

ARTICLES

BUILDING A NEW BRIDGE OVER TROUBLED WATERS: LESSONS LEARNED FROM CANADIAN AND U.S. ARBITRATION OF HUMAN RIGHTS AND DISCRIMINATION EMPLOYMENT CLAIMS*

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“Two nations in the land that lies along its shore
But just one river rolling free.”¹

TABLE OF CONTENTS

I. INTRODUCTION	3
II. SPECIAL CONSIDERATIONS IN FORUM SELECTION FOR WORKPLACE DISCRIMINATION AND HUMAN RIGHTS CLAIMS	5
III. RESOLVING EMPLOYMENT DISCRIMINATION CLAIMS AND MANDATORY ARBITRATIONS IN THE UNITED STATES.....	12
A. Legislation: The Federal Arbitration Act and the National Labor Relations Act	13
1. The Federal Arbitration Act.....	13
2. The National Labor Relations Act.....	16

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¹ *One Single River (Song for Canada)*, DYLANCHORDS, http://dylanchords.info/17_basement/one_single_river.htm (last visited Oct. 8, 2011) (words by L. Tyson, music by P. Gzowski, recorded by Bob Dylan and the Band in the Basement, summer 1967).

2	<i>CARDOZO J. OF INT'L & COMP. LAW</i>	[Vol. 20:1
	B. Judicial Interpretation of Employment Arbitration Agreements.....	20
	1. Individual Contract Forum Waivers: <i>Gilmer v. Interstate/Johnson Lane Corporation</i>	21
	2. Waivers and Forum Availability in the Collective Bargaining Context	22
	C. The Pyett Legacy: Uncertainty and Unpredictability....	25
	1. Nature and Scope of Waiver	26
	2. Class Actions and Waivers	27
	3. Union Control of Claims Process	29
	4. The Scope of Bargaining Unit's Authority to Waive Statutory Discrimination Claims	30
	5. Other Challenges Ahead	31
IV.	THE CANADIAN APPROACH TO RESOLVING EMPLOYMENT HUMAN RIGHTS CLAIMS	32
	A. Labor Arbitrator Jurisdiction.....	32
	B. Statutory Grievance Arbitration.....	33
	C. General Principle Favouring Exclusive Arbitrator Jurisdiction.....	35
	1. Courts.....	36
	2. Other Administrative Tribunals	38
	D. Human Rights Claims and Statutory Grievance Arbitration	40
	1. Revisiting Weber	41
	2. Concurrent Jurisdiction	43
	E. The Challenges of "Legislative Intent" and Concurrent Jurisdiction.....	44
	1. Certainty and Consistency.....	45
	2. Multiplicity	47
V.	NAVIGATING THE WAY FORWARD: BUILDING AN OPTIMAL DISPUTE RESOLUTION MODEL FROM THE CANADIAN AND U.S. EXPERIENCES.....	49
	A. Arbitration: Concurrent rather than Exclusive Arbitrator Jurisdiction	50
	B. Individual Access to a Public Forum: Judicial or Tribunal.....	52
	1. Public v. Private Forum	53
	2. Unfettered Individual Access	57
	3. Post Dispute Forum Election.....	60
	C. Certainty of Forum and Multiplicity.....	63
	D. Correctness and Finality.....	68
	E. Charting a Course for Implementation	71

2011]	<i>BUILDING BRIDGES</i>	3
VI. CONCLUSION		72

I. INTRODUCTION

Over the last decade, Canadian and U.S. Supreme Court cases and legislative reforms have muddied the legal waters for union members seeking redress of employment discrimination or human rights claims. In the United States, it is well within a bargaining unit's authority to waive certain labor law rights, such as the right to strike.² In that spirit, the U.S. Supreme Court recently confirmed the bargaining unit's authority to collectively waive a union member's individual right to proceed to court on discrimination claims, upholding exclusive arbitrator jurisdiction when a collective bargaining agreement waives a statutory remedy in favor of mandatory arbitration. By contrast, a Canadian labor arbitrator's jurisdiction to deal with statutory human rights complaints is usually concurrent with that of provincial and federal human rights tribunals specifically created to address such claims. In several Canadian provinces, complainants proceed directly to tribunal adjudication without any prior screening or conciliation. In both countries, the ability of organized workers to have their day in court faces a tidal wave of obstacles.

This Article explores and compares the current Canadian and U.S. positions on labor arbitrator jurisdiction over employment discrimination and human rights claims, and recommends optimal approaches for resolving employment discrimination disputes. It specifically references the role of the adjudicatory body, the express and implicit intention reflected in the empowering legislation, the factual context of the dispute and the language of the arbitration agreement. It concludes that the U.S. Supreme Court's apparent endorsement of exclusive arbitrator jurisdiction in *14 Penn Plaza LLC v. Pyett*³ unduly and prejudicially restricts access to discrimination redress without providing the desired certainty of forum. Branded as "controversial activist methodology,"⁴ the decision raises a "multitude of open

² Mark Berger, *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55, 81-82 (2009). The right to strike is guaranteed under the National Labor Relations Act, 29 U.S.C. § 157 (1998).

³ 14 Penn Plaza, LLC v. Pyett, 129 S. Ct. 1456 (2009).

⁴ David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory*

4 *CARDOZO J. OF INT'L & COMP. LAW* [Vol. 20:1

questions,”⁵ and leaves both employers and employees without clear guidelines for moving forward to resolve disputes. While multiple Canadian federal and provincial forums offer wider access to human rights relief, parallel proceedings risk inconsistent findings and result in forum uncertainty. Lessons can be learned from each country’s system in order to improve access, clarity of process, fairness and justice, and to advance the societal interests and legislative intent in employment discrimination dispute resolution.

Transparency and the right to appeal are distinct advantages of resolving employment discrimination and human rights claims in a judicial forum. Consequently, when the claim is one purportedly addressed in a collective bargaining agreement, individual claimants should retain the right to have the matter proceed to a judicial forum absent an individual waiver. Therefore, this Article recommends that the U.S. Congress amend employment discrimination and labor legislation to explicitly preserve access to a judicial forum for statutory discrimination claims, regardless of the terms of a collective bargaining agreement. Access to a judicial forum should only be foreclosed if the union member has executed an informed individual waiver of that forum.

Admittedly, arbitration also offers inherent benefits including privacy and finality. In order to maintain efficiency, reduce costs, and provide optimal fairness to both employer and employee, the benefits of arbitration should be preserved in the unionized context. Congress should provide that while the claimant may elect a forum, either arbitration or judicial, the choice precludes either party from re-litigating the dispute in the other forum. In addition, Congress should address the scope of arbitrator authority and remedies available through an arbitration forum, as well as the standard for judicial review of arbitration decisions.

While the authors of this Article applaud the Canadian Human Rights Tribunal structure for preserving the availability of public forums for employment discrimination claims, we acknowledge that the cost⁶ and cultural sea change inherent in

Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett, 19 CORNELL J.L. & PUB. POL’Y 429, 431 (2010).

⁵ *Id.* at 450.

⁶ Tiffany Tsun, Note, *Overhauling the Ontario Human Rights System: Recent Developments in Case Law and Legislative Reform*, 67 U. TORONTO FAC. L. REV. 115, 129-30, 130 fig.1 (2009) (describing the exploding costs associated with the Ontario Human

2011]

BUILDING BRIDGES

5

adopting such a structure in the United States make it impracticable. Canada's system of multiple forums capable of addressing employment discrimination disputes promotes wider access and public visibility; however it is not without drawbacks. In Canada, action is also needed to improve, clarify, and guarantee individual access to dispute resolution. Legislation must be directed toward managing parallel proceedings and promoting national consistency.

In order to formulate the aforesaid recommendations, Part II of this Article explores the special problems inherent in private sector⁷ workplace discrimination and human rights disputes, and identifies characteristics of an optimal resolution framework. Parts III and IV follow with a review and discussion of each country's processes and challenges. This review serves as a springboard for the development of recommendations for an optimal model of dispute resolution in Part V. The recommendations address the drawbacks and outstanding issues integral to each country's approach.

II. SPECIAL CONSIDERATIONS IN FORUM SELECTION FOR WORKPLACE DISCRIMINATION AND HUMAN RIGHTS CLAIMS

Workplace discrimination and human rights complaints come in a wide variety of shapes and sizes ranging from alleged discriminatory or infringing behaviour by the employer, to claims of disparate impact of general policies and hostile work environments involving co-worker conduct. Discrimination may arise from any number of prohibited grounds related to the victim's personal characteristics, such as age, gender, sexual orientation, ethnic origin, race or disability.⁸ Human rights violations generally involve infringement of a fundamental right or freedom afforded to all persons, such as privacy or free speech.⁹

Rights Tribunal between 2004 and 2009).

⁷ This article does not address public sector employment disputes. Rather, it confines itself to the private sector unionized workplace. See John-Paul Alexandrowicz, *A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada*, 23 COMP. LAB. L. & POL'Y J. 1007 (2002) (addressing arbitration agreements in the non-unionized workplace).

⁸ Canadian legislation does not define discrimination, but courts have taken it to mean differing treatment arising from a personal characteristic that results in an adverse impact. See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, paras. 19-21 (Can. B.C.).

⁹ Concepts overlap in Canada as most human rights legislation considers it a human

6 *CARDOZO J. OF INT'L & COMP. LAW* [Vol. 20:1]

The sources of protection or prohibition may be constitutional, quasi-constitutional, statutory or common law depending upon the jurisdiction.¹⁰ In the United States, employment environment claims are collectively referred to as “employment discrimination” claims, while in Canada the “human rights” label is more often applied. For the purposes of this Article, it is not important to differentiate between the two, nor is it important to consider particular grounds or rights independently.¹¹ For our purposes, it is essential to focus solely on the unique resolution challenges presented by disputes in the unionized private sector workplace.

Identifying an appropriate dispute resolution protocol for employment related discrimination and human rights complaints is challenging. These disputes do not suffer from a shortage of applicable resolution forums. In both Canada and the United States, administrative agencies exist to advance the societal and public policy goals of anti-discrimination and human rights legislation. There are fundamental differences between the two models but both assist in the resolution of claims. In the United States, the Equal Employment Opportunity Commission (EEOC)¹² performs screening and conciliation functions before a matter can proceed to court,¹³ while Canadian human rights

“right” not to be discriminated against. *See, e.g.*, Ontario Human Rights Code, R.S.O. 1990, c. H.19, §§ 1-9 (Can.); *see also* Hunter v. Southam Inc., [1984] 2 S.C.R. 145, para. 27 (Can.) (declaring that the right to privacy is a fundamental human right protected by section 8 of the Charter of Rights and Freedoms).

¹⁰ For Canada, *see, e.g.*, Canadian Charter of Rights and Freedom, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (addressing government behaviour); Cadillac Fairview Corp. v. Saskatchewan (Human Rights Comm.), (1999) 173 D.L.R. 4th 609, paras. 14-15 (Can. Sask. C. A.) (describing provincial human rights codes as quasi-constitutional in nature that cannot be contracted out of). *See also* typical statutes dealing with human rights and discrimination: Privacy Act, R.S.C. 1985, c. P.21 (Can.), Occupational Health and Safety Act, R.S.O. 1990, c. O.1 (Ont.) (now covering hostile workplace and bullying). Common law torts of nuisance and intentional infliction of emotional shock have been applied to harassing and discriminatory circumstances. *See, e.g.*, Motherwell v. Motherwell, (1976), 73 D.L.R. 3d 62 (Alta. C. A.) (finding harassing phone calls so invaded the privacy of the plaintiff that they amounted to the tort of private nuisance). For the United States, *see, e.g.*, Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.*, and the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 603 (codified at 29 U.S.C. §§ 621-34 (2006)).

¹¹ Phrases may be used interchangeably throughout this Article to refer to any discrimination or human rights claim advanced by an employee and arising in the unionized employment context.

¹² For a general description of the EEOC’s function, *see* EEOC, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Sept. 14, 2011).

¹³ For a description of this process, *see The Charge Handling Process*, EEOC, <http://>

tribunals have an adjudication branch that actually determines the substance of a complaint.¹⁴ In addition, labor regimes and employers in both countries recognize arbitration as a forum conducive to quick, final and non-disruptive labor dispute resolution.¹⁵ By 2002, approximately six million employees in the United States were subject to American Arbitration Association clauses in mandatory arbitration agreements.¹⁶ In Canada, labor legislation designates arbitration as the forum for labor dispute resolution.¹⁷ As a result, possible forums for discrimination and human rights disputes range from the public courts and administrative tribunals to the more private forum of arbitration.

Before embarking on an assessment of resolution alternatives, it is important to understand the unique needs and characteristics of employment discrimination disputes. In her comparative analysis of American, English and Australian approaches to employment discrimination claims in the *individual* employment context,¹⁸ Professor Jean Sternlight offers that legal, practical, and emotional realities often make disputes highly adversarial, hard to settle, and present unique challenges to those involved. Since they “tend to involve significant non-legal and legal interests,”¹⁹ their

www.eeoc.gov/employees/process.cfm (last visited Sept. 14, 2011).

¹⁴ Most Canadian provincial and federal tribunals have two branches: a commission that educates, investigates, prosecutes and screens complaints; and a tribunal that hears and adjudicates claims. *See, e.g.*, Human Rights Act, R.S.A. 2000, c. A-25.5, §§ 20-30 (Alta.); Human Rights Act, R.S.C. 1985, c. H-6 §§ 40-48 (Can.). Ontario’s current model dispenses with the commissions screening role and allows complainants to file claims with the tribunal. Human Rights Code, R.S.O. 1990, c. H.19, § 29 (Can.); *see* Tsun, *supra* note 6, at 125 (describing the new complaints process).

¹⁵ *See* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and the Fury?*, 11 EMPL. RTS. & EMPLOY. POL’Y J. 405, 411 (2007) (reporting a “significant expansion of employment arbitration” since the Court’s decision in *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), and finding reasonable “a current estimate in the range of 15 to 25 percent of employers having adopted employment arbitration.”). *See also* Gina K. Janeiro, *Balancing Efficiency and Justice: In Support of the Equal Employment Opportunity Commission’s Policy Statement Regarding Mandatory Arbitration and Employment Contracts*, 7 AM. U. J. GENDER SOC. POL’Y & L. 125, 127 (1998).

¹⁶ David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1321 (2009) (citing Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44).

¹⁷ *See infra* Part IV (describing the Canadian approach).

¹⁸ Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78(5) TUL. L. REV. 1401, 1401-02 (2004).

¹⁹ *Id.* at 1474.

impact is felt well beyond the disputing parties and involves important societal goals. Additionally, although simple language disguises the complexity behind defining words like “equal” or “qualified,”²⁰ anti-discrimination legislation is in fact quite complicated.²¹ For example, “disparate treatment can look remarkably like disparate impact, leaving some practitioners ‘scratching their heads’ as to which theory to advance or defend.”²²

Familiarity with the workplace environment is a valuable asset for an adjudicator as the confusing and often complex factual scenario giving rise to the complaint is usually hotly contested.²³ Few independent witnesses exist to help the adjudicator determine what actually happened. Moreover, the personal, emotional, and psychological impact on both the victim and the accused trigger feelings of anger, betrayal, embarrassment, humiliation, and depression. Consequently, sophisticated legal skills may be necessary to wrestle with the elusive legal concepts, sensitive fact situations and heightened emotions inherent in discrimination and human rights claims.

These claims also present economic and legislative challenges. The realities of lost jobs and denied promotions mean that victims must be compensated for their losses and these monetary awards require an enforcement mechanism.²⁴ Beyond factors specific to a particular case, discrimination claims also implicate a societal mandate expressed through legislation. Society as whole benefits from the elimination of individual and systemic discrimination, and this is typically achieved through state participation in and enforcement of the outcomes.²⁵ Society must be able to punish

²⁰ Sternlight, *supra* note 18, at 1468-71; *see also* Michael Z. Green, *Ruminations About The EEOC’S Policy Regarding Arbitration*, 11 EMP. RTS. EMP. POL’Y J. 154, 163, n.111 (2007).

²¹ For a discussion of the complexities of discrimination claims, particularly characterizing them as “disparate treatment” or “disparate impact,” *see* Ann Marie Tracey, *Still Crazy After All These Years? The ADEA, the Roberts Court, and Re-Claiming Age Discrimination as Differential Treatment*, 46 AM. BUS. L.J. 607, 615-16 (2009).

²² *Id.* at 616 (quoting Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL’Y REV. 95, 111 (2006)).

²³ Sternlight, *supra* note 18, at 1471-74.

²⁴ *Id.* at 1478-79.

²⁵ In a press release associated with its July 10, 1997 issuance of its “Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment,” EEOC Chairman Gilbert F. Casellas said, “[w]hen employees are forced into private, employer-designed arbitration systems to resolve their discrimination claims, there is no public accountability for decisions that are made or for employers who violate the law.” EEOC, <http://www.eeoc.gov/eeoc/newsroom/release/7-10>

particular offenders²⁶ and must build public precedent to deter future misconduct.²⁷

The importance of procedural fairness is also stressed in existing academic literature. Where victims of discrimination are often among the most vulnerable members of society, they need procedural vehicles that are accessible, easy to use, inexpensive, and offer representation.²⁸ Typically, there is a significant resource imbalance between the individual victim and the accused employer.²⁹ Unless subsidized funding is available to the victim, a fair resolution may be unlikely. Finally, as the saying goes, justice delayed is justice denied. Quick resolution allows parties to normalize their relationship and move forward, which is a key priority for continuing the employment relationship and important for maintaining organized labor peace.³⁰

One forum cannot possibly satisfy all of these criteria or meet every conflicting need and interest. Rather, as Professor Sternlight concluded, multiple forums should be available for resolution of employment discriminations claims and a gatekeeper is needed to screen and direct appropriate forum selection.³¹ Professor Sternlight frames her recommendation only in the context of individual employment; as this Article addresses, the unionized workplace presents additional interests and challenges that make forum selection and design even more complex.

Maintaining labor peace in the unionized workplace is in the best interests of management, labor and society as a whole.³²

-97.cfm (last visited Sept. 14, 2011) (post *Pyett*, the Policy Statement itself is no longer available on the EEOC website).

²⁶ Sternlight, *supra* note 18, at 1479.

²⁷ *Id.* at 1477-78.

²⁸ *Id.* at 1479-80; *see also* Tsun, *supra* note 6, at 127-28 (discussing why the privatization of human rights law is bad for the vulnerable victim).

²⁹ Sternlight, *supra* note 18, at 1481; *see also* Green, *supra* note 20, at 180-81 (discussing the deterrence factor arising from the uncertainty of costs of arbitration).

³⁰ Sternlight, *supra* note 18, at 1481.

³¹ *Id.* at 1487-89, 1495.

³² In the United States, a chief role of collective bargaining is to minimize “industrial strife,” and as such, it is essential to national labor policy, particularly where parties agree on a dispute resolution mechanism. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 735 (1981). In Canada, labor legislation expresses the goal of promoting “the expeditious resolution of workplace disputes.” Ontario Labour Relations Act, 1995, S.O. 1995, c. 1 A, § 2 (Ont.); *see* Karl Tabbakh, *The Standard of Review of Grievance Arbitrators When Deciding on Human Rights Issues: The “Magnificent Goal” vs. Industrial Peace*, 43 MCGILL L.J. 261, 269 (stating that one way to achieve the aforesaid “objective is to avoid multiple proceedings before multiple adjudicative bodies.”).

Typical resolution schemes manage disputes in a way that satisfies the majority of workers and management, and places less focus on the individual. On account of its unique brand of collectivization and privatization,³³ the unionized model is not ideal for protecting individual rights. Decisions to unionize, adopt a collective agreement, arbitrate, or strike are made by the majority (or their representatives). It is generally not within the individual employee's power to initiate a grievance or arbitration. Rather, the grievance and arbitration processes depend on the union advancing the complaint, and may require that the worker convince the union that the dispute is worth pursuing. In addition, conflicts of interest abound for the union when complaints involve fellow union members, or the union itself, and this presents another barrier for a worker seeking redress.³⁴ Finally, triggering the union controlled arbitration could foreclose other individually accessible forums and further complicate the resolution of unionized workplace disputes.³⁵

These hallmarks of collective bargaining dispute resolution are in stark contrast to the fundamental right of "access to justice" for all individuals.³⁶ Historically defined as the "vindication of state determined legal rights through the adjudicative institution that administers and enforces them,"³⁷ access to justice has

³³ Bernard Adell, *Jurisdictional Overlap Between Arbitration and Other Forums: An Update*, 8 CAN. LAB. & EMP. L.J. 179, 180 (2000) (speculating that expanding the role of arbitration (into human rights and other areas) may be compromising its ability to deal with its core competency and forcing an individualization of the collective model).

³⁴ See Green, *supra* note 20, at 166 n.125 (citing several commentaries, in particular Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB & EMP. L.J. 1, 9 (1999) (identifying conflicts for unions in pursuing the collective interests of the membership versus individual claims of employees alleging discrimination claims).

³⁵ See Green, *supra* note 20, at 162 (listing reasons why mandatory arbitration is not good for discrimination disputes as outlined in the EEOC 1997 Policy Statement); Adell, *supra* note 33, at 223-28 (discussing whether the union should take on the role of enforcement of human rights law).

³⁶ Janice B. Payne & Christopher C. Rootham, *Are Human Rights Commissions Still Relevant?*, 12(2) CAN. LAB. & EMP. L.J. 199, 215 (2005) (capturing the essence of the difference between the two forums saying "public decision makers exist to do justice; labor arbitrators exist to maintain industrial peace"); Jacob Ziegel, *Canadian Consumer Law and Policies 40 Years Later*, 50 CAN. BUS. L.J. 259, 287 (stating that access to justice has long been considered a fundamental right); ONTARIO CIVIL LEGAL NEEDS PROJECT STEERING COMMITTEE, LISTENING TO ONTARIANS; REPORT OF THE ONTARIO CIVIL LEGAL NEEDS PROJECT, *Executive Summary*, 2 (Jan. 23, 2010), http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf [hereinafter OCLN REPORT].

³⁷ Sean C. McGuire & Roderick A. McDonald, *Small Claims Court Can't*, 34

evolved from mere access to the courts into a multi-faceted concept that incorporates judicial, administrative, social, community and political components.³⁸ Still, the state sponsored adjudicative system retains a key role in dispute resolution.³⁹ Applying the priorities of access to justice to system design reveals an inherent conflict between the two elements; access, focusing on barriers to use, usually reduces procedural complications, while justice, in focusing on fairness, tends to add procedural safeguards.

Procedural justice research⁴⁰ suggests that a process is viewed as procedurally fair when all of the following characteristics are present:

1. Decisions are consistent across decisions-makers and across settings.
2. Decisions are unbiased.
3. Decisions are accurate, and all relevant information is considered before making a decision.
4. There are mechanisms in place to correct errors (and the mechanisms work).
5. The procedure considers the interests of everyone who is affected.
6. The process is transparent.⁴¹

Striking the appropriate balance between the access and justice features of any given resolution model must be done in light of the priorities set for the particular type of dispute and disputants. When considering mandatory arbitration, three critical “access to justice” concepts come into play: process, outcome and availability.⁴² Arbitration is usually considered a less formal

OSGOODE HALL L.J. 509, 510 (1996).

³⁸ Faisal Bhabha, *Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions*, 33 QUEEN’S L.J. 139, 145 (2007) (describing access to justice as having three sources—judicial, legislative and societal).

³⁹ See OCLN REPORT, *supra* note 36, at 19 (reporting that over 80% of respondents viewed courts as central to resolving civil disputes).

⁴⁰ Gerald S. Leventhal, *What Should Be Done With Equity Theory? New Approaches To The Study of Fairness in Social Relationships*, SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27-55 (Kenneth J. Gergen, Martin S. Greenberg & R.H. Willis eds., 1980).

⁴¹ Marc W. Patry & Steven M. Smith, EVALUATION OF THE NOVA SCOTIA SMALL CLAIMS COURT – FINAL REPORT TO THE NOVA SCOTIA LAW REFORM COMMISSION 15 (Jan. 23, 2011), <http://www.lawreform.ns.ca/Downloads/SmallClaimsFinaReportFINAL.pdf> (summarizing Leventhal, *supra* note 40).

⁴² Schwartz, *supra* note 16, at 1254. Schwartz’s article discusses process fairness and access as they relate to outcomes in mandatory arbitration. *Id.* at 1254-59.

process than litigation, with privacy, speed⁴³ and finality as its key characteristics; this suggests an emphasis of access over justice. Indeed, there is a justice concern that arbitration implicitly offers an advantage to employers—repeat players in arbitrations—by treating them as the “buyers in the market for private judging.”⁴⁴ Conversely, court and tribunal forums prioritize transparency, consistency, expertise and appealability, suggesting an emphasis of justice over access.

Although the “access” focus of arbitration alone may be a good fit for the typical unionized workplace dispute, the special societal and governmental interests in universal elimination of discrimination make “justice” characteristics more important to the resolution of this type of employment dispute. The public stigma arising from discrimination allegations demonstrates the powerful deterrence capabilities of a public forum and the importance of accurate and correctable outcomes. Deterrence, consistency and appealability cannot be achieved with private arbitration alone. Each forum, public and private, makes a valuable contribution to the resolution of discrimination complaints arising in the unionized workplace and, as will be discussed more fully below, both should remain available.

Resolving workplace discrimination and human rights disputes involves conflicting considerations and interests not present in the typical employment dispute. Designing a single forum to meet all of these needs and priorities is a utopian task and unionization of the workplace makes forum design and selection even more difficult. As will be discussed, Canada and the United States take different positions on a labor arbitrator’s role in the resolution of this type of dispute. Each model has its strengths and weaknesses, and both countries can benefit from examining the other’s position.

III. RESOLVING EMPLOYMENT DISCRIMINATION CLAIMS AND MANDATORY ARBITRATIONS IN THE UNITED STATES

Like its neighbor to the north, the United States has a common law legal system, and court cases, statutes, and

⁴³ See Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 580 *CARDOZO J. CONFLICT RESOL.* 579, 582 (2009). However, comparing the arbitration process to conclusion of litigation through a trial is somewhat deceptive as most cases resolve pretrial. See Schwartz, *supra* note 16, at 1313.

⁴⁴ Schwartz, *supra* note 16, at 1338.

regulations govern how parties may pursue claims arising in the employment context. In the United States, where an individual or collective bargaining agreement embraces arbitration as the dispute resolution mechanism, it is enforced through federal law. The terms of the specific agreement alone will govern the procedure used to resolve a claim under it, without any statutory intervention. These contractual terms will be interpreted in light of federal legislation, particularly the National Labor Relations Act (NLRA)⁴⁵ and the Federal Arbitration Act (FAA),⁴⁶ agency regulations and case law.

A. Legislation: The Federal Arbitration Act and the National Labor Relations Act

Courts typically invoke at least one of two statutes in addressing issues that involve statutory rights and waivers of a judicial forum under an employment agreement. The result is that in the United States, contractual arbitrations have special status. “[C]learly designed to give teeth to commercial arbitration agreements,”⁴⁷ the FAA⁴⁸ empowers parties to customize their contractual agreement to eliminate the availability of a judicial forum and it upholds their choice. However, it is the NLRA⁴⁹ that “governs federal labor-relations law”⁵⁰ and is thereby the umbrella for issues involving collective bargaining.

1. The Federal Arbitration Act

Originally enacted in 1925 as the United States Arbitration Act,⁵¹ the FAA was expressly introduced to counter judicial hostility to arbitration agreements,⁵² and to make “valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign

⁴⁵ 29 U.S.C. §§ 151-169 (2006).

⁴⁶ 9 U.S.C. §§ 1-9 (2006). *See also* Berger, *supra* note 2, at 56 n.3 (2009) (regarding state-enacted arbitration statutes providing for non-FAA governed arbitration agreements).

⁴⁷ Berger, *supra* note 2, at 60.

⁴⁸ 9 U.S.C. §§ 1-14.

⁴⁹ 29 U.S.C. §§ 151-169.

⁵⁰ 14 Penn Plaza, LLC v. Pyett, 129 S. Ct. 1456, 1463 (2009).

⁵¹ Stolt-Nielsen S. A. v. Animalfeeds Int’l Corp., 559 U. S. ____ (2010), slip op. at 17.

⁵² AT&T Mobility LLC v. Concepcion, 563 U.S. ____ (2011), slip op. at 4.

nations.”⁵³ Indeed, as the Court reiterated in *Stolt-Nielson* during its general discussion of 9 U.S.C. § 4, “[c]onsistent with these provisions, we have said on numerous occasions that the central or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’”⁵⁴ The Court has described this as indicative both of a “‘liberal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’”⁵⁵ It is this agreement to proceed by way of arbitration in lieu of litigation that empowers arbitrators to resolve the dispute.⁵⁶ It is only those issues that the parties contractually agree to submit to arbitration that must be arbitrated.⁵⁷

Unlike a judicial process, or even that provided under the NLRA, under the FAA the parties “may agree on rules under which any arbitration will proceed.”⁵⁸ As the Court itself noted in distinguishing judicial proceedings from arbitration:

The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.⁵⁹

Enforcement of arbitration agreements under the FAA

⁵³ *Stolt-Nielson*, slip op. at 17 (citing 43 Stat. 883). Section 2 of the FAA provides: “an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. See also *Stolt-Nielson*, slip op. at 18. The Court has rejected any interpretation of the FAA as exempting employment contracts not specifically enumerated in the act, that is, seamen, railroad employees, and those “actually engaged in the movement of goods in interstate commerce.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112, 119 (2001).

⁵⁴ *Stolt-Nielson*, slip op. at 18 (citing *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 58 (1995); see also *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

⁵⁵ *Concepcion*, slip. op. at 4 (internal citations omitted).

⁵⁶ *Id.* at 18 (referencing *AT&T Tech., Inc. v. Commc’ns Workers*, 475 U.S. 643, 648-49 (1986)). The Court also cited *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate . . . [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”). *Concepcion*, slip. op. at 18 (additional citations omitted).

⁵⁷ *Id.* at 19.

⁵⁸ *Id.* at 19 (citing *Volt. Info. Sciences v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

⁵⁹ *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984) (citing *Alexander v. Gardner-Denver*, 415 U.S. 36, 57-58 (1974)).

proceeds by way of petitioning a U.S. district court for an order staying any court action and directing that “arbitration proceed in the manner provided for in such agreement.”⁶⁰ A significant body of case law proclaims the supremacy of arbitration agreements.

Successfully challenging an arbitrator’s order is also a “high hurdle.”⁶¹ The circumstances under which an arbitrator’s order may be vacated are quite limited, and largely subject to arbitrator wrongdoing or acting outside the scope of arbitrator authority. This can occur if: (1) “the award was procured by corruption, fraud, or undue means”;⁶² (2) “there was evident partiality or corruption in the arbitrators, or either of them”;⁶³ (3) the arbitrators engaged in “misconduct” or “misbehavior”;⁶⁴ or (4) “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”⁶⁵ While the FAA provides for correcting an award,⁶⁶ the process is largely to address clerical issues and not to affect the merits of the outcome.⁶⁷

As the Court noted in *Stolt-Nielson*, where it reviewed an arbitrator’s decision that class actions were subject to arbitration in the instant case, “[i]t is not enough for petitioners to show that the panel committed an error—or even a serious error.”⁶⁸ Rather, “[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be

⁶⁰ *Stolt-Nielson*, slip op. at 18; 9 U.S.C. § 4. The Act also has been deemed to pre-empt state laws that may seek to restricting access to a judicial forum. See Berger, *supra* note 2, at 56 (citing *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 987 (2008); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996)). See also Berger, *supra* note 2, at 56 n.5.

⁶¹ *Stolt-Nielson*, slip op. at 7 (citing 9 U.S.C. § 10(a)(4)).

⁶² 9 U.S.C. § 10(a)(1).

⁶³ *Id.* § 10(a)(2).

⁶⁴ *Id.* § 10(a)(3).

⁶⁵ *Id.* § 10(a)(4).

⁶⁶ *Id.* § 11. This section allows a federal district court to modify or correct an award where: (a) there was “an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award”; (b) “arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted”; or (c) “[w]here the award is imperfect in matter of form not affecting the merits of the controversy . . . [t]he order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.” *Id.*

⁶⁷ See *id.* § 11(c).

⁶⁸ *Stolt-Nielson*, slip op. at 7 (evoking *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000), and *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

unenforceable.”⁶⁹

While the collective bargaining agreement can bestow arbitrators with the power to resolve a dispute, it also limits them⁷⁰ to contract interpretation and enforcement.⁷¹ An arbitrator “has no general authority to invoke public laws that conflict with the bargain between the parties,”⁷² and an arbitrator invites non-enforcement of the award if he or she goes beyond the four corners of the contract to look at statutory requirements.⁷³ Nor is policy-making within the arbitrator’s job description; rather, it is up to Congress to establish federal labor policy.⁷⁴ The Court deems enforcement of a negotiated, albeit mandatory, arbitration clause as “fully congruent with the congressional policy choice favoring arbitration over litigation as the preferred means of settling labor disputes.”⁷⁵

2. *The National Labor Relations Act*

While clearly applicable to individual employment agreements, the FAA informs,⁷⁶ but does not govern, collective bargaining agreements. The Court, however, has not directly applied the FAA’s provisions to govern collective bargaining agreements,⁷⁷ which are the focus of this Article. Rather, the

⁶⁹ *Stolt-Nielson*, slip op. at 7 (citing *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960))).

⁷⁰ *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 744 (1981) (citing *Alexander v. Gardner-Denver*, 415 U.S. 36, 53 (1974)).

⁷¹ *Stolt-Nielson*, slip op. at 7. In *Stolt-Nielson*, the Court vacated the arbitration decision because the Court concluded that, “the panel simply imposed its own conception of sound policy.” *Id.* at 11.

⁷² *Id.*

⁷³ *Barrentine*, 450 U.S. at 744.

⁷⁴ *Gregory & McNamara*, *supra* note 4, at 445 (citing *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456, 1466 (2009)).

⁷⁵ *Id.*

⁷⁶ *See, e.g., Pyett*, 129 S. Ct. at 1469 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)).

⁷⁷ *See Berger*, *supra* note 2, at 56 n.6 (“Whether the FAA applies to arbitration agreements contained in labor contracts is a question that has not been resolved by the Supreme Court. Some uncertainty on this exists among circuit court decisions. *See Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 226 (3d Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357 (7th Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996); *Rojas v. TK Commc’ns, Inc.*, 87 F.3d 745, 747 (5th Cir. 1996).”).

NLRA, and federal court decisions pursuant to it,⁷⁸ are the vehicle courts use to enforce collective bargaining agreement arbitration mandates. Unlike the FAA, however, the NLRA offers no provisions for enforcing arbitration agreements, but does establish a protocol with respect to evidence, testimony, findings of the board and review of a decision of the National Labor Relations Board (NLRB) substantively.⁷⁹

Enacted in 1935, Congress intended it “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”⁸⁰ The NLRA provides that the union selected by the majority of its members serves as the exclusive bargaining representative for the members.⁸¹

The NLRA provides for hearings by the National Labor Relations Board (NLRB or “Board”)⁸² on claims of unfair labor practices,⁸³ and provides protocol for its hearings, including following the federal rules of procedure and evidence.⁸⁴ The Act invokes the courts through its provisions allowing the NLRB to seek recourse from the courts to compel production of evidence and the attendance of witnesses,⁸⁵ and empowering the Board to

⁷⁸ See *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

⁷⁹ 29 U.S.C. § 160(c).

⁸⁰ *National Labor Relations Act*, NLRB, http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx (last visited Sept. 16, 2010). See also 29 U.S.C. § 151.

⁸¹ 29 U.S.C. § 159(a) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

⁸² *Id.* § 160(b).

⁸³ These are defined in 29 U.S.C. § 158, and pertain directly to the right to organize, such as an employer’s interfering with it ((a)(1)), discriminating against a member in relation to it ((a)(3) and (4)), and an employer’s refusal to bargain with the union representatives ((a)(5)). Similar unfair labor practices perpetrated by the union are described in § 158(b).

⁸⁴ *Id.* § 160(b).

⁸⁵ *Id.* § 161(2).

petition the courts⁸⁶ to enforce its orders and for injunctive relief.⁸⁷ Once the petition is filed, the court has jurisdiction “of the proceeding and of the question to be determined therein.”⁸⁸ The Board’s findings with respect to questions of fact are conclusive “if supported by substantial evidence on the record considered as a whole”⁸⁹ The court is authorized to issue temporary relief or a restraining order, to enforce and/or modify the order, or even to set it aside in whole or in part.⁹⁰ It can also order the Board to hear additional evidence.⁹¹

The NLRA conveys to the Board the power to act. Beyond the powers of any arbitrator under the FAA, the Board can issue a cease and desist order, and take “affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies” against unfair labor practices.⁹² Its orders also have “teeth”: it can order a post-adjudication report to show whether the subject party has complied with the NLRB’s order.⁹³

Unlike the FAA, the NLRA outlines a specific protocol for hearings. Its provisions direct record keeping and written findings. Testimony must be reduced to writing,⁹⁴ and, after the hearing, the adjudicative body must serve a proposed report and recommended order on the parties, which must also be filed with the Board; the parties have 20 days to file exceptions.⁹⁵ The Act also provides for the taking of additional evidence.⁹⁶

In accordance with 28 U.S.C. § 1254, if a district (trial) court made the determination, the court’s final order is subject to review by a federal circuit court of appeals upon writ of certification, or, if a circuit court made the decision, upon writ of certiorari to the

⁸⁶ Or a district court in the circuit if the applicable circuit courts are “in vacation.” *Id.* § 160(e).

⁸⁷ *Id.* § 160(e), (j).

⁸⁸ *Id.* § 160(e).

⁸⁹ *Id.* This is true also with respect to any further findings subject to additional evidence. *Id.*

⁹⁰ *Id.* § 160(e).

⁹¹ *Id.* This can occur upon a showing that it is “material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, its member, agent, or agency,” after which consideration the Board may modify its findings or make new ones. *Id.*

⁹² *Id.* § 160(c).

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *Id.* § 160(c).

⁹⁶ *Id.* § 160(e).

U.S. Supreme Court.⁹⁷ An individual “aggrieved by a final order of the Board” may seek judicial review as well.⁹⁸ Again, the Board’s decision will be deemed conclusive if supported by substantial evidence on the record considered as a whole.⁹⁹ The NLRA also invokes federal courts by providing that suits for a violation of the contract between a labor organization and an employer be brought in federal district court,¹⁰⁰ and that a “labor organization may sue or be sued as an entity or on behalf of the employees whom it represents” in federal court.¹⁰¹

Nothing in the NLRA itself mandates or provides protocols for arbitration of disputes arising under the contract.¹⁰² Instead, the Court has directed that the federal courts “fashion, from the policy of our national labor laws, a body of federal law for the enforcement of collective bargaining agreements.”¹⁰³ In so doing it also specifically rejected the view reflected in the Canadian system, that state law could govern such questions.¹⁰⁴ Rather, with a view toward comprehensiveness,¹⁰⁵ section 301 of the NLRA¹⁰⁶ would “require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute.”¹⁰⁷ This language, then, serves as an impetus for the development of federal law with respect to arbitration agreements in collective bargaining agreements apart from any specific statutory directive or enforcement provision.¹⁰⁸

Essentially, in the United States, the courts have used the NLRA as the backdrop through which to formulate federal policy

⁹⁷ *Id.*

⁹⁸ 29 U.S.C. § 160(f).

⁹⁹ *Id.*

¹⁰⁰ 29 U.S.C. § 185(a). There is no amount in controversy or diversity requirement. *Id.*

¹⁰¹ *Id.* § 185(b).

¹⁰² 29 U.S.C. § 171 does recognize that “conciliation, mediation, and voluntary arbitration” may be useful in reaching agreement regarding rates of pay, hours, and working conditions. *Id.* § 171(b). Title II of the Act addresses this topic, as well as national emergencies.

¹⁰³ See *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 95 (1962) (discussing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)).

¹⁰⁴ *Teamsters*, 369 U.S. at 103.

¹⁰⁵ *Id.*

¹⁰⁶ National Labor Relations Act (NLRA), c. 120, 61 Stat. 156, § 301 (1947) (codified as amended at 29 U.S.C. § 185 (2006)).

¹⁰⁷ *Teamsters*, 369 U.S. at 103.

¹⁰⁸ Berger, *supra* note 2, at 57-58. See *id.* at 57 n.10, for a discussion of Supreme Court cases addressing the enforceability of arbitration agreements arising under the Labor Management Relations Act.

with respect to arbitration agreements arising from collective bargaining agreements otherwise governed by the NLRA, but informed by the principles governing the FAA. While one can view the two systems as similar, as is “illustrated by the fact that courts often cite labor and non-labor arbitration cases interchangeably,”¹⁰⁹ there are large differences between the two. The FAA simply was not designed with addressing discrimination claims in mind, and provides no vehicle through which these types of claims can be addressed adequately, consistently, or in a manner to ensure correctness. The NLRA, although it offers a protocol designed in part to resolve unfair labor practice claims, contains no such provisions for arbitration of labor discrimination claims. The result is that the Court has used the FAA to mold labor policy and, as the next section will address, the formulation has been a bumpy, white water ride.

B. Judicial Interpretation of Employment Arbitration Agreements

Jurisprudence with respect to enforcement of contractual arbitration agreements arising in the workplace developed fairly consistently and predictably until 2009. If a private individual had agreed prospectively to waive the availability of a judicial forum, and if a dispute arose under the contract, pursuant to the FAA courts enforced the waiver as an election to proceed by arbitration. On the other hand, if the agreement to arbitrate occurred within the context of a collective bargaining agreement, the individual union member retained the opportunity to pursue a judicial forum in addition to arbitration. This landscape changed radically with the Supreme Court’s 2009 decision in *14 Penn Plaza LLC v. Pyett*.¹¹⁰ There, the Court sidestepped apparent, or at least arguable, precedent and held that a union could waive individual members’ rights to pursue a statutory claim under the Age Discrimination in Employment Act (ADEA)¹¹¹ in a judicial forum. This effectively created exclusive arbitrator jurisdiction over the dispute.¹¹² Examining the pre-*Pyett* jurisprudence informs key considerations inherent in using an arbitration model to address discrimination claims in an employment context.

¹⁰⁹ *Id.* at 57-58.

¹¹⁰ *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456, 1456 (2009).

¹¹¹ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 603 (codified at 29 U.S.C. §§ 621-634 (2006)).

¹¹² *Pyett*, 129 S. Ct. at 1474.

1. Individual Contract Forum Waivers: Gilmer v. Interstate/Johnson Lane Corporation

In *Gilmer v. Interstate/Johnson Lane Corporation*,¹¹³ the Supreme Court comfortably eliminated the availability of a judicial forum even for statutory discrimination claims when private parties so agreed in an individual employment contract. The Court recognized that an individual waiver of the ability to resort to a judicial forum effected the removal of the courts as an available forum. The Court did not view as material the distinction between the statutory claim at issue, which was an alleged violation of the Age Discrimination in Employment Act, and a claim arising under the contract itself. The Court intended its decision to settle a conflict among the circuits with respect to whether ADEA claims were arbitrable.¹¹⁴

Examining legislative intent was at the heart of the decision to assign the arbitrator exclusive jurisdiction in these situations. The Court concluded that the petitioner had failed to show that, “Congress, in enacting the ADEA, intended to preclude arbitration of claims under the Act.”¹¹⁵ The Court also considered arbitration policy when rejecting numerous concerns about arbitration that the Court had articulated in its *Gardner-Denver* decision, where the contract at issue was a collective bargaining agreement. These questions included fairness and perceived deficiencies of the arbitration process. The *Gilmer* decision reinforced limited arbitrator jurisdiction: “a labor arbitrator has authority only to resolve questions of contractual rights.”¹¹⁶

Nevertheless, the *Gilmer* decision extended the “potentially enforceable arbitration agreements to include the entire range of statutes designed to bar discrimination in the workplace.”¹¹⁷ It would become the foundation for the Court’s later position in *Pyett*, where it invoked its interpretation of the ADEA in *Gilmer* as being “fully appli[cable] in the collective-bargaining context.”¹¹⁸

¹¹³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹¹⁴ *Id.* at 24.

¹¹⁵ *Id.* at 35.

¹¹⁶ *Id.* at 34 (citing *Alexander v. Gardner-Denver* 415 U.S. 36, 53-54 (1974)).

¹¹⁷ *Berger*, *supra* note 2, at 67.

¹¹⁸ 14 Penn Plaza, LLC v. *Pyett*, 129 S. Ct. 1456, 1465 (2009).

2. *Waivers and Forum Availability in the Collective Bargaining Context*

The last forty years of Supreme Court jurisprudence reflect a transition from staunch protection of preserving a judicial forum for statutory rights, even in the collective bargaining context, to one of disregarding its import. The Court frowned upon prospective waivers of a judicial forum for statutory discrimination claims in *Alexander v. Gardner-Denver*.¹¹⁹ While distinguishing between statutory and contractual rights in *Wright v. Universal Maritime Service Corp.*,¹²⁰ the Court also left open the door to the enforceability of a clear and unmistakable waiver of this forum.¹²¹ Consequently, for decades leading up to the 2009 *Pyett* decision, both judicial and arbitration forums were available for those who claimed employment discrimination and were subject to a collective bargaining agreement. In a marked departure from the *Gardner-Denver* jurisprudence, the *Pyett* Court retained the need for “clear and unmistakable” waivers and subjugated individual statutory rights to the bargaining table.

The Supreme Court’s decision in *Alexander v. Gardner-Denver*¹²² governed the availability of a judicial forum when the collective bargaining agreement provided for arbitrating disputes arising from employment and its contract. There, the Court essentially preserved the availability of a judicial forum for individual claimants to address statutory employment discrimination claims.¹²³ The central issue before the Court in *Gardner-Denver* was, “under what circumstances, if any, an employee’s statutory right to a trial *de novo* under Title VII may be foreclosed by prior submission of his claim to final arbitration under the non-discrimination clause of a collective bargaining agreement.”¹²⁴ By so framing the question, the Court implicitly acknowledged that there existed a right to a judicial resolution, but queried whether proceeding to arbitration in fact operated as a waiver of that right. It answered its own query in the negative, and determined that a prior arbitration under a collective bargaining

¹¹⁹ 415 U.S. 36 (1974).

¹²⁰ 525 U.S. 70 (1998).

¹²¹ *Id.* at 82.

¹²² The factual scenario in *Gardner-Denver* involved a Title VII race-based claim, a collective bargaining agreement, and a preclusion issue.

¹²³ *Gardner-Denver*, 415 U.S. at 59-60.

¹²⁴ *Id.* at 38.

agreement did not preclude a trial *de novo* of Title VII claim.¹²⁵ To a certain extent evocative of the Canadian system, the Court effectively gave arbitrators concurrent and overlapping jurisdiction over such disputes. For the ensuing thirty-five years, *Gardner-Denver* arguably preserved the availability of a judicial forum in which claimants could seek redress of statutory discrimination claims, even despite waiver of that forum and an agreement to arbitrate in a collective bargaining agreement.¹²⁶

A second case was instrumental in setting the stage for *Pyett*. In *Wright v. Universal Maritime Service Corp.*,¹²⁷ the Court addressed the question of “whether a general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure” for claims under the Americans with Disabilities Act of 1990 (ADA).¹²⁸ Two contractual provisions were implicated in *Wright*. First, a general clause in the collective bargaining agreement mandated arbitration as part of the grievance process with respect to “all matters affecting wages, hours, and other terms and conditions of employment” and specifically excluded matters not covered by the agreement.¹²⁹ A separate, second clause of the contract indicated an intent “that no provision or part of this Agreement shall be violative of any Federal or State Law.”¹³⁰

The Court acknowledged the tension between the *Gilmer* progeny cases, allowing for a prospective individual waiver of a judicial forum for statutory discrimination claims, and those waivers not upheld when presented in the collective bargaining context, pursuant to the *Gardner-Denver* line of cases.¹³¹ The Court noted the presumption of arbitrability under section 301 of the NLRA: indeed, “arbitrators are in a better position than courts

¹²⁵ See *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456, 1467-1474 (2009) (distinguishing *Gardner-Denver*). See also *id.* at 1475 (Stevens, J., dissenting), and *id.* at 1476 (Souter, J., Stevens, J., Ginsburg, J., and Breyer, J. dissenting).

¹²⁶ See, e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981) (permitting a judicial forum for a Fair Labor Standards Act claim in spite of an arbitration agreement); *McDonald v. W. Branch*, 466 U.S. 284, 291 (1984) (regarding an action under 18 U.S.C. § 1983).

¹²⁷ 525 U.S. 70 (1998).

¹²⁸ *Id.* at 72 (regarding the Americans with Disabilities Act of 1990, 104 Stat. 327, 42 U.S.C. § 12101 *et seq.*).

¹²⁹ *Id.* at 73.

¹³⁰ *Id.*

¹³¹ *Id.* at 76-77.

to interpret the terms of a CBA.”¹³² This presumption fails, however, “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”¹³³ Statutory discrimination claims, the Court noted, fall squarely outside any such presumption,¹³⁴ and consequently any waiver of arbitration must be “particularly clear.”¹³⁵

The *Wright* Court set about distinguishing contract claims from statutory claims. Because the underlying issue was whether Wright, as a disabled person, was qualified to perform work as a longshoreman,¹³⁶ it involved a statutory right, not a contract right,¹³⁷ and involved interpreting the meaning of a federal statute as opposed to a contract clause.¹³⁸ In this case this distinction was particularly important: “[t]o be sure, respondents argue that Wright is not qualified for his position as the CBA requires, but even if that were true he would *still* prevail if the refusal to hire violated the ADA.”¹³⁹ Stopping short of reaching the question of whether a waiver of statutory rights would be enforceable, the Court held that the absence in the collective bargaining agreement at issue of a “clear and unmistakable waiver” of a right to a judicial forum rendered the arbitration clause unenforceable.¹⁴⁰

In 2009, the Court answered the question left open in *Wright*: is a prospective, clear and unmistakable waiver of a judicial forum for statutory discrimination claim enforceable? In the abstract, the Court in *Pyett* answered affirmatively. The Court extended the effective scope of the waiver of a judicial forum for contract claims

¹³² *Id.* at 78. See also *AT&T Tech., Inc. v. Comm’n Workers*, 475 U.S. 643, 650 (1986) (citing *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960)). The Court explained, “[t]his rationale finds support in the very text of the LMRA, which announces that ‘[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement[.]’ 29 U.S.C. § 173(d) (emphasis added).” *Wright*, 525 U.S. at 77.

¹³³ *Wright*, 525 U.S. at 78 (citing *AT&T Tech.*, 475 U.S. at 650 (quoting *Steelworkers*, 363 U.S. at 582-83)).

¹³⁴ *Wright*, 525 U.S. at 79-80.

¹³⁵ *Id.* at 79.

¹³⁶ *Id.* at 74. Wright had been certified as “permanently disabled” pursuant to a previous settlement, and although apparently performing longshore work, was deemed “not qualified” to perform it under the CBA. *Id.*

¹³⁷ *Id.* at 74-75.

¹³⁸ *Id.* at 78-79.

¹³⁹ *Id.* at 79.

¹⁴⁰ *Id.* at 82.

in a collective bargaining agreement to include statutory discrimination claims.¹⁴¹ In *Pyett*, the collective bargaining agreement prohibited discrimination for certain protected characteristics including those governed by state and federal law, including Title VII of the Civil Rights Act of 1964 and the ADEA.¹⁴² Essentially, the Court deemed that the collective bargaining agreement clause, agreeing to arbitrate statutory discrimination claims, constituted a “condition[] of employment” subject to mandatory bargaining under the NLRA.¹⁴³ It also expressly required submitting such claims to the grievance and arbitration process.¹⁴⁴ In a 5-4 decision, the Court held that, where waiver was clear and unmistakable, a mandatory arbitration clause in a collective bargaining agreement eliminated an individual union member’s ADEA right to a jury trial for statutory claims.¹⁴⁵

In so confining the reach of the *Gardner-Denver* decision,¹⁴⁶ the Court skirted and limited it to involve only the issue of preclusion.¹⁴⁷ The Court in *Pyett* also noted that where the collective bargaining agreement in *Gardner-Denver* did not expressly mandate arbitration of statute-based discrimination claims, which raised a question of election of remedies, there was no such question in *Pyett*.¹⁴⁸

C. *The Pyett Legacy: Uncertainty and Unpredictability*

In enforcing and “construing an arbitration clause, courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties,’”¹⁴⁹ with the parties’ intention

¹⁴¹ 14 Penn Plaza, LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009).

¹⁴² *Id.* at 1461.

¹⁴³ *Id.* at 1463-64.

¹⁴⁴ *Id.* at 1461.

¹⁴⁵ The Court in *Pyett* concluded that, “a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.” *Id.* at 1474.

¹⁴⁶ *Id.* at 1466.

¹⁴⁷ The Court stated that in *Gardner-Denver* it had “reversed the judgment on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims.” *Id.* at 1467.

¹⁴⁸ *Id.* at 1466-67. The *Pyett* majority deemed the *Gardner-Denver* holding narrower than respondents suggested. *Id.* at 1466. This dichotomy is reflective of the differences existing among the circuits with respect to the question presented.

¹⁴⁹ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. ____ (2010), slip op. at 18 (citing *Volt Information Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

controlling.¹⁵⁰ This expectation, until *Pyett*, was within the context of *Gardner-Denver*, and governed parties' understanding as they entered into collective bargaining agreements, as well as the interpretation of rights under collective bargaining agreements. It also set limits to the extent of any "waiver," and would have allowed seeking a judicial forum even after arbitration. Suddenly, with *Pyett*'s explosive force, the predictability of the *Gardner-Denver* context and preserving the availability of a judicial forum *in addition to* arbitration was gone.¹⁵¹ Neither employers nor bargaining units, not to mention individual members and, arguably, Congress,¹⁵² could have anticipated the law changing so markedly during the life of the contract.

Going forward, while employers and collective bargaining units presumably will adjust their approaches in light of the *Pyett* decision, its aftermath still creates more questions than it answers. The primary and overriding question is whether any given arbitration clause will operate to preclude a claimant from accessing a judicial form on a statutory discrimination claim. This implicates the issues of the collective waiver's efficacy and language, the power of the union to waive individual rights and class actions, and individual access to the grievance process. These will be uncertain waters when employers and unions are at the bargaining table.

1. Nature and Scope of Waiver

The *Pyett* decision would preclude a judicial forum only where the language in a collective bargaining agreement "clearly and unmistakably requires union members to arbitrate ADEA claims."¹⁵³ However, the Court in *Pyett* did not tackle any waiver language; it found such a waiver occurred only because the respondents had largely failed to raise the issue on appeal.¹⁵⁴ As it

¹⁵⁰ *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

¹⁵¹ While offering that the Court may have reached a correct result, two authors opined that "the political and ideological Court ran roughshod over stare decisis principles." Gregory & McNamara, *supra* note 4, at 431.

¹⁵² See *Pyett*, 129 S. Ct. at 1476 (Stevens, J., dissenting).

¹⁵³ *Id.* at 1474.

¹⁵⁴ *Id.* at 1473-74. The Court noted that having failed to raise this issue in the Second Circuit, respondents "acknowledged on appeal that the CBA provision requiring arbitration of their federal anti-discrimination claims 'is sufficiently explicit' in precluding their federal lawsuit." *Id.* at 1473.

failed to address the substance of any waiver, the Court failed to provide guidance as to what language would constitute a clear and unmistakable waiver of the judicial forum.

In *Pyett*, the language of the collective bargaining agreement specifically included claims of age discrimination,¹⁵⁵ while also enumerating Title VII and other identified statutes.¹⁵⁶ However, it also included a catchall phrase that referred to “or any other similar laws, rules, or regulations.”¹⁵⁷ As the Court to date has not distinguished this context with respect to Title VII, ADEA, and other discrimination claims, it is likely that *Pyett* will govern with respect to these statutory protections. As in *Pyett*, courts may then look to whether the statute itself safeguards a judicial forum.¹⁵⁸ Not so predictable is how courts will interpret and apply the phraseology of the collective bargaining agreement arbitration clause with respect to the efficacy and scope of any waiver. For instance, it is unclear whether the Court would view the language of the catchall reference in *Pyett* to “any other similar laws”¹⁵⁹ as “clearly and unmistakably” encompassing a waiver of a judicial forum for claiming genetic discrimination or another statutory discrimination violation.

2. Class Actions and Waivers

While this Article does not focus on class actions, two recent Supreme Court cases have shed light on the existence and enforceability of waivers and class arbitration: one in which a company *sought* to require class arbitration, and a second in which

¹⁵⁵ The collective bargaining agreement provided:

§ 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Id. at 1461.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *Pyett*, 129 S. Ct. at 1472 (looking to statutory language in the ADEA).

¹⁵⁹ *Id.* at 1461.

a company *fought* class arbitration by consumers.

In the first case, *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*,¹⁶⁰ the issue before the Court was whether an arbitration panel had exceeded its authority in determining that a contract had authorized arbitration of a class claim in lieu of pursuing a remedy in a judicial forum.¹⁶¹ The Court held that the arbitrators had exceeded “their limited powers under the FAA”¹⁶² when they concluded “that the parties’ mere silence on the issue of class-action arbitration constitute[d] consent to resolve their disputes in class proceedings.”¹⁶³

In the second case, *AT&T Mobility LLC v. Concepcion*,¹⁶⁴ consumers sought class arbitration and it was alleged that California jurisprudence would permit non-enforcement of the class arbitration waiver clause in the consumer contract. Under what was known as the *Discover Bank* rule, courts could refuse to enforce contract terms under certain conditions, such as when a contract clause was unconscionable in its formation.¹⁶⁵ This could occur in a contract of adhesion that was both procedurally and substantively unconscionable, such as a consumer adhesion contract that contained a harsh or oppressive arbitration clause, where fraud or wrongdoing was alleged, or where the individual claims involved were so small as to make it unlikely consumers would pursue and obtain meaningful remedy.¹⁶⁶ In a 5-4 decision, the Court held that the *Discover Bank* rule stood as an obstacle to the purposes of section 2 of the FAA and therefore the waiver of class arbitration stood.¹⁶⁷

Assessing the *Pyett*, *Stolt-Nielsen*, and *Concepcion* decisions together begs the next question: will the Court eliminate the availability for a judicial forum for class actions, effectively striking that vehicle for addressing common claims where the collective agreement so provides? The *Stolt-Nielsen* decision may suggest that the Court, with respect to class actions, will favor protecting the right to a judicial forum for statutory remedies where the contract language is murky. Other factors, though, may lead to a

¹⁶⁰ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. ____ (2010).

¹⁶¹ *Id.* slip op. at 1.

¹⁶² *Id.* slip op. at 23.

¹⁶³ *Id.*

¹⁶⁴ *AT&T Mobility LLC v. Concepcion*, 563 U.S. ____ (2011).

¹⁶⁵ CAL. CIV. CODE § 1670.5(a) (West 2011).

¹⁶⁶ *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108-09 (Cal. 2005).

¹⁶⁷ *Concepcion*, slip op. at 18.

different conclusion. First, in *Stolt-Nielsen*, the parties had stipulated there was no agreement on the question of mandating arbitration of class disputes.¹⁶⁸ Second, in its opinion the Court indicated that with respect to waivers of a judicial forum, it might distinguish between class and individual arbitration agreements.¹⁶⁹ The Court further noted that “the differences between bilateral and class-action arbitration are too great” for arbitrators to have presumed consent on the issue when the contract was silent in this regard.¹⁷⁰ Clearly, *Pyett* and *Stolt-Nielsen* enhance the power of the employer and bargaining unit to control or limit remedies through the language of the collective bargaining agreement, which may fly in the face of the legislative intent behind enacting discrimination laws. On the other hand, where statutory discrimination remedies were not involved, as was the case in *Concepcion*, the Court took no quarter in cutting consumers off from the ability to accumulate their claims in order to have a meaningful remedy.

3. Union Control of Claims Process

In the United States, the parties to the collective bargaining agreement, and the arbitration agreement it contains, are typically the employer and the union.¹⁷¹ In exchange for other terms, the union “foregoes both the right to strike as well as the right to litigate the contract breach in court.”¹⁷² Importantly, unlike the context of an individual contract, where singular concerns drive negotiation, here the members’ collective well-being drives the union’s bargaining position.¹⁷³ This collective interest drives decisions about pursuing claims as well. This is particularly troublesome when it is the union, and not the individual, that determines whether to take action on a claim—precisely what occurred in *Pyett*. There, because the bargaining unit had consented to the employer’s job action, which formed the basis of

¹⁶⁸ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. __ (2010).

¹⁶⁹ *Id.* slip op. at 22-23.

¹⁷⁰ *Id.* slip op at 23.

¹⁷¹ Berger, *supra* note 2, at 79.

¹⁷² *Id.* at 80.

¹⁷³ See, e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 742 (1981) (“Since a union’s objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available.”).

the claim,¹⁷⁴ it withdrew the age claims from arbitration, and only arbitrated the overtime and seniority claims, which were eventually denied.¹⁷⁵ Consequently, the ADEA discrimination claims were never arbitrated in a venue beyond an initial hearing.¹⁷⁶ Oddly, the Court in *Pyett* left for another day the question of whether union control of the claims process, which “is usually the case,”¹⁷⁷ would render a waiver of a judicial forum in a CBA unenforceable. As such, the decision is murky with respect to when lack of access to a dispute resolution forum is sufficient to skirt the arbitration requirement of a collective bargaining agreement.

4. *The Scope of Bargaining Unit’s Authority to Waive Statutory Discrimination Claims*

One check on the power of the bargaining unit to bind its members to mandatory arbitration of claims, and thereby the availability of remedies articulated in the collective bargaining agreement, derives from the members themselves and the power they grant the bargaining unit. While not an issue before the Court, the factual context of *Pyett* should raise a collective eyebrow in this regard. There, the Service Employees International Union (SEIU), Local 32BJ (Union), was the exclusive bargaining agent for the employees in New York City’s building-services industry,¹⁷⁸ including the respondents in this case, with respect to “rates of pay, wages, hours of employment, or other conditions of employment.”¹⁷⁹ It is likely that the Union’s agreement that 14 Penn Plaza could engage another union contractor (Sparta Security) would be consistent with its role as representatives of its members. However, whether its members had granted it the authority to waive statutory discrimination claims is an entirely different matter. The question then is whether statutory claims, such as those under Title VII, or the

¹⁷⁴ The union believed it would be disingenuous to pursue claims over practices to which it had agreed. *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456, 1458, 1462 (2009).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1481 (Souter, J., dissenting) (citing *McDonald v. W. Branch*, 466 U.S. 284, 291(1984)); *id.* at 1474 (majority opinion). See also Berger, *supra* note 2, at 77.

¹⁷⁸ This industry is comprised of service providers such as building cleaners, doorpersons and porters. *Pyett*, 129 S. Ct. at 1461.

¹⁷⁹ *Id.* (internal quotations omitted) (emphasis added).

ADEA, are “conditions of employment.” At the least, discrimination is not an “employment condition” along the lines of wages, hours, seniority systems, or the like.

5. *Other Challenges Ahead*

In sum, in marked contrast to the dispute resolution venues that Canada offers to discrimination and human rights claimants, the U.S. system now offers no judicial or public forum to which an individual claimant can resort if that claimant individually, or through a collective bargaining unit as a result of *Pyett*, has clearly waived the availability of a dispute resolution forum beyond arbitration. Even if recently appointed Justices Sonya Sotomayor and Elena Kagan adopted positions similar to that of their predecessors on a like question, the 5-4 split would remain the same.¹⁸⁰ Nevertheless, it would be short-sighted to view *Pyett* as the last and comprehensive word on whether mandatory arbitration clauses will preclude a claimant from availing him or herself of a judicial forum. The decision leaves a number of questions and issues unresolved. These include the language and breadth of waivers, the scope of a union’s authority to bind the bargaining unit members, overarching policy concerns, and potential Congressional action. The current case by case, or “we’ll see” approach invites uncertainty and a lack of predictability that, at best, disturbs the balance of power at the bargaining table. At worst, it deprives union claimants of the right to their day in court on discrimination claims.

¹⁸⁰ Justice Stephens joined an opinion written by Justice Powell, together with Justices Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, and Rehnquist. At least four justices, one of who had joined the unanimous opinion in *Gardner-Denver*, believed *Gardner-Denver* to be dispositive. Joined by Justices Stevens, Ginsburg, and Breyer, in a blistering dissent Justice Souter wrote:

The issue here is whether employees subject to a collective-bargaining agreement (CBA) providing for conclusive arbitration of all grievances, including claimed breaches of the Age Discrimination in Employment Act of 1967 (ADEA), lose their statutory right to bring an ADEA claim in court. Under the 35-year-old holding in [*Gardner-Denver*], they do not, and I would adhere to *stare decisis* and so hold today.

Id. at 1476-77 (citations omitted). He further offered that the Court in *Gardner-Denver* had “considered the effect of a CBA’s arbitration clause on an employee’s right to sue under Title VII.” *Id.* at 1477. As Justice Souter concluded, “[t]he majority evades the precedent of *Gardner-Denver* as long as it can simply by ignoring it . . .,” and he noted that all of the circuits examining *Gardner-Denver* after *Gilmer*, except the Fourth Circuit, agreed with this view. *Id.* at 1478-79.

IV. THE CANADIAN APPROACH TO RESOLVING EMPLOYMENT HUMAN RIGHTS CLAIMS

A. Labor Arbitrator Jurisdiction

In Canada, the constitutional right to freedom of association protects the collective bargaining process,¹⁸¹ and an array of federal and provincial statutes govern processes for different segments of the workforce. The majority of private sector workers are governed by provincial law.¹⁸² In the early twentieth century, fear of the spread of unpredictable work stoppages and strikes led Canada to adopt its first federal labor relations legislation, which limited the right to strike and imposed mandatory conciliation.¹⁸³ When this statute was held not to apply to municipal institutions, individual provinces enacted their own similar legislation.¹⁸⁴ After the Great Depression, the passage of the Wagner Act¹⁸⁵ in the United States drove the Canadian model to refine union certification and introduce U.S.-style labor relations boards to monitor and adjudicate unfair bargaining and labor practices.¹⁸⁶ In

¹⁸¹ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, paras. 19-20 (Can.); Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 2(d) (U.K.).

¹⁸² Federal public sector unionized employment is under federal jurisdiction, as are industries constitutionally assigned to federal jurisdiction, such as airlines and banks; provincial public sector unionized employees are subject to provincial legislation and the balance of private sector unionized employees are subject to separate provincial labor legislation.

¹⁸³ Andrew Sims, *Reflections on Administering Labour Law*, 12(2) CAN. LAB. & EMP. L.J. 121, 126 (2005).

¹⁸⁴ *See* Sims, *supra* note 183, at 126-27 (discussing *Toronto Electric Comm'rs v. Snider*, [1925] A.C. 396 (Can. P.C.)). Under the Canadian Constitution, federal jurisdiction applies to private sector workforces involved in national activities such as railways, airlines, banks, and shipping; municipal institutions are under provincial jurisdiction. Constitution Act, 1867, 30 & 31 Vict., c.3, §§ 91, 92 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

¹⁸⁵ Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169) (named after its sponsor, New York State Senator Robert F. Wagner, and adopted in 1935).

¹⁸⁶ Sims, *supra* note 183, at 127, 128-35 (describing Alberta and British Columbia as the first to enact and Saskatchewan's act as closest to the Wagner Act). *See also* GEORGE ADAMS, CANADIAN LABOUR LAW 1-18/ch. 1 (2d ed. 1985); Sims, *supra* note 183, at 132-33 (describing the five reasons employees go on strike and how the Wagner Model sought to address these reasons through majoritarian approach to certification). Although there are jurisdictional variations in the precise functions of the various Canadian labor relations boards, by the 1970s and '80s all had evolved into free-standing independent tribunals with similar functions to their U.S. counterparts. *See* Sims, *supra* note 183, at 130.

the middle of the twentieth century, the right to unionize was extended to public sector employees and separate legislation, both provincial and federal, was passed to regulate these workforces.¹⁸⁷ Although much of the foregoing history is similar to that of the United States,¹⁸⁸ an important and uniquely Canadian component was added to the legislation after the Second World War—statutory grievance arbitration.

B. Statutory Grievance Arbitration

Canadian federal, provincial, public, and private labor relations statutes require collective agreements to incorporate a dispute resolution process into the agreement. Final binding arbitration is identified as the process to be used for resolution of workplace disputes arising from the interpretation, application, administration or alleged violation of a collective bargaining agreement.¹⁸⁹ If the relevant collective bargaining agreement does not contain an arbitration clause or the dispute resolution clause is deficient in some way, then virtually all Canadian legislation has a statutory arbitration template that is deemed to be included in the agreement.¹⁹⁰ The need to describe the exact process in an arbitration clause is diminished because any inadequacies may be rectified by the legislation that ensures a fair and impartial arbitration process. Legislation also supplements the arbitrator's substantive authority by expanding the range of remedies and expressly granting authority to apply employment-related statutes, even if they conflict with the collective agreement.¹⁹¹ These

¹⁸⁷ See, e.g., Public Service Labour Relations Act, S.C. 2003, c. 22, § 2 (Can.); Parliamentary Employment and Staff Relations Act, R.S.C. 1985, c. 33 (2d Supp.) (Can.).

¹⁸⁸ *Supra* Part III.A.2.

¹⁸⁹ In some provinces arbitration is the only allowable dispute resolution process. See, e.g., Labour Relations Act, S.O. 1995, c. 1 A, § 48(1) (Ont.); Trade Union Act, R.S.S. 1978, c. T-17, § 25(1) (Sask.); Labour Act, R.S.P.E.I. 1988, c. L-1, § 37(1) (Can. P.E.I.). In other provinces, parties may agree to other means of resolution. See, e.g., Labour Relations Code, R.S.A. 2000, c. L-1, § 135 (Alta.). In 2008, the Alberta Court of Appeals held that “a method” did not necessarily mean arbitration and a final and binding grievance process that denied probationary employees the right to arbitration did not violate the provincial legislation. *Alberta v. A.U.P.E.*, 2008 ABCA 258, (2008) 295 D.L.R. 4th 66, para. 33-36 (Alta.).

¹⁹⁰ See, e.g., Labour Relations Act, S.O. 1995, c. 1 A § 48(2)(3) (Ont.); The Trade Union Act of Nova Scotia, R.S.N.S. 1989, c. 475, § 42(1) (N.S.); see also Canada Labour Code, R.S.C. 1985, c. L-2, § 57(2)(3).

¹⁹¹ See, e.g., Ontario Labour Relations Act, S.O. 1995 c.1 A § 48(12) (specifically empowering arbitrators to deal with employment discrimination and human rights issues).

specialized labor arbitration provisions expressly exclude the application of the more general commercial arbitration legislation.¹⁹²

Disputes arising during the life of a collective agreement are initially raised by the union on behalf of an individual employee through the grievance process created in the collective agreement. If the grievance process does not result in a satisfactory resolution, the grievance proceeds to final binding arbitration. In Canada, grievance arbitration is not only a privately negotiated choice of the parties, it is a legislative directive imposed upon all collective bargainers. The key distinction between the Canadian and U.S. systems is that Canadian labor legislation regulates arbitration and empowers arbitrators beyond the limits of the collective agreement or general arbitration legislation.

Arbitration may remain contractual if the relevant collective agreement provides for a complete process and does not violate or conflict with labor legislation provisions or other employment standards legislation. Usually a collective agreement outlines its own process, which includes selecting the arbitrator, defining jurisdiction over specific types of disputes, and describing remedies. However, the traditional labor arbitrator role as a private peacemaker confined to the consideration and interpretation of the terms of the collective agreement, has given way to a form of public adjudicator with the power to apply public and private law,¹⁹³ award common law damages¹⁹⁴ and equitable remedies,¹⁹⁵ and whose reported decisions create a body of arbitral jurisprudence.¹⁹⁶ In sum, Canadian labor arbitration is primarily viewed as a statutorily regulated process involving both private

¹⁹² See, e.g., Labour Relations Act, C.C.S.M., c. L-10, §132 (Man.); Trade Union Act, R.S.S. 1978, c. T-17, § 25(4) (Sask.).

¹⁹³ Canada Labour Code, R.S.C. 1985, c. L-2, § 60(1)(a.1).

¹⁹⁴ Adell, *supra* note 33, at 186-87 (citing *Giorno v. Pappas*, (1999), 170 D.L.R. 4th 160 (Ont. C.A.)).

¹⁹⁵ Adell, *supra* note 33, at 183 (describing *B.M.W.E. v. Canadian Pac. Ltd.*, [1996] 2 S.C.R. 495 (Can.), and the limitation on granting interim relief such as interlocutory injunctions).

¹⁹⁶ Peter A. Gall, Andrea L. Zwack and Kate Bayne, *Determining Human Rights Issues in the Unionized Workplace: The Case for Exclusive Arbitral Jurisdiction*, 12(3) CAN. LAB. & EMP. L.J. 381, 383-85 (2005); Adell, *supra* note 33, at 179-80. See also Sims, *supra* note 183, at 130 (as to importance of reported decisions and the reporting series known as Labor Arbitration Cases). These cases do not create a precedent in the purest form, but do provide persuasive influence and a body of knowledge. See Labour Act, R.S.P.E.I. 1988, c. L-1, § 37(9) (Can. P.E.I.) (requiring that a copy of an arbitral award be filed with the Ministry of Labour).

and public components.¹⁹⁷

The professed benefit of Canada's statutory grievance arbitration is that it directs the prompt, informal, and inexpensive resolution of all workplace disputes through a transparent process that offers substantial expertise in the resolution of collective agreement disputes.¹⁹⁸ The statutory structure minimizes arguments surrounding due process, fairness, and transparency.¹⁹⁹ Although the system is not perfect—cost and delay remain sources of complaint—it is described as fundamentally sound, sufficiently flexible, and extremely effective when compared with other possible forums.²⁰⁰

C. General Principle Favouring Exclusive Arbitrator Jurisdiction

In 2006, while staying a class action initiated by a union member against his employer, the Supreme Court of Canada described exclusive arbitrator jurisdiction as a “pillar” of the Canadian collective labor relations system and elaborated as follows:

This Court has considered the subject-matter jurisdiction of grievance arbitrators on several occasions, and it has clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided those conditions can be shown to have an express or implicit connection to the collective agreement.²⁰¹

In Canada, the reach of the principle favouring exclusive arbitrator jurisdiction is limited by two variables: the nature of the dispute and the possible alternative forum.

¹⁹⁷ Beth Bilson, *The Expertise of Labour Arbitrators*, 12(1) CAN. LAB. & EMP. L.J. 33, 57-58 (2005).

¹⁹⁸ *Parry Sound (Dist.) Soc. Servs. Admin. Bd. v. Ontario Pub. Serv. Emps. Union (OPSEU), Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, para. 50-51 (Can.).

¹⁹⁹ See Green, *supra* note 20, at 180-81 (making the arguments as to minimum standards of fairness in *Cole v. Burns Intl Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997)).

²⁰⁰ Sims, *supra* note 183, at 133-34.

²⁰¹ *Bisaillon v. Concordia Univ.*, 2006 SCC 19, [2006] 1 S.C.R. 666, paras. 33, 46 (Can.) (citing *Regina Police v. Regina Bd.*, 2000 SCC 14 (Can.); *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 (Can.); *Allen v. Alberta*, 2003 SCC 13, [2003] 1 S.C.R. 128 (Can.)) (emphasis added).

1. Courts

The judicial system was rejected as an alternate forum for enforcement of a collective bargaining agreement in 1986. In *St. Anne Nackawic Pulp & Paper Co. v. CPU*,²⁰² the Supreme Court examined whether an employer's damages arising from an illegal walkout by the union were recoverable in court. The Court emphatically pronounced that the statutory arbitration process was the only recourse open to parties to a collective agreement and dismissed the breach of contract action initiated in the judicial forum.²⁰³ The rationale was one of legislative intent—"it would offend the legislative scheme" to allow parties to revert to the ordinary courts "to which the legislature has not assigned [this task]."²⁰⁴ Both individual and class actions are denied access to the courts on this rationale.²⁰⁵

In *Weber v. Ontario Hydro*,²⁰⁶ the Supreme Court considered court jurisdiction over a human rights based tort allegedly committed in a unionized workplace. An employer undertook covert surveillance of the unionized employee as part of its investigation into the employee's disability claim. The Court suppressed the courts' inherent jurisdiction in favour of exclusive arbitrator jurisdiction.²⁰⁷ Once again, it was legislative intent and statutory interpretation that led Madam Justice McLachlin (as she then was) to reject overlapping or concurrent jurisdiction in favour of exclusivity for the arbitrator.²⁰⁸ Little attention was paid to the exact wording of the arbitration clause or the emerging policy in favour of arbitration in the commercial and non-unionized environments;²⁰⁹ the legislative intent behind the statutory labor

²⁰² *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 (Can.).

²⁰³ *Id.* at paras. 37-38.

²⁰⁴ *Id.* at para. 16. See also Gall et al., *supra* note 196, at 386.

²⁰⁵ See *Bisaillon*, 2006 SCC 19, [2006] 1 S.C.R., paras. 22, 64 (Can.) (finding that the procedural nature of class actions subordinate to the substantive statutory right to arbitration in the labor context).

²⁰⁶ *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (Can.).

²⁰⁷ *Id.* at para. 75.

²⁰⁸ Gall et al., *supra* note 196, at 387 (relying specifically on the statutory directive that arbitrators "render final and binding resolution").

²⁰⁹ For a discussion of expansion of arbitration in other genres, see Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1196-99 (2003) (tracing the original distinction between international and domestic arbitration law that has since been removed by the courts); see, e.g., Harvey J. Kirsh, *Arbitrating Construction Disputes*, in COMMERCIAL DISPUTE

scheme and the dispute's "express or inferential" connection to the collective agreement were the defining factors in her decision.²¹⁰

Commentators hailed *Weber* as the pre-eminent authority for exclusive arbitrator jurisdiction to the exclusion of the judicial forum, and the result was that arbitrators assumed jurisdiction over many disputes previously considered as only within a court's purview.²¹¹ In subsequent jurisdictional disputes, judges tended to start from a position that sought to preserve the exclusive jurisdiction of the arbitrator, essentially creating a presumption in favour of exclusive arbitrator jurisdiction.²¹² Some labor legislation now includes an exclusivity clause specifically ousting court jurisdiction.²¹³

A few cautionary points should be made so as not to overstate the strength of the exclusivity principle. First, judges have used the factual nature or essential character of the dispute to retain jurisdiction over it. For example, a dispute over a pre-employment contract was held not to involve the collective agreement that governed the subsequent employment relationship and so the court maintained jurisdiction.²¹⁴ Courts have given very little guidance on what "essential character of the dispute" means or when a dispute arises "inferentially" from the collective agreement. The precise language of the collective agreement is relevant here, but subject matter interpretations and variations in the wording of the agreements make results difficult to reconcile.²¹⁵

RESOLUTION: ALTERNATIVES TO LITIGATION 175-202 (D. Paul Edmond ed., 1989).

²¹⁰ *Weber*, [1995] 2 S.C.R. 929, at paras. 71-75.

²¹¹ Gall et al., *supra* note 196, at 387-88 (listing benefit entitlement and negligence misrepresentation, among others); Adell, *supra* note 33, at 181; Andrew K. Lokan & Maryth Yachnin, *From Weber to Parry Sound: The Expanded Scope of Arbitration*, 11 CAN. LAB. & EMP. L.J. 1, 3 (2004).

²¹² *Amalgamated Transit Union, Local 583 v. Calgary*, 2007 ABCA 121, (2007) 281 D.L.R. 4th 222, paras. 22, 28-30 (Can. Alta.).

²¹³ Canada Labour Code, R.S.C. 1985, c. L-2, § 58(2): "No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of their proceedings under this Part."

²¹⁴ *Goudie v. Ottawa*, 2003 SCC 14, [2003] 1 S.C.R. 141, para. 24 (Can.); *but see Allen v. Alberta*, 2001 ABCA 171, (2001) 286 AR 132, (Can. Alta.) (opposite result relating to letter of intent).

²¹⁵ Sims, *supra* note 183, at 134; Lokan, *supra* note 211, at 6-9 (contrasting *Goudie* and *Allen*). See, e.g., *Piko v. Hudson's Bay Co.*, (1998), 167 D.L.R. 4th 479 (Can. Ont.) (malicious prosecution tort action allowed to proceed in court because it involved criminal fraud charges laid by the employer; since the employer took proceedings outside the

Second, although the exclusivity principle may restrict a court's initial jurisdiction, a judicial forum may still play a role through the administrative law process of judicial review.²¹⁶ In a judicial review, deference is usually given to the arbitrator's decision by overturning only *patently unreasonable*²¹⁷ results.²¹⁸ However, a much higher standard of *correctness* has been applied when reviewing awards that involve general legal principles not considered part of the arbitrator's core area of expertise, *i.e.*, the collective agreement or labor legislation.²¹⁹ Disputes that only inferentially arise from the collective agreement, jurisdictional rulings, or decisions involving legislation of general application, such as human rights legislation, may attract the higher standard of review.²²⁰

2. Other Administrative Tribunals

Most importantly for the purposes of this Article, the presumption in favor of arbitrator exclusivity does not extend beyond the judicial forum. When the alternate forum is not a court, but rather another administrative tribunal also established under its own legislative scheme, there is no preference afforded to

collective agreement process so too could the employee); but see an opposite holding by an arbitrator in *Zehrs Markets Inc. v. United Food & Commercial Workers Int'l Union, Locals 175 & 633*, (2000) 92 L.A.C. 4th 98 (Can. Ont.). See also Adell, *supra* note 33, at 188 (discussing defamation action allowed to proceed in court, *Fording Coal Ltd. v. United Steel Workers of Am., Local 7884* (1999), 169 D.L.R. 4th 468 (Can. B.C.)).

²¹⁶ Some labor legislation purports to block even judicial review. See, e.g., Canada Labour Code, R.S.C. 1985, c. L-2, § 58; Labour Relations Code, R.S.B.C. 1996, c. 244, § 102 (Can. B.C.).

²¹⁷ *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, para. 47 (Can.) (defining the deferential standard of reasonableness afforded to arbitrators).

²¹⁸ *Id.* at paras. 59, 62-64; see also *Bd. of Educ. for the City of Toronto v. Ontario Secondary Sch. Teachers' Fed'n, Dist. 15*, [1997] 1 S.C.R. 487, paras. 35-37 (Can.); Tabbakh, *supra* note 32 (describing the deference afforded specifically in human rights arbitrations). The Canadian position is different from stringent requirements in U.S. law governing overturning an arbitration decision.

²¹⁹ Bilson, *supra* note 197, at 42-45.

²²⁰ *Id.* at 35-36, 42-44, 48-49, 61; *Amalgamated Transit Union, Local 583 v. Calgary*, 2007 ABCA, (2007) 281 D.L.R. 4th, para. 20 (applying the correctness standard to the arbitration board's jurisdictional ruling). See also *Calgary Health Region v. Alta. (Human Rights & Citizenship Comm'n)*, 2007 ABCA 120, (2007) 404 A.R. 201, paras. 17-22 (Can. Alta.); *Parry Sound (Dist.) Soc. Servs. Admin. Bd. v. Ontario Pub. Serv. Emps. Union (OPSEU), Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, paras. 21-22 (Can.); but see for contrasting view of standard of review of decisions involving human rights legislation: Bilson, *supra* note 197, at 60; Lokan, *supra* note 211, at 24; Tabbakh, *supra* note 32, at 282-84.

arbitration.²²¹ The legislative intent behind each scheme must be individually considered to determine what type of jurisdiction the legislature intended: exclusive, overlapping, or concurrent, and where the essential character of the dispute fits. In theory, results will vary.

In *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*²²² the union grieved the termination of a police officer facing disciplinary charges under the Police Act, and the arbitrator held that she lacked jurisdiction to determine the grievance. The Supreme Court agreed that the Saskatchewan Police Commission, created under the 1990 Police Act, was exclusively empowered to deal with a police officer's discipline and it superseded all jurisdiction of a grievance arbitrator.²²³ When competing statutory tribunals are involved, legislative intent will determine the extent and priority of jurisdiction and the essential character of the dispute will determine the better fit.²²⁴

Many employment-related statutes create specialized administrative tribunals to enforce standards and promote compliance.²²⁵ Therefore, there may be multiple tribunals, in addition to an arbitrator, claiming jurisdiction over any given workplace dispute. As a result, the determination of arbitrator jurisdiction involves a complicated case-by-case assessment of the legislative intents behind the particular pieces of legislation involved.²²⁶ The various combinations may yield differing results. However, few jurisdictional questions remain as contentious as a grievance arbitrator's jurisdiction over human rights complaints arising in the unionized workplace. As will be discussed below, most Canadian human rights legislation designates administrative human rights tribunals, not courts, to deal with statutory claims.

²²¹ *Amalgamated Transit*, 2007 ABCA 121, paras. 21-23.

²²² 2000 SCC 14, [2000] 1 S.C.R. 360.

²²³ *Id.* paras. 23, 34 (Can.). See discussion Lokan, *supra* note 211, at 18; see also *Quebec (Att'y Gen.) v. Quebec (Human Rights Tribunal) (Charette)*, 2004 SCC 40, [2004] 2 S.C.R. 223, (Can.) (preferring the Commission des affaires sociales over the human rights tribunal).

²²⁴ *Quebec (Comm'n des droit de la personne et des droits de la jeunesse) v. Quebec (Att'y Gen.) (Morin)*, 2004 SCC 39, [2004] 2 S.C.R. 185, para. 11 (Can. Que.).

²²⁵ See, e.g., *Employment Insurance Board of Referees*, SERVICE CANADA, <http://www.ei.gc.ca/eng/board/home.shtml> (last visited Sept. 17, 2011); WORKPLACE SAFETY AND INSURANCE BOARD, <http://www.wsib.on.ca/splash.html> (last visited Sept. 17, 2011).

²²⁶ Lokan, *supra* note 211, at 19.

D. Human Rights Claims and Statutory Grievance Arbitration

Weber's factual scenario involved a human rights issue arising from covert surveillance by the employer. The complaint was advanced before the courts as a tort action for trespass and as a breach of the Charter of Rights and Freedoms.²²⁷ As noted above, the Supreme Court endorsed exclusive arbitrator jurisdiction over the dispute and in so doing authorized the arbitrator to deal with Charter claims. However, *Weber* did not completely resolve the human rights jurisdiction question because the source of the claim was the Charter and the alternate forum was a court—most Canadian employment human rights complaints are not Charter claims, as it controls only government behavior.²²⁸ The private sector is governed by separate federal and provincial human rights (and labor) legislation that create statutory remedies and, unlike in the United States, specialized human rights tribunals²²⁹ to investigate, prosecute and *adjudicate* private sector claims. Employment related discrimination claims comprise the majority of the tribunals' work²³⁰ and it is not uncommon for employees to

²²⁷ Government treatment of the public, including its employees, is governed by the Charter of Rights and Freedoms—a schedule appended to the Canadian constitution in 1982. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

²²⁸ See Gall et al., *supra* note 196, at 388, 391-92; Cadillac Fairview Corp. v. Saskatchewan (Human Rights Comm.), (1999) 173 D.L.R. 4th 609, para. 11 (Sask. C. A.) (holding *Weber* did not oust human rights tribunal); see also British Columbia v. Tozer [1998] 60 B.C.L.R. 3d 160, 175 (Can. B.C.); Regina Police Assn. Inc. v. Regina Bd. of Police Comm'rs, 2000 SCC 14, [2000] 1 S.C.R. 360 (Can.) (holding other tribunal had exclusive jurisdiction, (although not in the human rights context) and nothing in *Weber* should be taken as undermining the jurisdiction of tribunals established for the purpose of enforcing a particular statute).

²²⁹ See, e.g., Human Rights Code, R.S.O. 1990, c. H.19, §32 (Can. Ont.); Human Rights Code, R.S.B.C. 1996, c. 210 (Can. B.C.); see also Sims, *supra* note 183, at 138 (suggesting expertise was not the only rationale for the development of tribunals; it was the view that courts were too conservative to be the forum for social change). Most systems have a commission charged with administration of the act and a separate tribunal that adjudicates the claims. Models vary between controlled access where the commission decides which claims will proceed (Alberta) and direct access where complainants file claims directly with the tribunal (Ontario). See *supra* note 14. Sometimes human rights responsibility is also contained in other employment related statutes. See, e.g., Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), S.O. 2009, c. 23 (Can. Ont.) (expanding hostile workplace to include situations beyond those articulated in Ontario Human Rights Code; Ontario Ministry of Labor assigned investigative and order making powers – resulting in a possible third forum). See *Charette*, 2004 SCC 40, [2004] 2 S.C.R. 223 (holding that human rights jurisdiction may overlap with multiple tribunal systems).

²³⁰ In Ontario, the percentage of total claims that related to employment was over 63%

initiate both a grievance and a tribunal complaint.²³¹ As a result, a human rights jurisdictional tug of war exists between the various legislative regimes, each with public policy goals, specialized expertise and distinct dispute resolution processes.

1. Revisiting Weber

In *Parry Sound v. OPSEU*,²³² the Supreme Court was asked whether an arbitrator had jurisdiction to apply human rights law in a grievance over the termination of a probationary employee during a maternity leave after the arbitrator declined to do so. The majority held that the arbitrator had not only the power but also the responsibility to implement and enforce the substantive obligations of human rights legislation.²³³ This furthered the public policy goals of both the labor and human rights legislative schemes—final resolution of workplace disputes and broadening the reach of human rights standards.²³⁴ However, confusion arose from the Court's statement that the substantive rights and obligations of human rights legislation were deemed to be incorporated into every collective agreement and would override any conflicting terms.²³⁵ Did this inclusion into the collective

in 2008/2009 and over 70% in 2007/2008. ONTARIO HUMAN RIGHTS COMMISSION ANNUAL REPORT 2007/2008, *Case Data Tables*, available at <http://www.ohrc.on.ca/en/resources/annualreports/ar0708>; ONTARIO HUMAN RIGHTS COMMISSION ANNUAL REPORT 2008/2009, *Case Data Tables*, available at <http://www.ohrc.on.ca/en/resources/annualreports/ar0809>. See also *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009: Hearing on Bill 168 Before the S. Comm. on Social Policy*, Leg. 39, Sess. 1 (Can. Ont. 2009) (statement of Jeff Poirier, Senior Policy Analyst, Ont. Human Rights Comm'n), available at http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=2009-1117&ParlCommID=8875&BillID=2181&Business=&DocumentID=24517.

²³¹ Gall et al., *supra* note 196, at 390; *Calgary Health Region v. Alberta (Human Rights & Citizenship Comm'n)*, 2007 ABCA 120, para. 6. (Can. Alta.).

²³² *Parry Sound (Dist.) Soc. Servs. Admin. Bd. v. Ontario Pub. Serv. Emps. Union (OPSEU)*, Local 324, 2003 SCC 42, [2003] 2 S.C.R. 157 (Can.). Since as far back as 1975, arbitrators have been required to consider employment related statutes when adjudicating grievances, *Macleod v. Egan*, 1974 SCC 12, [1975] S.C.R. 517 (Can.); some labor legislation codifies the obligation to consider human rights legislation as means of confirming jurisdiction over such disputes, see, e.g., *Ontario Labour Relations Act*, S.O. 1995, c. 1 A, §§ 48(12)(j), 54; *Payne & Rootham*, *supra* note 36, at 76 n.27 and accompanying text.

²³³ *Parry Sound*, 2003 SCC 42, paras. 15, 40 (Can.).

²³⁴ *Id.* at paras. 50-52.

²³⁵ *Id.* at para. 15. It is common for parties to accept that human rights legislation overrides the terms of a collective agreement. *Adell*, *supra* note 33, at 190 (citing *United Steel Workers of Am., Local 7884 v. Fording Coal, Ltd.*, (1999) 179 D.L.R. 4th 284, 289

agreement invoke *Weber* and give the arbitrator exclusive jurisdiction over human rights issues to the exclusion of the human rights tribunal? Were the two regimes on a “collision course?”²³⁶ The court saved that question for another day.²³⁷

That day came in 2004 when the Supreme Court considered *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*—otherwise known as the *Morin* case.²³⁸ In *Morin*, the collective agreement’s seniority credit scheme was alleged to discriminate against younger teachers. The question was whether the Quebec human rights tribunal or the labor arbitrator had jurisdiction. The Court took the opportunity to re-explain *Weber* in the context of competing statutory regimes:

Weber does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction or themselves be endowed with exclusive jurisdiction.²³⁹

Human rights jurisdiction between competing tribunals would be determined through the above described two step process: a determination of the legislative intent as to jurisdiction behind each legislative scheme, and an assessment of the best fit given the nature of the dispute.²⁴⁰ In the context of the relevant Quebec legislation, the Court held that the grievance arbitrator and the human rights tribunal had concurrent jurisdiction, and this dispute best fit within the human rights regime.²⁴¹

(Can. B.C.).

²³⁶ Lokan, *supra* note 211, at 19.

²³⁷ *Parry Sound*, 2003 SCC 42, at para. 15.

²³⁸ *Morin*, 2004 SCC 39, [2004] 2 S.C.R. 185 (Can.).

²³⁹ *Id.* para. 11. The express rejection of arbitral exclusivity as the holding ratio of *Weber* is reiterated in *Amalgamated Transit Union, Local 583 v. Calgary*, 2007 ABCA, (2007) 281 D.L.R. 4th, para. 39, and in *Calgary Health Region v. Alberta (Human Rights & Citizenship Comm’n)*, 2007 ABCA 120, para. 25 (Can. Alta.).

²⁴⁰ *Morin*, 2004 SCC 29, para. 15. See also *Calgary Health*, 2007 ABCA at paras. 25-30; Gall et al., *supra* note 196, at 388.

²⁴¹ *Morin*, 2004 SCC 39, paras. 19-30. But see *id.* at paras. 58-65 (Bastarache, J., dissenting) (suggesting that second part of test prone to manipulation as shown by an artificial distinction drawn by the majority between dispute under the collective agreement or negotiation prior of agreement in order to put the dispute within human rights rather than labor jurisdiction); Sims, *supra* note 183, at 140 (suggesting that the second step makes no logical sense).

2. Concurrent Jurisdiction

Although cases go other ways²⁴² when considering the labor and human rights regimes, the typical result of the legislative intent analysis is a finding of concurrent jurisdiction.²⁴³ The fundamental quasi-constitutional nature of human rights legislation demands that it be given an expansive meaning and afforded accessible application.²⁴⁴ Concurrence with arbitration furthers the policy goals of the human rights legislation by offering wide access to relief in multiple forums.²⁴⁵ Suggestions that concurrency stems from judicial realism relating to weaknesses in the tribunal system²⁴⁶ and the volume of disputes that must be processed have been denied by the courts, asserting that the determination is made based only upon assessment of legislative intent.²⁴⁷ Arguments that the expertise of the human rights regime justifies exclusive jurisdiction to its tribunal have been countered by the argument that labor arbitrators offer greater expertise in the nuances of the union-management relationship.²⁴⁸

²⁴² See, e.g., *Canada v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, para. 99 (Can.) (finding that the grievance arbitrator appointed under the Parliamentary Employment and Staff Relations Act had exclusive jurisdiction over a parliamentary employee's employment discrimination and harassment complaint involving a question of privilege even though the employment was also subject to the Canada Human Rights Code).

²⁴³ See, e.g., *Belanger v. Correctional Servs. Canada* No. T1419.4509, 2009 CHRT 36, paras. 16-18 (Can.) (applying *Morin* to assign Canadian Human Rights Tribunal jurisdiction); *Nova Scotia (Human Rights Comm'n) v. Halifax (Reg'l Municipality)*, 2008 NSCA 21, (2008) 290 D.L.R. 4th 577, paras. 43-47, 78 (Can. N.S.) (finding concurrent jurisdiction and refusing to put hostile workplace dispute into arbitration process). See *infra* notes 237-238.

²⁴⁴ *Tranchemontagne v. Ontario (Dir. Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, para. 33 (Can.) (holding that the quasi-constitutional nature of the Ontario Human Rights Code required that it be given not only an expansive meaning but also accessible application); *Amalgamated Transit*, 2007 ABCA, para. 44; *Halifax*, 2008 NSCA, paras. 63-70. See also *Canada (Human Rights Comm'n) v. Canadian Airlines Int'l, Ltd.*, 2006 SCC 1, [2006] 1 S.C.R. 3, para. 15 (Can.) (cautioning against narrow interpretations of human rights laws while considering pay equity legislation).

²⁴⁵ *Tranchemontagne*, 2006 SCC 14, paras. 13, 22, 33, 39 (extending the policy in favour of concurrent jurisdiction so far as to make every tribunal with the authority to hear questions of law a forum for human rights claims).

²⁴⁶ General complaints relate to speed and failure to process the majority of claims. See *Payne & Rootham*, *supra* note 36, at 220-26.

²⁴⁷ *Id.* at 16; *Amalgamated Transit*, 2007 ABCA, para. 69; *Tsun*, *supra* note 6, at 126-27; *Tranchemontagne*, 2006 SCC 14, para. 12.

²⁴⁸ *Parry Sound (Dist.) Soc. Servs. Admin. Bd. v. Ontario Pub. Serv. Emps. Union (OPSEU), Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, paras. 53-54 (Can. Ont.). For a general discussion of the relevance of and extent of deference to arbitrator expertise, see *Bilson*, *supra* note 197.

Canadian Courts recognize that the major drawback of grievance arbitrator exclusivity is restricted access to human rights relief, leaving some wrongs without a remedy and turning the union into the new gatekeepers of human rights law enforcement.²⁴⁹ Access to the grievance process is controlled by the union and not the individual employee, so only those grievances deemed worthy by the union are advanced. The union has a duty to represent all its members so it might refuse a grievance critical of the conduct of other union members or the union itself.²⁵⁰ Concurrent jurisdiction ensures access to the human rights tribunal in such circumstances.²⁵¹ Restricted access to human rights relief could not have been the legislative intent and therefore, absent clear unequivocal language, adjudicators tend to give the quasi-constitutional human rights regime concurrent jurisdiction with that of the labor arbitrator.²⁵²

E. The Challenges of “Legislative Intent” and Concurrent Jurisdiction

The obvious attraction of the concurrent model is the wide availability of human rights dispute resolution while still respecting the policy goals and legislative intent of the labor regime; it adds justice characteristics of transparency, consistency and correctability to the existing access benefits of speed and finality. However, it presents some challenges. The major challenges presented by concurrency involve certainty, consistency, and

²⁴⁹ *Morin*, 2004 SCC 39, [2004] 2 S.C.R. 185, para. 28 (Can.) (citing *Ford Motor Co. of Canada, Ltd. v. Ontario (Human Rights Comm’n)*, (2001) 209 D.L.R. 4th 465 (Can. Ont.); *Amalgamated Transit*, 2007 ABCA, paras. 65-68. *See also* Adell, *supra* note 33, at 223-28. *But see* Gall et al., *supra* note 196, at 394-402 (arguing contrasting view critical of concurrency and advocating in favour of exclusive jurisdiction for arbitrators).

²⁵⁰ *Parry Sound*, [2003] SCC 42, para. 53; Adell, *supra* note 33, at 223-28.

²⁵¹ *Amalgamated Transit*, 2007 ABCA, para. 65 (finding that when a matter is not grieved by union it goes to human rights tribunal).

²⁵² *Morin*, 2004 SCC 39, paras. 19-24; *Amalgamated Transit*, 2007 ABCA, paras. 57, 61; *Calgary Health Region v. Alberta (Human Rights Comm’n)*, 2007 ABCA 120, [2007] A.R. 201, paras. 34, 39 (Can. Alta.); *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Comm’n)*, (1999) 173 D.L.R. 4th 609, para. 29 (Can. Sask.); *Nova Scotia (Human Rights Comm’n) v. Halifax (Reg’l Municipality)*, 2008 NSCA 21, (2008) 290 D.L.R. 4th 577, paras. 70, 73 (Can. N.S.); *Tranchemontagne v. Ontario (Dir. Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, paras. 72, 93-94 (Can.). *See* Sonia R. Luciw, *Parry Sound and its Successors in the Supreme Court of Canada: Implications for the Scope of Arbitral Authority*, 11(2) CAN. LAB. & EMP. L.J. 365, 380 (2005).

multiplicity.²⁵³

1. Certainty and Consistency

If a complainant asks where to advance a claim, the answer will be “it depends.” Not surprisingly, given the multitude of federal and provincial labor and human rights statutes, the assessment of legislative intent varies and will change over time. Consider the Province of Ontario for example. When first enacted, the Ontario Human Rights Code contained an express exclusivity clause in favour of the human rights tribunal.²⁵⁴ Subsequent revisions replaced this clause with a deference clause,²⁵⁵ giving the tribunal discretion to defer to the jurisdiction of another forum (i.e., other tribunals, courts or arbitration). This type of clause is usually viewed as more consistent with concurrent jurisdiction than exclusivity.²⁵⁶ Critics alleged that the Commission deferred too often as a means of reducing its backlog.²⁵⁷ Therefore, in the most recent overhaul, the Commission’s gatekeeper role of receiving, screening and processing complaints has been entirely removed and complainants file directly with the adjudicative branch of the tribunal.²⁵⁸ The tribunal has authority to summarily dismiss an

²⁵³ Gall et al., *supra* note 196, at 394-402.

²⁵⁴ Human Rights Code, R.S.O. 1970, c. 318 § 14(b)(6) (Can. Ont.). See *Seneca Coll. of Applied Arts & Tech. v. Bhaduria*, [1981] 2 S.C.R. 181, 194-95 (Can.) (upholding exclusive jurisdiction of tribunal in denial of an actionable tort); *Payne & Rootham*, *supra* note 36, at 3-4.

²⁵⁵ Human Rights Code, R.S.O. 1990, c. H.19, § 34(1) (Can. Ont.) (deference clause in effect from 1981 to 2008); see *Morin*, 2004 SCC 39, [2004] 2 S.C.R. 185, para. 19 (presence of a deference clause in the HRC legislation showed a non-exclusive intention).

²⁵⁶ See *Tranchemontagne*, 2006 SCC 14, para. 43 (finding that without a deference clause, a statutory tribunal cannot decline to do its job); *Amalgamated Transit*, 2007 ABCA, para. 13; *Naraine v. Ford Motor Co. of Canada* (2002), 209 D.L.R. 4th 465, para. 59-62 (Can. Ont.) (amendments to labor and human rights legislation represented shift to concurrency).

²⁵⁷ *Payne & Rootham*, *supra* note 36, at 6-8, 16-28; *Tsun*, *supra* note 6, 122-24; *Adell*, *supra* note 33, at 193. See *Thomas v. Ontario (Human Rights Comm’n)*, [2001] 151 O.A.C. 188, 2001 CanLII 5844, paras. 21-23, 28 (Can. Ont.) (concluding that the Ontario Commission’s decision not to act was unsupportable and must proceed despite a concluded grievance).

²⁵⁸ *Tsun*, *supra* note 6, at 125, 130-31. The only bar to such an application is if a court proceeding has been commenced (explain limited expansion of court jurisdiction if part of a separate cause of action). Loss of the gatekeeper meant complainants pay to process their own claims so the new model includes a Legal Support Centre that will help fund complainants only. *Id.* at 129. British Columbia also has a direct access model. See Human Rights Code, R.S.B.C. 1996, c. 210, §§ 21-38 (Can. B.C.).

application *only* if “another proceeding *has (note the past tense) appropriately* dealt with the substance” of the matter.²⁵⁹ The discretion to defer to an ongoing parallel proceeding is reduced and the decision to defer rests on the substance of the complaint. Practically speaking, the Ontario tribunal routinely defers to arbitration proceedings that are already underway, however, the tribunal application may be continued after the conclusion of the grievance.²⁶⁰ New unfettered access, limited power to dismiss, and reduced discretion to defer may reflect a change in Ontario’s legislative intent on jurisdiction. Naturally, revisions of legislation will trigger the need for new assessments of legislative intent.

Recent changes to Alberta’s statute demonstrate the jurisdictional variation in legislative intent among the provinces. In 2009, the Alberta Human Rights Act was amended to add a deference clause empowering the director to refuse a complaint where there is “another [more appropriate] forum”; in contrast to Ontario, this change actually expands the gatekeeper role and may restrict access.²⁶¹ The director may defer to any ongoing parallel proceeding or even to a forum where a proceeding has yet to be initiated. The focus is on the appropriateness of the forum not the substance of the dispute. This amendment may change the assessment of legislative intent made by the Alberta Court of Appeal in *Amalgamated Transit*.²⁶² In this case, the employer asked the arbitration panel to assume exclusive jurisdiction over both the wrongful termination grievance and the human rights complaint filed with the Alberta tribunal. The panel held that it had exclusive jurisdiction over the dispute. The Court of Appeals disagreed; in holding that the human rights tribunal retained concurrent jurisdiction even after arbitration of the dispute, it drew an inference from the lack of deference clause, saying this

²⁵⁹ Human Rights Code, R.S.O.1990, c. H.19, §§ 34(11), 45.1, 46.1 (Can. Ont.) (emphasis added). The role of the courts has been expanded, but legislation falls short of creating a stand-alone civil action. *Id.* § 46(2).

²⁶⁰ *See, e.g.*, *Clyne v. Ford Motor Co. of Canada*, 2009 HRTO 821 (Can. Ont.); *Brown v. Loblaw Cos. Ltd.*, 2009 HRTO 456, paras. 6, 9 (Can. Ont.) (relying on *Parry Sound* for appropriateness of arbitration forum and setting a 60-day deadline following completion of the arbitration to proceed with the tribunal application); *Spence v. Inista (Co.) Canada*, 2011 HRTO 2, paras. 5, 8 (Can. Ont.); *Bangura v. Ontario (Minister of Community and Social Services)* 2011 HRTO 23, paras. 4, 9-10 (Can. Ont.).

²⁶¹ Human Rights Act, R.S.A. 2000, c. A-25.5, § 22(1.1) (Can.).

²⁶² *Amalgamated Transit Union, Local 583 v. Calgary*, 2007 ABCA 121, (2007) 281 D.L.R. 4th 222 (Can. Alta.).

obligated the tribunal to hear the claim.²⁶³ Clearly the relative positions on legislative intent will be quite fluid and in a state of perpetual change.

Once concurrent jurisdiction is assigned, the final forum selection comes down to the assessment of the essential character of the specific dispute and where it fits best. This is a highly subjective component that has been criticized as artificial and illogical and which can be manipulated to justify any desired result.²⁶⁴ Language such as “but for,” “nexus,” “hook” and “landing pad” have been used to connect the dispute to the collective agreement and therefore the labor arbitration forum.²⁶⁵ The human rights tribunal is argued as a better fit when a modification of the collective agreement or a systemic remedy is sought or when the union is the respondent.²⁶⁶ These variables contribute to a lack of certainty about where to commence a human rights dispute and may contribute to the adoption of the safest possible course of action—advance the claim in both forums. Both forums have limitation periods and it may be too late to initiate the claim in the alternate forum after the first forum declines jurisdiction.²⁶⁷

2. Multiplicity

Inconsistent interpretations of the “essential character of the dispute,” “better fit” or “more appropriate forum” by the tribunal gatekeeper or the arbitrator could result in duplicity of proceedings or no forum at all. If each forum were to determine that the other is more appropriate, the claimants could be left with no recourse at all. The current Ontario practice of deferring to an ongoing arbitration, while still allowing the applicant to proceed

²⁶³ *Calgary Health*, 2007 ABCA 120, para. 34; see also *Amalgamated Transit*, 2007 ABCA 121, paras. 60-61. Similar amendments in British Columbia empower any tribunal to defer. See *Administrative Tribunals Act*, S.B.C. 2004, c. 45, §§ 46.1-46.3 (B.C.).

²⁶⁴ *Sims*, *supra* note 183, at 134; see also *Morin*, 2004 SCC 39, [2004] 2 S.C.R. 185, paras. 55-71 (Bastarache, J., dissenting) (suggesting majority’s reasoning is illogical).

²⁶⁵ *Adell*, *supra* note 33, at 184, 196.

²⁶⁶ *Belanger v. Correctional Servs. Canada* No. T1419.4509, 2009 CHRT 36, para. 19 (Can.).

²⁶⁷ See e.g., *Saskatoon (City) v. Amalgamated Transit Union*, (2010) 194 L.A.C. 4th 28 (Can. Sask.) (employer arguing that the claim was within the exclusive jurisdiction of the Workers’ Compensation Tribunal and was not advanced during the limitation period; Union arguing it fell within the arbitration protocol of the collective agreement).

with the application after the arbitration is completed,²⁶⁸ generates multiple consecutive proceedings. If the human rights tribunal does not believe arbitration has *appropriately* dealt with the substance of the matter it may still proceed even after a concluded grievance arbitration.²⁶⁹

Rather than risk no forum at all, some courts have decided that the better course of action is to allow parallel proceedings to continue in both forums and let the common law principles of *res judicata* and issue estoppel sort out any resulting overlap.²⁷⁰ In this way it would be a race to the swiftest (probably arbitration) jurisdiction; the first forum to render a decision would bind the latter on overlapping issues. Problems with this approach include possible inconsistent characterizations of the issue by the latter forum, forum shopping by disputants, differing reach of decisions from each forum and the different parties to the proceeding.

In grievance arbitration, the union is the party and the award binds all members of the union, not just the complainant. This is not true in the human rights regime. There the applicant may be either the complainant, or the commission itself, and the result initially binds only the parties to the proceeding, not the union or its members. If the human rights tribunal decides the matter first, the decision may initially have a far narrower application than an arbitration award and yet *res judicata* and issue estoppel would prevent the arbitrator from re-deciding the same issue. Separate proceedings will be needed for other affected employees and outcomes could vary. Over the long term however, a tribunal decision could be of greater importance. In the Canadian common law legal system, the tribunal decision will form a more valuable precedent than a labor arbitration grievance award and thereby ultimately have a broader impact. Obviously, allowing parallel matters to proceed without any limitation risks inconsistent findings and irreconcilable remedies. Existing Canadian

²⁶⁸ *Brown*, 2009 HRTO 456, para. 9 (Can. Ont.).

²⁶⁹ *Marc v. Fletcher Challenge Canada Ltd.*, [1996] B.C.C.H.R.D. No. 24 (QL) (B.C. H.R.T.). For discussion of proceeding in both forums, see Gall et al., *supra* note 196, at 396; *Halifax*, 2008 NSCA 21, paras. 75-77 (Can. N.S.).

²⁷⁰ *Calgary Health*, 2007 ABCA, at paras. 6, 12, 37 (Can. Alta.) (once a finding of concurrency is made, both matters should proceed; first forum to make the decision will bind the latter); *Adell*, *supra* note 33, at 226 (due to speed of arbitration this may put the arbitrator in de facto control); *Amalgamated Transit*, 2007 ABCA, at paras. 8, 79-83 (Ritter, J., dissenting); *Axton v. B.C. Transit*, [1996] B.C.C.H.R.D. No. 25 (QL) (B.C. H.R.T.); see *Green*, *supra* note 20, at 187-91 (as to U.S. concern about the use of *res judicata* and duplication—difference may be as to who is the plaintiff).

jurisprudence fails to definitively speak to the management and impact of parallel proceedings.²⁷¹

In sum, there are major challenges and remaining unresolved issues in the Canadian approach to jurisdiction over human rights complaints arising in the unionized workplace. So far, the benefits of wide access and respect for legislative intent have prevailed over concerns about certainty of forum, consistency, uniformity, and multiplicity of proceedings.

V. NAVIGATING THE WAY FORWARD: BUILDING AN OPTIMAL DISPUTE RESOLUTION MODEL FROM THE CANADIAN AND U.S. EXPERIENCES

The Canadian and U.S. processes for resolving employment discrimination and human rights claims of unionized workers have significant procedural and substantive similarities and differences. The streamlined and binding nature of arbitration in the unionized workplace is common to systems in both Canada and the United States; these hallmarks continue in the context of human rights and discrimination disputes. In addition, each system takes similarly restrictive views of the role of the judicial forum and slightly differing, though still expanding, views of arbitral authority over statutory claims outside traditional areas of labor arbitrator expertise. Unfortunately, also common to both countries is a lack of certainty as to the appropriate forum. Although the respective uncertainty stems from the differing sources of arbitral authority, variations in legislative intent in Canada and differing contractual language in the United States, the result is the same: unionized disputants in both countries have no clear path to redress of discrimination claims.

The differences between the systems are fundamental and go to the heart of the appropriate forum question—multiple forums or one, state sanctioned remedies or private redress, individual access or collective resolve? Specialized public tribunals with concurrent jurisdiction offer Canadian workers a choice of public or private dispute resolution venues. The Canadian model endorses multiple forums as a means of preserving state participation in the resolution. On the other hand, where there is an agreement to arbitrate, the U.S. model effectively condones

²⁷¹ Alexander v. Gardner-Denver 415 U.S. 36, 53-54 (1974) (holding claimant always entitled to trial *de novo*—despite prior arbitration on statutory discrimination claim).

only one forum, thereby prioritizing the speed and efficiency available through private resolution. Varying importance placed upon factors, such as party autonomy, language of the collective agreement, general arbitration policy, lack of arbitrator expertise, policy goals of anti-discrimination legislation and legislative intent, have led the two countries in different directions. Each model addresses different stakeholder needs and can be defended using differing access to justice priorities and party autonomy rationales.

Access to justice principles offer a crucial context in which to evaluate the strengths and weakness of the two systems. Ideally, a model dispute resolution process would seamlessly blend both access and justice priorities in order to meet the needs of all stakeholders. The model would be consistent with the rule of law, fair, transparent, in keeping with procedural justice, yield appropriate outcomes, correct its own errors, and accomplish all this with speed, low cost and finality.²⁷² Unfortunately, when stakeholder interests are as varied and conflicting as they are in discrimination disputes, priorities are unclear. In the context at hand, individual disputants may prioritize access features over justice, the collective workforce may benefit from a blend of both,²⁷³ while the interests of government and society will favor justice over access features. Resolving workplace discrimination disputes must involve addressing diverse interests; it therefore requires both the access benefits of a private forum and the justice benefits of a public forum. The following recommendations promote a model that blends public and private redress to accommodate both the access and justice needs of all employment discrimination stakeholders.

*A. Arbitration: Concurrent rather than Exclusive Arbitrator
Jurisdiction*

Arbitration remains a fundamental part of an optimal model. In the Canadian statutory scheme, as well as in *Pyett*—and to a lesser extent, the *Gilmer* decision—the core tenets of the arbitration process itself are respected: limited and binding resolution. Arbitration's efficiency, easy access and speed are imperatives in the union context given the high volume of labor

²⁷² *Supra* Part II.

²⁷³ *But see* Gregory & McNamara, *supra* note 4, at 450-51. "The major elements of justice and fairness to employees, employers, and unions are within *Pyett* probabilities, and they deserve the opportunity to become operational." *Id.*

disputes. When a claim involves traditional employment contract issues related to the conditions of employment, such as wage and hour, seniority, or layoff issues in which an arbitrator may be well versed, arbitration affords an effective remedy. Mandating arbitration exclusively, where this is an informed, voluntary and individually agreed upon choice, is consistent with principles of contract law and party autonomy. It also serves “societal interests” of ensuring certainty in contractual relations and promoting labor peace. However, characterizing employment discrimination claims as merely contractual disputes ignores the major societal interest inherent in every discrimination dispute: deterring and eliminating widespread employment discrimination. Further, suggesting that a collective waiver contained in a union negotiated contract represents a voluntary consensual individual choice of forum ignores the collective bargaining reality that “majority rules.”

When a non-unionized individual employee agrees to waive a judicial forum and commit to binding arbitration, it “sounds” more in contract and, in effect, the employee has elected a forum. However, the parties to collective agreement are the employer and the bargaining unit; the individual union member is a third party beneficiary to the collective agreement who has not personally elected a forum. It is the union alone, and not the individual employee, that has standing to pursue the arbitration. Should the union fail to do so, as was the case in *Pyett*, the union member may be left with no remedy whatsoever.²⁷⁴ As a result, the unionized employee will forego an individual statutory right to a judicial forum because of the will of the majority voting in favor of a collective agreement containing a mandatory arbitration clause. This is inconsistent with the principles behind statutory discrimination laws. As the Court in *Gardner-Denver* pointed out, and Professor Mark Berger has emphasized, unlike the terms and conditions of employment typically encompassed in a collective bargaining agreement, “Title VII . . . concerns not majoritarian processes, but an individual’s right to equal employment opportunities.”²⁷⁵

Recent jurisprudence in both countries broadens the scope of arbitral authority beyond the collective agreement to include the

²⁷⁴ While the Court did offer that this scenario was an open question, the claimant in *Pyett* was left without recourse. 14 Penn Plaza, LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009).

²⁷⁵ Berger, *supra* note 2, at 82.

laws of general application. Canadian labor legislation goes so far as expressly empowering grievance arbitrators to consider laws beyond the scope of the collective agreement and the Supreme Court imposed a duty on Canadian arbitrators to apply human rights law in the determination of a grievance.²⁷⁶ In the United States, the expansion is more modest; still the *Pyett* decision evidences a widened view of arbitral scope and expertise.²⁷⁷ As arbitration is the primary venue for labour dispute resolution in both countries, it is a necessity that labour arbitrators be empowered to fully resolve the discrimination and human rights disputes that come before them. However, the union will not grieve every dispute and the interests of justice and society are not served if the wide scope of arbitral authority is applied to preclude alternate public forums.

An optimal system will endorse arbitration as an acceptable dispute resolution process if the collective agreement so elects, as the Canadian and U.S. systems currently do. Further, in a Canadian-like manner, the optimal model should legislatively empower arbitrators to apply human rights and anti-discrimination legislation to address the substance of employment discrimination complaints brought before them. As next discussed, arbitrators should be empowered to grant relief contemplated by applicable statutory provisions. This empowerment would be most advantageous if concurrent with the relevant public forum's jurisdiction and not exclusionary, so that the will of the majority and the discretion of the union do not foreclose statutory relief. Such a model would satisfy both the "access" and "justice" needs of disputants and the public.²⁷⁸

B. Individual Access to a Public Forum: Judicial or Tribunal

An optimal model for resolving discrimination and human rights claims should embrace two interdependent components: first, continued availability of a public forum and second,

²⁷⁶ *Parry Sound (Dist.) Soc. Servs. Admin. Bd. v. Ontario Pub. Serv. Emps. Union (OPSEU), Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, para. 15 (Can.).

²⁷⁷ *Pyett* characterized the Court's earlier opinion in *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974), that the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land," as a misconception that had been corrected. *Pyett*, 129 S. Ct. at 1471 (quoting *Gardner-Denver*, 415 U.S. at 57).

²⁷⁸ See Rutledge, *supra* note 43, at 580. "Even arbitration's harshest critics accept that such agreements can be enforceable, provided that they are offered on a post-dispute (as opposed to pre-dispute) basis." *Id.*

unfettered individual access to it. Courts in both Canada and the United States have watched their initial jurisdiction over discrimination and human rights disputes erode; legislative intent as embodied (or in the United States, not specifically included) in the statutory language played a key role in these determinations. Expressed in both countries is a common view of the relative undesirability of the judicial forum when arbitration is elected or designated. Even with this commonality, the impact of blocked access to a judicial forum is far more severe in the United States than in Canada, which offers the continued availability of a public tribunal forum.

1. *Public v. Private Forum*

Arbitration is viewed as less formal and less costly than litigation.²⁷⁹ The “relative informality of the process is one of the chief reasons that parties elect arbitration. Parties ‘trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’”²⁸⁰ It is this trade-off that makes arbitration different, if not inferior, to a public forum when statutory discrimination claims are at issue.²⁸¹ In fact, it may be too expeditious for a discrimination claim. With a truncated motion and discovery process, proving intentional discrimination, not to mention a complex claim such as disparate impact, could be very difficult or impossible.²⁸² With its limited appeal and review process, errors are not easily correctable and progressive outcomes will not have an impact and may not become known beyond the specific workplace. These limitations compromise the justice objectives underlying access to justice theory and the societal goal of deterrence; they demand a public forum.

In Canada, public quasi-judicial tribunals remain accessible to individual workers and offer a public forum with specialized

²⁷⁹ *Pyett*, 129 S. Ct. at 1471.

²⁸⁰ *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

²⁸¹ *See, e.g., Gardner-Denver*, 415 U.S. at 57-58. As Berger discusses in his article, the *Gardner-Denver* court noted that the typical rules of evidence, procedure, and discovery found in litigation do not surface in arbitration. Berger, *supra* note 2, at 65.

²⁸² Schwartz, *supra* note 16, at 1274-76 (noting the limited discovery available through arbitration, where the employer is largely in control of the evidence). As Schwartz points out, the plaintiff may have to “penetrate the employer’s plausible cover story to demonstrate that it is a pretext.” *Id.* at 1274.

expertise capable of punishing and building a body of public precedents.²⁸³ Disputes may proceed through public tribunal or arbitration forums with concurrent jurisdiction as directed by human rights gatekeepers or legislative intent. This is in sharp contrast to the United States, where union negotiated collective agreements may foreclose access to all but final binding arbitration. In addition, in the Canadian statutory labor arbitration model, awards are publicly reported and therefore bring an element of transparency even to that process. As a result, societal interests are acknowledged, justice needs for transparency and procedural fairness are accommodated, and the urgency to restore the judicial forum is reduced. The same cannot be said for the current American model.

In *Pyett*, the U.S. Supreme Court effectively blocked access to the only existing public forum—the courts—when it disregarded the legislative and jurisprudential context²⁸⁴ in which the ADEA was enacted and instead myopically searched in vain for express statutory language preserving the availability of the judicial forum. The resulting consequences are that exclusive arbitrator jurisdiction forecloses any other forum, and a failure to fully arbitrate the dispute may result in no forum at all.²⁸⁵ Increasingly, collective agreements designate arbitration for dispute resolution;

²⁸³ See *Parry Sound (Dist.) Soc. Servs. Admin. Bd. v. Ontario Pub. Serv. Emps. Union (OPSEU), Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, para. 50-54 (discussing policy considerations); *Morin*, 2004 SCC 39, [2004] 2 S.C.R. 185, para. 11 (making it clear the Weber does not stand for exclusive arbitrator jurisdiction); *Tranchemontagne v. Ontario (Dir. Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, paras 38-40 (Can.).

²⁸⁴ As Title VII and the ADEA contain similar provisions and legislative intent, in *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Court used Title VII to inform its decision with respect to whether the ADEA barred disparate impact discrimination. *Smith*, 544 U.S. at 233; see also Ann Marie Tracey, *Is Business Judgment a Catch-22 for ADEA Plaintiffs*, 33 U. DAYTON L. REV. 232, 233-34 (2008). As the Court had noted earlier in *Albermarle Paper v. Moody*, with respect to the legislative intent behind the Title VII, “[i]t is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to ‘secur[e] complete justice’. . . .” *Albermarle Paper v. Moody*, 422 U.S. 405, 418 (1975) (citations omitted).

²⁸⁵ In this vein, the majority in *Pyett* viewed the *Gardner-Denver* Court as unduly concerned with the individual union member’s lack of control of the grievance process, especially where a union may not fully pursue a grievance. *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456, 1472 (2009). Rather, it noted, in addition to the remedy the Federal Arbitration Act afforded for judicial review, (the Court cited 9 U.S.C. § 10(a)) the union’s duty of “fair representation” provided a safeguard. *Id.* at 1473. In so doing the Court was grasping at remedial straws.

American workers are left with only one possible private forum, lacking important justice features and incapable of addressing the societal concerns and Congressional intent behind discrimination statutes.²⁸⁶

U.S. style labor arbitration is a limited vehicle for effectuating the legislative intent behind discrimination statutes: to end discrimination in the workplace and to remedy individual injuries.²⁸⁷ As the *Gardner-Denver* Court underscored, Congress enacted discrimination statutes like Title VII²⁸⁸ in order to address employment discrimination. It created the EEOC and gave it authority to establish procedures, “to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.”²⁸⁹ It provided a broad array of remedies, including equitable relief.²⁹⁰ Further, it gave private litigants their own role in seeking redress and promoting congressional policy with respect to discrimination.²⁹¹ Courts, and not labor arbitrators, were assigned the “final responsibility for enforcement of Title VII.”²⁹² As reflected in the EEOC 1997 policy statement, “mandatory binding arbitration of employment discrimination claims impedes the federal government’s ability to enforce its employment discrimination laws.”²⁹³

None of these purposes is effectuated through exclusive arbitration of U.S. employment discrimination disputes;²⁹⁴ indeed, the source of discrimination legislation, Congress, is left out of the

²⁸⁶ “Title VII’s prohibition against discrimination did not create a new right, but granted a right to enter federal court.” Mary Rebecca Tyre, *Arbitration: An Employer’s License to Steal Title VII Claims?*, 52 ALA. L. REV. 1359, 1366 (2001). Tyre notes that “[t]he House Committee on the Judiciary stated, ‘The bill . . . is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States.’” *Id.*

²⁸⁷ *Id.*

²⁸⁸ Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.*

²⁸⁹ *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974).

²⁹⁰ *Albermarle*, 422 U.S. at 418.

²⁹¹ *Gardner-Denver*, 415 U.S. at 45.

²⁹² *Id.* at 44.

²⁹³ Natalie Hrubos, Note, *Agreements to Arbitrate Employment Discrimination Claims: Pyett Illustrates Need to Re-Forest the Legal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 281, 293 (2008).

²⁹⁴ See Tyre, *supra* note 286, at 1366. “Arbitration is not an appropriate vehicle to make [the] widespread changes” contemplated by Title VII of the Civil Rights Act. *Id.*

equation altogether. Arbitrators have no obligation to consider public policy or to answer to Congress or the public.²⁹⁵ Arbitration outcomes in the United States are neither reported nor used as precedent,²⁹⁶ stunting the development of employment discrimination jurisprudence.²⁹⁷ Neither the government nor the public can evaluate whether legislative policy is effectuated.

If claim outcomes are inaccessible to other employers or industries, deterrence of similar conduct fails.²⁹⁸ Deterrence is also thwarted, not only by a lack of unwelcome publicity,²⁹⁹ but also the arbitrator's limitation of remedies, for example, to award punitive damages.³⁰⁰ As U.S. arbitrators lack equitable power to enjoin conduct, statutory violations can continue unabated.³⁰¹ With the finality of arbitration and lack of judicial review of arbitrators' decisions, there is little if any assurance that federal or state law is being applied appropriately and even if so, its impact is limited.

As legislative intent is the rationale for eroded judicial jurisdiction in both countries, any misperception of legislative intent must be corrected through statutory reform. In the United States, Congress may need to comb the various discrimination laws, such as Title VII and the ADEA, as well as other relevant

²⁹⁵ *Id.* at 1364.

²⁹⁶ *Id.* at 1364-65. "Arbitrators are without authority to develop the law." *Id.* at 1364.

²⁹⁷ It is through jurisprudence, and not legislation, that we see, for instance, the recognition of disparate impact as a form of discrimination under Title VII of the Civil Rights Act of 1964. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005); *see generally* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 603 (codified at 29 U.S.C. §§ 621-634 (2006)).

²⁹⁸ According to the EEOC in its July 10, 1997 press release accompanying its policy against mandatory employment arbitration, "[t]he Commission continues to hold that the courts play an essential role in enforcing the civil rights laws. For example, only the courts can create legal precedents. Such precedents are responsible for some core anti-discrimination principles, such as the doctrine that sexual harassment violates the law." *EEOC Releases Policy Statement on Mandatory Binding Arbitration*, EEOC, <http://www.eeoc.gov/eeoc/newsroom/release/7-10-97.cfm> (last visited Sept. 19, 2011).

²⁹⁹ Tyre, *supra* note 286, at 1371. "Googling" the term "Wal-Mart discrimination lawsuit," for instance, produced about 433,000 results. *See also* Hrubos, *supra* note 293, at 293.

³⁰⁰ Tyre, *supra* note 286, at 1371. *See also* Hrubos, *supra* note 293, at 293. For an interesting discussion of the ramifications of bestowing arbitrators with remedies associated with a judicial forum, see Gregory & McNamara, *supra* note 4, at 455-56. The authors conclude it would "significantly transform the conventional labor arbitration of the pre-*Pyett* era, making it unrecognizable." *Id.* at 455.

³⁰¹ In Canada and the United States, unions could also use the complaints process for unfair labor practices to advance matters dealing with discriminatory practices through the relevant labor boards. *See supra* notes 80-90, 179 and accompanying text.

statutes, such as the FAA and NLRA, to provide specifically for the preservation of a judicial forum, either concurrently or as elected individually, as the authors address further in this Article.

In spite of its clear benefits, the authors do not recommend that the United States introduce a new, adjudicative tribunal system into its anti-discrimination model. The administrative and bureaucratic infrastructure necessary to maintain the adjudicative branch of the Canadian tribunal system is neither small nor inexpensive. Criticism has targeted under-funding as a failing that contributes to slow processing, major backlogs, and misuse of discretion to defer.³⁰² The tribunal's focus on processing individual complaints may also be viewed as too narrow to address systemic discrimination and patterns of behaviour that affect the wider community. In this regard the class action and equitable relief powers of a judicial forum may be superior to those of a tribunal system; further, the supplemental application of arbitral awards to bind the entire workplace may also be capable of effecting minor systemic reform. Therefore, it is the continued availability of an additional individually accessible public forum that we find attractive and best fulfills the access to justice needs, societal goals and unique characteristics of these disputes. The United States could ensure individual access to a public forum by simply restoring access to the courts, as was the *Garden-Denver* approach.

Although restoration of the judicial forum is less necessary in Canada, as the need for a public forum is largely addressed by the quasi-judicial tribunal system, it could benefit from reform. Professed benefits of the tribunal system have not been fully realized and it faces serious challenges.³⁰³ Lingering issues related to unfettered individual access, cost and delay make the Canadian style tribunal model a work in progress and therefore not an optimal model for adoption in the United States.

2. *Unfettered Individual Access*

Just as important as the availability of a public forum is the ability of an individual complainant to gain access to it. Unions in Canada and the United States typically serve as the gatekeepers to

³⁰² Tsun, *supra* note 6, 121-29; Payne & Rothman, *supra* note 36, at 214-22.

³⁰³ See Sternlight, *supra* note 18, at 1438-40 (concluding that professed advantages of tribunals not always realized); Green, *supra* note 20, at 161 (lamenting loss of right to jury).

arbitration access—a “filtering mechanism whose role is to ensure consistency in the enforcement of the labor contract as well as protect the arbitration process from being overwhelmed.”³⁰⁴ The union’s duty of fair representation³⁰⁵ is balanced against these other objectives.³⁰⁶ As a result, rather than clarifying responsibility to proceed on a claim, “*Pyett* may have the unintended, ominous consequence of having ushered everyone into a limbo-like no-man’s land,”³⁰⁷ where a union decision not to pursue a grievance opens the door to privately-engaged attorneys vigorously pursuing arbitrations. The consequences may not have been anticipated by the *Pyett* majority: “If the parties begin taking all statutory claims into arbitration, the dispute resolution process could become flooded with grievances”³⁰⁸ Such an outcome would undermine the expediency benefit arbitration now offers over litigation. Therefore, unfettered access is best offered through the public not private forum.

In the Canadian administrative tribunal model, few provinces allow unfettered individual access to the public adjudicative branch.³⁰⁹ The presence of screening³¹⁰ and deference clauses³¹¹ means that there is no guarantee that even worthy claims will be allowed to proceed. Critics challenge the effectiveness of the application of public funds to screen individual claims rather than target broad systemic reform.³¹² Only a small fraction of

³⁰⁴ Berger, *supra* note 2, at 77-78.

³⁰⁵ Union decisions not to arbitrate could invite failure of the duty of fair representation lawsuits. 14 Penn Plaza, LLC v. *Pyett*, 129 S. Ct. 1456, 1460 (2009). See also Gregory & McNamara, *supra* note 4, at 454; Berger, *supra* note 2, at 86-87. Such breach of duty claims may offer the only hearing the grievant receives. Berger, *supra* note 2, at 86-87.

³⁰⁶ However, implicit in the Court’s decision in *Pyett*, and even in oral argument, was the assumption that “the individual must have the right to arbitrate [a claim] on his own” should the union choose not to arbitrate. Gregory & McNamara, *supra* note 4, at 453-54, 454 n.184 (citing Justice Scalia, Transcript of Oral Argument at 17, *Pyett*, 129 S. Ct. at 1456).

³⁰⁷ Gregory & McNamara, *supra* note 4, at 454.

³⁰⁸ *Id.* at 452.

³⁰⁹ See *supra* notes 14 and 221 and accompanying text (only Ontario and British Columbia allow direct access).

³¹⁰ Screening is obviously designed to block unfounded complaints and to control volume. Tsun, *supra* note 6, at 118.

³¹¹ Although one would hope that if a union refuses to grieve, the tribunal would not defer and would accept jurisdiction, as was the result in *Amalgamated Transit Union, Local 583 v. Calgary*, 2007 ABCA 121, (2007) 281 D.L.R. 4th 222, paras. 8, 9, 11, 67-70 (Can. Alta.). Still, it is possible that neither forum will be available to the worker when both arbitration and tribunal processes assign carriage of the complaint to third parties.

³¹² Tsun, *supra* note 6, at 121-22.

complaints make it to adjudication; and only after long delay.³¹³ Meanwhile, the cost of delivering the screening model in Ontario doubled between 2006 and 2009.³¹⁴ Multiple conflicts of interest are present when the commission investigates, conciliates, screens and adjudicates a claim. Finally, in 2009, Ontario eliminated the gatekeeper role because “[i]t had become clear . . . that this ‘agency-enforcement’ model was not effective. The Commission had a *de facto* monopoly over the fate of all complaints and was overburdened by its conflicting roles.”³¹⁵

In essence, the former Ontario system was deemed unsuccessful at meeting the access needs of disputants—it blocked access, it was slow, inefficient and expensive to provide—leading to its reform to allow direct access to the adjudication branch. Funds for screening were re-allocated to a legal support fund applied to assist complainants.³¹⁶ Unfortunately, not all provinces have followed the Ontario lead and the gatekeeper model remains the norm.³¹⁷ Arguably, these access failings may be of less consequence given the concurrent availability of arbitration. Still, as the debate over the most effective tribunal model rages on in Canada, it seems premature to recommend that the United States develop an entirely new bureaucratic infrastructure to deliver what was formerly available through the combined efforts of the EEOC and the public courts.

It is important to distinguish the Canadian screening model from the EEOC function. EEOC screening is only a prerequisite to a court action rather than a barrier to it. Prior to *Pyett*, individuals were never denied access to the judicial forum provided they first exhausted the EEOC process. Although it represents a hurdle along the path to the public forum, and therefore could be considered *fettering access*, a complainant may still pursue a court action even after an unfavorable EEOC assessment. It is a delay, not a barrier and it represents a reasonable compromise between the need to manage court volume

³¹³ *Id.* at 123 (reporting that in the 2006-2007 fiscal year only 6.6% of Ontario claims were referred to adjudication and the average time to complete screening was 33.4 months).

³¹⁴ *Id.* at 130 (reporting that total expenditures in 2005/2006 were \$13,904,922 and in 2008/2009 were \$28,190,900).

³¹⁵ *Id.* at 122. It remains to be seen whether the adjudicative branch will hear more claims or defer to alternate forums.

³¹⁶ *Id.* at 126.

³¹⁷ *Supra* notes 14 and 221 and accompanying text.

and the right to pursue one's claim. The conclusion reached is that restoration of the judicial forum in the United States will satisfy the justice concerns at least as well as any public tribunal system and unfettered individual access is best preserved using the existing EEOC protocol.

3. *Post Dispute Forum Election*

In the consumer context,³¹⁸ only an informed post-dispute individual waiver of a public forum should be capable of foreclosing access to that public forum. Collective bargaining agreements should not be permitted by law to waive prospectively the rights of individual members to pursue a judicial forum for statutory discrimination claims. Rather, individual access to the applicable public forum should remain available to members of collective bargaining units; the employee should only be required to elect a forum after the events occur.

Fundamental objections to enforcing a prospective waiver stem from the timing and collectivity of such contractual terms. As has been discussed, the majority-rules foundation of the collective bargaining process means that individuals opposed to the exclusive use of arbitration for redress of statutory rights will see the majority's will foreclose their individual rights to pursue public relief. In addition, given the complexity of most collective agreements and the focus of ratification on traditional "conditions of employment" such as wages, seniority and benefits, it is unlikely that the majority is even informed about or contemplating the impact of an arbitration clause on their individual right to discrimination redress. Real consent in this context is a fallacy—just as it is in the consumer context.

Numerous bills have been introduced in Congress³¹⁹ to limit the application of pre-dispute consumer arbitration agreements. The most recent configuration, the proposed Arbitration Fairness Act (AFA) of 2011, goes well beyond the consumer context—invalidating pre-dispute arbitration agreements of consumers,

³¹⁸ Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47(3) AM. BUS. L.J. 361, 397-406 (2010) (recommending enforcement of only post dispute consumer arbitration agreements provided that they meet basic disclosure requirements as is the case in Ontario and Quebec).

³¹⁹ See, e.g., S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007). See also Joseph M. Matthews, *Are Florida Courts Really Parochial when It Comes to Arbitration? A Rebuttal*, 81 FLA. B.J. 29, 32 (2007).

franchisees and individual *employees*.³²⁰ Introduced on May 12, 2011 and referred to committee, it purports to preserve the judicial forum for statutory civil rights claims, concluding that arbitration lacks transparency, accountability, and reviewability, and thereby undermines the development of civil rights law.³²¹ The AFA 2011 has limited application to employment arbitration agreements housed in collective agreements, preserving only the “right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a state constitution, or federal or state statute, or public policy arising therefrom.”³²² Unfortunately, the bill is silent as to the preservation of collective redress in either the judicial or arbitral forum.

Although well intentioned, more comprehensive and labor-specific Congressional action is necessary at this juncture. The vagueness of the “public policy” catch-all phrase leaves wide open the question of the scope of the collective agreement exception. It seems to go well beyond preserving express statutory rights to include any common law causes of action stemming from the same policy. Clarification is needed. In addition, access to collective redress is a necessity and must remain available in the arbitral and/or the judicial forum. Legislation must expressly address this need.

Consumer and individual employment disputes share some of the same power imbalances faced by unionized workers; however, as already discussed, the unionized workplace presents uncommon challenges. Combining these broad categories into a “one size fits all” solution denies the opportunity to focus on the uniqueness of each context. The omnibus bill approach also has the potential to slow the approval process, increasing the chances that support may be fragmented and defeat passage of the bill. This is particularly likely given the Supreme Court’s recent hotly-debated consumer

³²⁰ “Employee” defined as under Fair Labor Standards Act of 1938, *amended by* 29 U.S.C. § 201 *et. seq.*, § 203(e)(1).

³²¹ H.R. 1020, 111th Cong. § 2 (2009); H.R. 1873, 112th Cong. (2011); S. 987, 112th Cong. (2011) (AFA 2011). The 2011 bills do not refer to franchise disputes as did the 2009 bills. *See* H. R. 1020, 111th Cong. § 2 (2009). Senators Al Franken (D. Min.) and Richard Blumenthal (D. Conn.) and Representative Hank Johnson (D. Ga.) announced the re-introduction of the Arbitration Fairness Act on May 17, 2011. *See Al Franken*, SENATE.GOV, http://franken.senate.gov/?p=press_release&id=1514 (last visited May 25, 2011).

³²² H.R. 1873, 112th Cong. § 3(a) (2011).

arbitration decision in *AT&T Mobility LLC v. Concepcion*.³²³ The polarized positions on the availability of collective redress for consumers may overshadow the needs of unionized employees involved in civil rights disputes.

Further, the position of unionized workers is unique given their current inability individually to elect (or waive) the judicial forum or to control the processing of any remaining complaint.³²⁴ While the view in *Pyett*,³²⁵ that relinquishing a judicial forum is not a prospective waiver of statutory rights, is consistent with *Gilmer*'s examination of an individual agreeing to arbitration, it ignores the difficulties presented when a collective bargaining agreement waives individual statutory rights, despite its exclusive prerogative to pursue them. The Court's persistence in *Pyett* in viewing the waiver there as being an individual one is consistent with its viewing of the entire matter: as that of enforcing a contract. Neither viewing such disputes as sounding in contract, nor categorizing arbitration agreements as "forum selections" instead of waivers of a judicial forum, recognizes the reality of the labor environment or the limitations of the U.S. labor arbitrator's contractual empowerment.

We believe that legislative reform should expressly preserve access to the public forum despite pre-dispute collective contractual terms to the contrary. In distinguishing between a waiver of the judicial remedy and a mere change of forum for the redress of that same wrong, the *Pyett* Court pinpointed the key difference in how this issue has typically been framed in the

³²³ 563 U.S. ____ (2011).

³²⁴ The *Gardner-Denver* Court agreed that the disputed arbitration clause amounted to a prospective waiver but was later strongly criticized by the *Pyett* Court for "erroneously" assuming "that an agreement to submit statutory discrimination claims to arbitration was tantamount to a waiver of those rights." *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456, slip op. at 2 (2009) (citing *Alexander v. Gardner-Denver*, 415 U.S. 36, 51 (1974)). Instead of being a waiver, which the *Pyett* Court agreed cannot occur prospectively with respect to statutory rights, the *Pyett* Court concluded that the subject clause "waives only the right to seek relief from a court in the first instance." *Id.* at 1469 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). The Court's suggestion is in line with the Canadian position on the issue—one of forum change which essentially broadens the scope of arbitrator authority to provide the statutory relief. It is unclear whether the *Pyett* Court intended to so endow the U.S. contractual arbitrator with this new jurisdiction.

³²⁵ In the view of the *Pyett* majority, the *Gardner-Denver* decision "reveals a distorted understanding of the compromise made when an employee agrees to compulsory arbitration," *id.* at 1470, ignoring for the moment that the bargaining agent, and not the individual, agrees to the arbitration.

United States, as opposed to Canada.³²⁶ At the root of this differing characterization is the source of arbitral authority; Canadian arbitrators have the broad statutory authority needed to fully redress the wrong so the designation of arbitration is essentially a forum change. In the United States, mandatory arbitration agreements actually limit relief available in discrimination cases and so remedies may be lost by the exclusivity of arbitration. The *Pyett* approach takes a very Canadian view of arbitrator jurisdiction, but lacks the statutory support to ensure broad authority. Congress needs to ensure this foundation exists by amending discrimination legislation.³²⁷ Should Congress not wish to adopt this approach, at the very least additional provisions need to be instituted in the FAA, as we see in the NLRA, to provide for rules of evidence and procedure, broadened discovery, and subpoena power. Recourse to the courts for equitable relief should also be available.

In sum, it is this Article's conclusion that an optimal model should unequivocally preserve access to a public forum (be it judicial or quasi-judicial) for individual complainants who have not had their claims fully arbitrated despite any pre-dispute collective waiver of access to the public forum. Further, it should allow unfettered access to the public forum with only limited screening to prevent the complete failure to adjudicate the substance of the dispute as was the unfortunate result in *Pyett*.

C. Certainty of Forum and Multiplicity

Neither the Canadian nor U.S. approach provides great

³²⁶ See *supra* Part IV.B.

³²⁷ On a piece-meal basis other amendments may be appropriate. For instance, in late 2009, Senator Al Franken (D. Minn.) introduced to the Department of Defense Appropriations Act, 2010, the "Jamie Leigh Jones amendment," which the Senate approved. It "prohibit[s] the use of funds for any Federal contract with Halliburton Company, KBR, Inc., any of their subsidiaries or affiliates, or any other contracting party if such contractor or a subcontractor at any tier under such contract requires that employees or independent contractors sign mandatory arbitration clauses regarding certain claims." *U.S. Senate Roll Call Votes 111th Congress - 1st Session*, UNITED STATES SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00308 (last visited Sept. 19, 2011). It was prompted by a claim by Ms. Jones, a 20-year-old employee of defense contractor KBR, who was blocked from pursuing her claim of rape in the courts because of an arbitration clause in her contract. *Franken Statement On Passage Of Jamie Leigh Jones Amendment*, Posted on Al Franken, SENATE.GOV, http://www.franken.senate.gov/?p=press_release&id=520 (last visited Sept. 19, 2011).

certainty for parties trying to identify the applicable forum for a human rights or discrimination dispute. Uncertainty is greatest in Canada, where potential forums include arbitration and any number of other public tribunals. Any suggestion of a general policy presumption in favor of exclusive arbitrator jurisdiction was dispelled in *Morin*. Parties to a collective agreement have little power to alter the list of available forums for a dispute. Language of the collective agreement will only be relevant so far as it demonstrates connection between the dispute and the agreement. Chief among Canadian factors for forum determination is the legislative intent underlying the establishment of the given forum.

The proliferation of tribunals, each with its own legislation and legislative intent, creates a host of possible forums. In *Tranchemontagne v. Ontario*, the Supreme Court of Canada considered the human rights jurisdiction of the Social Benefits Tribunal and held that *any* tribunal empowered to apply law (not just human rights tribunals) was automatically assigned the corresponding jurisdiction and *responsibility* to apply human rights legislation.³²⁸ In this light, the question is not which forum has jurisdiction, but rather does the jurisdiction of one forum exclude, defer to or co-exist with the others. Comparative assessments of the legislative intents of each proposed forum are only relevant to subsequent assessments of the same combination of forums.

When comparing human rights tribunals and arbitration in Canada, as discussed *supra*, the usual finding is concurrent jurisdiction.³²⁹ As a result, the ultimate choice of forum comes down to the best fit and the inferential connection between the nature of the dispute and the collective agreement. Little guidance for assessing the strength of the connection is offered in the jurisprudence and reasoning may be manipulated to achieve any desired result. Therefore, the precedential value of resulting jurisprudence will be limited to specific legislation (provided not amended), to specific contractual wording and to specific dispute types.

The natural by-products of forum uncertainty are multiple or parallel proceedings, forum shopping and re-litigating and these are real challenges for the Canadian system. The varying

³²⁸ *Tranchemontagne v. Ontario* (Dir. Disability Support Program), 2006 SCC 14, [2006] 1 S.C.R. 513, paras. 32-39 (Can.).

³²⁹ *Supra* Part IV.D.2.

provincial positions on unfettered individual access,³³⁰ deference, parallel or multiple proceedings, rehearing,³³¹ issue estoppel, and trial *de novo*³³² create a patchwork effect across the country. Legislative amendment is needed to clarify the position on preclusion and multiple proceedings and a consistent approach among the provinces is probably an overly optimistic expectation.

At least in the United States, the parties can predict that the dispute will land in one of two possible dispute-resolution forums—the court or arbitration. Between these two, the FAA policy of enforcing arbitration agreements and the “pro-arbitration” *Pyett* decision seemingly place the collective agreement’s arbitration clause on “protected ground.”³³³ However, the exclusivity of the arbitral forum depends upon the language in the agreement and whether it “clearly and unmistakably” waives the judicial forum for the specific type of claim encompassed by it.³³⁴ As noted above, it is unclear how courts will interpret a general catch-all phrase lacking specific reference given the limitation of the *Stolt-Nielsen* decision to class actions. Variation in language between agreements leaves considerable room for uncertainty about whether exclusivity will be found in the particular language of the subject agreement. The resulting post-*Pyett* U.S. jurisprudence creates contractually specific reasoning with limited precedent value or portability to other agreements. Any variation in contractual languages generates uncertainty as to the applicability of prior jurisprudence.

Pre-*Pyett*, a claimant had maximum flexibility and could proceed under both the contract and in the courts. Allowing forum selection that includes multiple options is consistent with

³³⁰ *Supra* notes 14 and 221. Only a few provinces allow complainants to commence proceedings in the adjudicative branch without prior screening. In the other provinces the optics of multiple forums may be frustrated by high denial rates. Discretion to defer to other forums gives tribunal gatekeepers the right to restrict individual access.

³³¹ Human Rights Code, R.S.O. 1990, c. H.19, §§ 45, 45.1 (Can. Ont.).

³³² *Calgary Health Region v. Alta.* (Human Rights & Citizenship Comm’n), 2007 ABCA 120, (2007) 404 A.R. 201, paras. 17-22 (Can. Alta.) (ordering both arbitration and tribunal processes to continue while suggesting issue estoppels would address any conflicts). *But see* Ontario cases, *supra* note 253 (halting tribunal proceedings until after arbitration is concluded (subject to the right to re-activate)).

³³³ *The AT&T Mobility LLC v. Concepcion*, 563 U.S. ____ (2011), decision enforcing a waiver of class arbitration in a consumer adhesion contract further underscores the Court’s stance in this regard.

³³⁴ Whether the clause at issue in *Pyett* contained such an election was not at issue in *Pyett*. 14 Penn Plaza, LLC v. *Pyett*, 129 S. Ct. 1456, 1473-74 (2009).

the *Gardner-Denver* opinion³³⁵ and its assessment of the legislative intent behind at least the CRA of 1964 and the ADEA—choosing one forum generally did not preclude another.³³⁶ However, the *Pyett* Court saw this as a policy question best left to Congress.³³⁷ If Congress agrees that members of a collective bargaining unit should be able to pursue statutory discrimination claims under the ADEA and Title VII³³⁸ in a judicial forum—seeing the claims as clearly distinct from a contract claim³³⁹—it must act.

Providing “maximum flexibility” to a claimant may frustrate the access interest in finality and prompt resolution of disputes. In determining whether to adopt this option, Congress should pay heed to the advantages arbitration offers and the drawbacks of duplicate, and perhaps dueling, processes common to the Canadian experience. Instead, Congress could authorize the

³³⁵ *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974) (“There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual’s right to sue or divests federal courts of jurisdiction.”).

³³⁶ *Id.* at 47-48. The majority in *Pyett* viewed the *Gardner-Denver* decision as also mistaken with respect to its view that while arbitration could be well-suited to contractual disputes, it was “comparatively inappropriate forum for the final resolution” of Title VII rights. *Pyett*, 129 S. Ct. at 1471 (citing *Gardner-Denver* 415 U.S. at 56). That Court also differentiated individual, contractual rights from those collective rights—for instance, the right to strike—which the union could waive on behalf of its members. *Gardner-Denver*, 415 U.S. at 51-52 (citing *Wilko v. Swan*, 346 U.S. 427 (1953)). It also had noted, for instance, the “specialized competence of arbitrator’s pertains primarily to the law of the shop, not the law of the land.” *Pyett*, 129 S. Ct. at 1471.

³³⁷ *Pyett*, 129 S. Ct. at 1472 (resisting “introducing a qualification into the ADEA that is not found in its text”). Ignoring the thirty-five years of Court precedent since *Gardner-Denver*’s affirming that arbitration under a collective bargaining agreement could not be the exclusive remedy to pursue a statutory discrimination claim, absent a Congressional direction that a category of claims could not be subject to arbitration, the Court in *Pyett* would not impose this requirement. *Id.* at 1466-67. This was so although Congress had “taken no action” in the wake of those decisions. *Id.* Instead, it cited its discussion in *Gilmer* and *Mitsubishi Motors* upholding an agreement to arbitrate in the absence of Congressional intent to preclude a waiver. *Id.* at 1465. Justice Souter refuted the need for a qualification, *id.* at 1480, as well as noted the “justifiable” reliance “on statutory-interpretation precedent decades old, never overruled, and serially affirmed over the years.” *Id.* at 1481 (Souter, J., dissenting). Justice Stevens charged that the Court had also ignored the lack of any relevant statutory change discrimination claims associated with that precedent. *Id.* at 1475 (Stevens, J., dissenting).

³³⁸ See e.g., *Borrero v. Ruppert Housing Co, Inc.*, 2009 U.S. Dist. LEXIS 52174 (where the court applied *Pyett* to a Title VII claim and ordered arbitration, pursuant to the FAA, as the “[s]tatutory analyses under Title VII or the ADEA are generally interchangeable”) (internal quotation marks omitted) (citing *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d840, 84 (2d Cir. 1987))).

³³⁹ The Court in *Gardner-Denver* so distinguished these claims. *Gardner-Denver*, 415 U.S. at 49-50.

judicial forum to summarily dismiss the matter if an alternate forum has “appropriately dealt with the substance of the matter” as is allowed in the Ontario tribunal system. Not every arbitration proceeding should preclude access to the judicial forum, only those that the court deems appropriately resolved.

Any endorsement of concurrent jurisdiction in the United States should stop short of restoring the *Gardner-Denver* position of an unqualified right to trial *de novo*.³⁴⁰ While the authors have recommended preserving the availability of a judicial forum until after grounds for a claim have arisen, the potential for duplicate proceedings to reach inconsistent findings, to encourage forum shopping and to clog access to both resolution systems makes complete overlapping jurisdiction undesirable. It also potentially undermines knowing, voluntary, contractual agreement. Congress should qualify the *Gardner-Denver* position.

Preferably, Congress should limit duplication and cost by allowing individual employee-members of bargaining units to elect the forum in which to pursue a statutory discrimination claim. As noted in the previous section, such an election is meaningful only when it occurs after the dispute occurs, with full knowledge of the nature of the claim and the alternative processes and remedies available.³⁴¹ With these Congressional amendments, the benefits of a public forum could be realized without experiencing the pitfalls associated with unlimited multiple forums, as well, the uncertainty of the current case-by-case assessment would be eliminated.

Certainty of forum and multiplicity of proceedings primarily raise access issues arising from the justice based decision to offer both private and public forums. The inevitable risk of concurrent jurisdiction is multiple proceedings, both parallel and consecutive. The most access-friendly position would be to require the disputant to elect a forum after the dispute has arisen. A post-dispute election of forum, akin to succumbing to the jurisdiction of that forum, would thereby foreclose access to the alternate forum. Alternatively, parallel proceedings can be managed by the public

³⁴⁰ The Court in *Gardner-Denver* concluded that, “federal policy favoring arbitration of labor disputes,” as well as “the federal policy against discriminatory employment practices[,]” were “best accommodated” when an employee could “pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII.” *Gardner-Denver*, 415 U.S. at 59-60.

³⁴¹ Mandatory disclosure is considered ideal in the consumer context. See McGill, *supra* note 318, at 411-12.

forum, empowering it to defer to an alternate forum based on its own assessment of the appropriateness of that forum's process. When and under what conditions consecutive proceedings *de novo* should be allowed in the public forum is a challenging issue pitting justice and access hallmarks of correctness and finality against each other.

D. Correctness and Finality

When redressing human rights wrongs, some usually attractive access characteristics of arbitration become serious justice drawbacks. Correctness and finality are justice and access pillars, respectively, that rise to the top of the dispute resolution debate in this regard in two contexts. First, as discussed above, disputants may want to cross over between the private and public forums to re-litigate the same dispute when they are dissatisfied with the first outcome. Second, the limited appeal and review opportunities in the private forum of arbitration may prevent the correction of an allegedly flawed outcome. Quick processes without mechanisms for correction of errors advance neither individual needs to secure personal well-being nor the public goals of procedural justice, deterrence, building public confidence or preventing or eliminating discrimination. By contrast, the judicial system offers scrutiny at the trial court level, with a post trial motion for judgment notwithstanding the verdict, as well as at the appellate level.³⁴²

Characteristics of access, rather than justice, populate both countries' systems. While offering shortened processes and final decisions, they drastically limit the right to appeal or to seek judicial review of an arbitrator's decision. Reiterated in the question presented in *Stolt-Nielsen* is the high hurdle to be cleared in order to vacate a decision of a U.S. arbitration panel;³⁴³ even a "serious error" will not suffice.³⁴⁴ Rather, "[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable."³⁴⁵ With some

³⁴² Schwartz, *supra* note 16, at 1281 n.74.

³⁴³ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. ____, slip op. at 7 (2010).

³⁴⁴ *Id.* (citing *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38(1987)).

³⁴⁵ *Id.* (citing *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001) (*per curiam*) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597

exceptions, the Canadian system also restricts judicial review to narrow circumstances and even then affords similar deference to an arbitrator's decision by overturning only patently unreasonable awards.³⁴⁶ However, the impact of limited judicial review of arbitral awards is again far less harsh in Canada as the deference power and concurrent jurisdiction of tribunals have been used as a form of review on the merits, affording the opportunity for trial *de novo*.

The level or lack of human rights expertise is a key consideration when initially determining the "best forum fit" for a dispute in either the U.S. or the Canadian model.³⁴⁷ It is also crucially relevant when establishing the appropriate standard for judicial review. Claims brought in connection with discrimination statutes differ markedly from those disputes traditionally arising under a collective bargaining agreement, with which labor arbitrators should be well versed. Claims brought under Title VII, the ADEA, and the ADA require familiarity and expertise with an entirely different body of legal jurisprudence. Discrimination claims begin with questions of statutory, not contractual, interpretation³⁴⁸ and end with delicate assessments of credibility.³⁴⁹ These features of discrimination claims rarely are priorities in the typical labour dispute.

It is also true that arbitrators bring their own expertise in employment conditions and the unionized environment; it would be a mistake to devalue this contribution.³⁵⁰ Over time, arbitrators will develop the needed human rights expertise if given the opportunity to resolve these blended issue disputes. In the

(1960)).

³⁴⁶ See *supra* notes 209-213 and accompanying text.

³⁴⁷ Bilson, *supra* note 197, at 45-56 (discussing the arguments and counter arguments surrounding arbitrator human rights expertise); see also Gall et al., *supra* note 196, at 398-400 (while advocating for arbitrator exclusivity, still suggesting that human rights should be an exception to exclusive arbitrator jurisdiction because "arbitrators will not fully appreciate the importance of human rights principles," *id.* at 398).

³⁴⁸ This Article does not address constitutional equal employment claims that can be lodged against a government employer.

³⁴⁹ This can be especially problematic when unconscious biases affect decision-making. See, e.g., Tracey, *supra* note 21, at 626-28, for a discussion of cognitive bias.

³⁵⁰ See Gregory & McNamara, *supra* note 4, at 451 (asserting that concerns that "labor arbitrators notoriously lacked sufficient expertise in employment discrimination law . . . are simply not well-founded today."). The authors note that this is true due to such factors as the American Arbitration Association's screening of arbitrators and its demand "that each arbitrator make a career-long commitment to the state-of-the-art study of arbitration." *Id.*

meantime, as arbitrators move beyond their original comfort zones into enforcement of fundamental rights, current limited judicial review undermines the effectiveness of the arbitration process. Flawed decisions may remain unchallenged and thereby negatively influence the workplace culture.

Even with concurrent jurisdiction, arbitrators will still deal with a substantial number of discrimination and human rights complaints, acknowledged to be outside the core area of their expertise. Only procedurally fair and substantively correct awards advance the public goal of elimination of discrimination. Correcting mistakes must be made easier in Canada and made available in the United States. In Canada, the standard for vacating awards dealing with anti-discrimination or human rights claims should be legislatively modified to one of “correctness,” or “against the manifest weight of the evidence,” with respect to evidentiary outcomes, rather than patent unreasonableness.³⁵¹

In the United States, setting aside incorrect jurisdictional interpretations, as occurred in *Stotz-Nielson* with respect to arbitrator authority, should be preserved, but should be expanded to go beyond simply reviewing the authority of the arbitrator. Lowering the “high hurdle” for vacating an arbitral award to a correctness-related standard is essential to ensure procedural fairness and further the public goal of elimination of discrimination in the unionized workplace. This could be accomplished in part by amending the FAA to provide for review of arbitration decisions in a manner similar to that offered in the NLRA, that is, providing for judicial review, with a standard of being supported substantial evidence on the record as a whole.³⁵² At a minimum, to this should be added a standard of “clearly erroneous with respect to law.” Such review and criteria provide additional, yet limited, opportunities for either employer or employee appellant. Although some compromise to the finality of the arbitration process will be experienced,³⁵³ judicial oversight as to the substantive correctness of the decision will build confidence

³⁵¹ *Amalgamated Transit Union, Local 583 v. Calgary*, 2007 ABCA 121, (2007) 281 D.L.R. 4th 222, para. 19 (Can. Alta.) (applying this reasoning to adopt a standard of correctness in reviewing a jurisdiction decision).

³⁵² 29 U.S.C. § 160(f). Alternatively, a standard such as “against the manifest weight of the evidence” could be used.

³⁵³ *But see* Schwartz, *supra* note 16, at 1281 (“Parties to litigated civil suits rarely file appeals at all—the appeal rate in federal civil cases appears to be on the order of one appeal for every fourteen district court cases filed.”).

in the private process and contribute to the development of both jurisprudence and arbitrator expertise in this area.

E. Charting a Course for Implementation

In Canada, the existing legislative regimes dealing with arbitration and human rights tribunals and the priority afforded to legislative intent make implementation of the forgoing recommendations a relatively easy matter. The vehicles exist to address the necessary changes. The challenge, as always, will be in achieving national consistency between provincial jurisdictions. The current divergence on the position of direct access to tribunal adjudication is a typical scenario resulting in unequal access to redress for workers across the country.

Conversely in this regard in the United States, national consistency is easily attainable. Federal jurisdiction over both employment discrimination and arbitration mean Congressional action will have immediate national impact. A direct approach would be the most effective: amending employment discrimination legislation to preserve access to the public forum irrespective of any pre-dispute waiver of said forum contained in a collective agreement is the most direct approach.

Even with these changes, the hallowed bedrock of the FAA may prevent smooth sailing toward the combined justice and access approach suggested here. After all, “in the years since *Mitsubishi Motors*, no statute has been found by the Court to incorporate a ban against compelled arbitration”³⁵⁴ In particular, the *Pyett* Court found that the NLRA provided the authority for the union to collectively bargain for mandatory arbitration of discrimination claims, “and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA.”³⁵⁵ In recognizing the sanctity in this respect of contract claims over statutory ones, “the CBA’s arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA’s broad sweep.”³⁵⁶

³⁵⁴ Berger, *supra* note 2, at 62-63.

³⁵⁵ 14 Penn Plaza, LLC v. Pyett, 129 S. Ct. 1456, 1466 (2009).

³⁵⁶ *Id.* at 1459 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Court explained, in responding to a concern that there may be conflict of the interests between that of the union and that of the employee, that the Court had noted in *Mitsubishi Motors*, “[u]ntil Congress amends the ADEA to meet the conflict-of-interest concern identified in the *Gardner-Denver* dicta, there is ‘no reason to color the

This view rests squarely in the Court's belief that a statutory discrimination claim is well within the scope of the collective bargaining process: in essence it is an economic claim.³⁵⁷ Although giving lip service to the congressional intent honored in *Gilmer*,³⁵⁸ pursuant to *Pyett*, it appears that the means by which Congress most likely could preserve the judicial forum for a statutory remedy is amending the NLRA to exempt statutory discrimination claims from its umbrella. To further underscore its intent, Congress could also amend the various discrimination statutes to preserve the right to a judicial forum for such claims.

VI. CONCLUSION

Navigating the troubled waters of mandatory arbitration provisions in collective bargaining agreements in the United States and Canada can be stormy sailing. As Canadian human rights tribunals serve an adjudicative role, the impact of the loss of the judicial forum in the United States is much more severe. At the same time, neither system provides much certainty or consistency for parties, and both jurisdictions could benefit from legislative reform. When union and management representatives limit access to public forums, the interests of individual workers and society as a whole can suffer. Instead, the unique characteristics of employment discrimination and human rights disputes demand public participation in order to effectuate anti-discrimination and human rights protections.

Crossing the bridge between the two markedly different national approaches offers both challenges and opportunities for improving the means for resolving employment discrimination disputes arising in connection with collective bargaining agreements. Returning to a route that is fair, clear, transparent and predictable is essential to ensure that parties resort to the

lens through which the arbitration clause is read.” *Id.* at 1460 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

³⁵⁷ *Id.* at 1464. The Court further rubbed salt in the wounds of employees claiming discrimination by noting that arbitration, with its lower costs, was well suited to such contractual claims which often involve “smaller sums of money than disputes concerning commercial contracts.” *Id.* (internal citations omitted).

³⁵⁸ *Id.* at 1465 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)). “[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Pyett*, 129 S.Ct. at 1465 (quoting *Gilmer*, 500 U.S. at 26) (internal quotation marks omitted).

2011]

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73

process fully informed and with confidence. It is critical not only to the development of jurisprudence, but to the honor the purposes for which each country's lawmakers enacted discrimination legislation.

