorious grievances. Rather than being a reflection of individual *respondent* differences, variance in perceived negative consequences of the doctrine seems to be more a function of the degree of economic stress and political ferment affecting particular unions or local units.

It might be tempting to view individuals' use of the fair representation doctrine to protect their contractual rights as a means of enhancing workers' participation in «union control structure» and, thus, union democracy (Anderson, 1979). Given the large proportion of fair representation complaints found to lack merit (Knight, 1987) and the additional evidence of «tactical» complaint activity presented here, it should be apparent that the presence, or even the use of the fair representation doctrine does not in itself necessarily make unions (or any one union) more democratic. To the contrary, to the extent that union resources are expended in litigating unmeritorious complaints, a union may be less effective in advancing the interests of the bargaining unit as a whole, in turn diminishing democratic control in a broader sense.

Though this study provided some evidence that internal union appeal procedures provide workers with an acceptable alternative to fair representation complaints, the tough practical question is one of cost and benefit. It would be facile and possibly irresponsible to dismiss the growing volume of fair representation complaints and threats as simply «the price of democracy». Further theoretical and empirical research could be focused on the problem of balancing individual and collective interests under collective bargaining and on the exceedingly sensitive question of determining when the costs of individual litigation exceed the benefits to union democracy.

Of course, much depends upon the policies and practices of union, management, and public officials. Given the growing social commitment to protecting individual rights *and* the potential abuses of such protections

found here and in previous research, the nature and limits of the right of review afforded by the fair representation doctrine need to be stated as clearly and specifically as possible. Performance expectations must continue to be tempered by recognition that most union representatives are not lawyers. This limitation applies to most grievors as well, who may nonetheless feel free to interpret a diffuse legal standard to suit their own interests. For example, where the doctrine is expanded to cover «gross» or «serious» negligence, care must be taken by policy-makers to define this standard in practical terms⁶. Workers and union representatives alike will need to understand the limits of such a standard, for example, the fact that being substantively wrong in an earnest effort at representing a grievor does not amount to negligence, whether «simple» or «gross»⁷.

As noted previously, the role of labour relations board investigating officers may be crucial in clarifying rights and obligations under the fair representation doctrine and, as survey respondents suggested, investigating officers must be prepared to inform complainants that they do not have legitimate complaints if it can be determined that this is the case. Survey results also established that disputes concerning fair representation tend to be aroused by «critical job interests» of workers to begin with, calling into question the need for a separate standard for these issues as suggested by some scholars (Brown, 1983; Brown, 1984; MacIntyre, 1974; Surmon, 1984).

Management representatives can avoid encouraging frivolous complaints and may additionally be able to help avoid legitimate or imagined ones, even to the point of waiving contractual time limits in special circumstances (Christensen, 1985). By continuing to improve representatives' grievance handling skills and perhaps by establishing internal grievance appeal procedures, unions may diminish opportunities to exploit the fair representation doctrine as well as avoid *meritorious* complaints. Initiatives such as these will be necessary to discover the proper practical balance between individual and collective interests essential to the integrity of the collective agreement, the grievances process, and the union-management relationship.

6 In the past several years the B.C. Labour Relations Board made an effort to translate the fair representation tests into concrete guidelines by publishing a leaflet entitled, «The Duty of Fair Representation: What does it Mean?» This leaflet contains straightforward questions and answers regarding workers' rights under the doctrine and is given to all complainants upon application to the Labour Relations Board.

7 Previous research on fair representation complaint activity (Knight, 1987) found that almost always complainants charged union representatives with being «arbitrary, discriminatory, and in bad faith». Though this approach may be standard legal practice, the indiscriminate application of any and all standards calls into question the practical merit of additional ones.

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Le devoir de juste représentation dans les décisions sur les griefs

Le devoir de juste représentation des syndicats a évolué de façon à protéger les droits contractuels des salariés pris individuellement contre les atteintes à ceux-ci de la part des dirigeants syndicaux. Cet article rend compte des résultats d'une enquête auprès des dirigeants syndicaux au sujet de l'effet du devoir de juste représentation en matière de procédure de règlement de griefs. L'enquête a confirmé les résultats des recherches antérieures qui démontrent que les plaintes concernant la juste représentation reflètent l'existence de factions au sein des syndicats ou sont des mesures d'ordre économique qui touchent défavorablement les individus plutôt qu'un signe de représentation inadéquate de la part des dirigeants syndicaux. On a également découvert que le recours à cette doctrine de la part des plaignants a, à certaines occasions, incité les syndicats à présenter des griefs sans valeur, ce qui a eu pour conséquence l'augmentation du coût d'administration des conventions collectives.

Dans les négociations collectives, mais surtout lors de l'étude des griefs, les comportements ou les décisions du syndicat qui sont préjudiciables aux droits d'un individu ou effectués de façon «arbitraire», «discriminatoire» ou de «mauvaise foi» violent le devoir de juste représentation. Antérieurement, la recherche sur l'obligation de représentation équitable insistait sur la jurisprudence mise au point dans des décisions touchant des plaintes spécifiques. La plupart des chercheurs en ont conclu (comme le prévoient la loi au Québec et la politique administrative en Colombie-Britannique) que l'on doit accorder davantage de protection aux personnes en généralisant la doctrine de façon qu'elle englobe la négligence «grossière» ou «sérieuse» de la part des représentants syndicaux. Il y avait aussi unanimité dans les milieux de l'enseignement pour que, pour des motifs d'ordre pratique, les commissions de relations du travail, au lieu des tribunaux, soient appelées à disposer des plaintes relatives au droit de représentation équitable et pour que la vérification de la juste représentation ne soit pas à ce point stricte qu'il faille s'attendre à ce que les représentants syndicaux se comportent comme des avocats.

Une étude expérimentale récente a exprimé l'avis que les individus et les factions syndicales cherchent parfois à utiliser la doctrine ou la théorie de la représentation équitable comme un instrument de pouvoir. Cette analyse de l'activité actuelle en ce qui a trait au nombre de plaintes enregistrées, tend à démontrer que celles-ci ne peuvent être que la partie vérifiable du recours «tactique» à la doctrine du devoir de représentation équitable et que cela peut de plus nuire au fonctionnement du mécanisme de règlement des griefs lui-même. Les dommages au régime de règlement des griefs peuvent résulter de la menace de porter des plaintes de représentation équitable et les plaintes effectives sont de nature à exercer une pression sur le processus de règlement des griefs ou à devenir un instrument de pouvoir lorsqu'elles proviennent de factions syndicales. Les conséquences négatives pour le mécanisme de règlement des griefs se rapportent aux coûts supplémentaires, aux délais et au formalisme, ce qui est de nature à miner les qualités traditionnelles du régime comparé au règlement judiciaire des différends en matière de conventions collectives. D'un autre côté, les

exigences de la théorie du devoir de représentation équitable peuvent avoir pour résultat, non seulement la protection des droits individuels, mais aussi une représentation syndicale généralement mieux formée et, possiblement, des relations entre employeurs et syndicats plus franches à tel point que les parties reconnaissent le partage de leurs responsabilités devant la loi.

À ce sujet, un instrument d'enquête a été mis au point et remis à un échantillon des dirigeants de neuf syndicats tant du secteur privé que public représentatifs de l'ensemble des syndicats en Colombie-Britannique. On a retourné 88 questionnaires utilisables. Regroupant au total 28 sujets ou questions, l'instrument d'enquête était constitué de questions graduées ainsi que de descriptions de caractère narratif relatifs aux impacts positifs et négatifs du devoir de juste représentation sur le fonctionnement du mécanisme de règlement des griefs, soit les facteurs d'environnement et d'organisation qui peuvent être responsables des changements susceptibles de se produire dans le nombre de plaintes de même que des données de base relatives aux répondants et à leur syndicat respectif. Le questionnaire fut distribué par les syndicats participants et retourné par la poste.

Les résultats de cette investigation ont confirmé que les tentatives de recourir à la doctrine à l'obligation de représentation équitable exercent une influence sur le processus de règlement des griefs. Bien qu'elles ne soient pas générales ni même très fréquentes, les décisions des syndicats de retirer des griefs donnent lieu à des menaces de porter des plaintes de représentation équitable. Parfois, les syndicats y répondent en soumettant les griefs à l'arbitrage, même si l'on reconnaît que ceux-ci sont sans valeur. De plus, lorsqu'on s'enquiert des facteurs qui sont responsables d'une augmentation du nombre des menaces, on en attribue la cause aux mises à pied et aux politiques syndicales.

Ce qui ressort de cette enquête, c'est que aller à l'arbitrage uniquement pour éviter le recours à la Commission des relations du travail n'est pas d'une pratique fréquente, surtout depuis que cette dernière a cessé de fixer des auditions véritables automatiquement pour toute plainte de représentation équitable. Cependant, de fortes pressions de nature politique s'exercent de plus en plus à l'intérieur des syndicats d'où des arbitrages probables lorsqu'on redoute d'avoir à s'engager dans un processus judiciaire.

Plusieurs syndicats ont amélioré les méthodes de tamisage des griefs afin d'éviter le recours aux plaintes se rapportant à l'obligation de représentation équitable. Quelques-uns d'entre eux, qui faisaient partie de l'échantillon, se sont efforcés de donner une formation plus poussée aux représentants syndicaux et ils ont aussi procédé à certains changements dans leur façon de procéder. Toutefois, les répondants n'étaient pas d'accord pour considérer que la doctrine de la juste représentation a eu pour résultat d'assurer une meilleure protection aux travailleurs. De plus, la doctrine n'apparaît pas non plus favoriser davantage la franchise entre contremaîtres et représentants syndicaux dans la discussion des griefs.

L'auteur conclut que les syndicats, les employeurs et l'État peuvent aider à diminuer les effets secondaires négatifs de la théorie de la représentation équitable. Les enquêteurs de la Commission des relations du travail doivent être formés de telle

façon qu'ils puissent avertir les plaignants, au début de l'enquête, que leur réclamation peut bien n'être pas légitime et que celle-ci peut être rejetée si elle est sans valeur. Les représentants des employeurs peuvent éviter de favoriser les plaintes frivoles et s'efforcer d'aider à les éviter, qu'elles soient réelles ou imaginaires. En s'efforçant d'accroître leur compétence dans la façon de disposer des griefs et aussi en établissant peut-être certaines procédures d'appel, les syndicats peuvent restreindre les occasions de recourir à cette doctrine ou à cette théorie en évitant qu'il y ait des réclamations bien fondées de la part des travailleurs.

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