mutual agreement of the Union and the RAB. Any such arbitrations shall be conducted pursuant to the AAA National Rules for Employment Disputes, except those rules pertaining to administration by the AAA and the payment of fees, and any disputes about the manner of proceeding shall be decided by the arbitrator selected.

C. The hearings in any arbitration provided for in the preceding paragraph may be held at the OCA, however, it is understood that this forum is not a forum provided for in the CBA.

D. The Union will not be a party to the arbitration described above and the arbitrator shall not have authority to award relief that would require amendment of the CBA or other agreement(s) between the Union and the RAB or conflict with any provision of any CBAs or such other agreement(s). Any mediation and/or arbitration outcome shall have no precedential value with respect to the interpretation of the CBAs or other agreement(s) between the Union and the RAB.

III. PANEL DISCUSSION

Moderator: **Sharon Henderson Ellis,** National Academy of Arbitrators, Brookline, MA

Panelists: **Randi Hammer Abramsky,** National Academy of Arbitrators, Toronto, ON

Jacquelin F. Drucker, National Academy of Arbitrators, New York, NY

Larry Engelstein, Executive Vice President, SEIU Local 32BJ, New York, NY

Michel G. Picher, National Academy of Arbitrators, Ottawa, ON

Paul Salvatore, Proskauer Rose, New York, NY

Sharon Henderson Ellis: Welcome. I'm Sharon Henderson Ellis, Co-Chair of the Academy's Employment Issues Committee.

The scripted title for today is, "Would you like a Piece of Pyett with that?" A less tasty but more accurate title would be, "Arbitrating Statutory Claims Arising in the Workplace."

Normally, such claims are allegations of unlawful discrimination or, in Canada, allegations of Human Rights violations. Specifically, we will look at statutory claims in three separate settings:

- First, the arbitration of statutory claims in Canada's unionized sector.
- Second, statutory claims arising in the unionized workplace in the United States. This is where the *Pyett* decision is relevant.
- Third, in the United States, the arbitration of statutory claims involving individual at-will employees covered under a mandatory employer-promulgated arbitration plan—in other words, a *Gilmer*-type arbitration.

As to each of these settings, one of the inquiries will be: what does the arbitration *process* look like? Does it mirror a traditional, informal grievance arbitration proceeding or does it import litigation-style procedures from the courts? By "court-style procedures" we are referring to formal discovery and dispositive motions such as motions for summary judgment.

We will look at more than one question, but a central focus will be whether employees and the parties are better served by maintaining arbitration's traditional informality wherever possible rather than importing court-style procedures.

For our Canadian colleagues, let me describe the historical practice in the United States for resolving statutory claims in the unionized workplace and give you a sound bite of the decision in *14 Penn Plaza v. Pyett*. In the United States, a unionized employee with a discrimination claim has always had the option of taking the claim to court to obtain a jury trial. This continues to be the common practice. In its 2009 *Pyett* decision, however, the U.S. Supreme Court opened the door to arbitrating statutory claims through the grievance arbitration procedure and foreclosing the possibility of taking the claim to court. The Court held that if parties to a collective bargaining agreement (CBA) negotiate "clear and unequivocal language" so stating, a contract provision waiving the right of the employees to take their claim to court and requiring them to use the contractual grievance procedure is judicially enforceable.

To you, our Canadian colleagues, the holding in *Pyett* will not seem controversial or shocking because in Canada, all statutory claims are arbitrated. In the United States, however, *Pyett* was quite controversial. In fact, the Academy wrote an *amicus* brief opposing

the outcome the Court reached. In this panel discussion, however, we are not here to discuss the pros and cons of the decision. It is settled law. Rather, we look instead at some of its practical implications.

With that, I will now introduce you to our august panel.

To my left is Jacquelin Drucker, an Academy member and highly regarded arbitrator who is often asked to provide training for other arbitrators. She is principally based in New York but also practices out of the Ohio Region. As an especially busy labor and employment arbitrator, Jackie will talk about the process she has observed in employment arbitration and she will be the first panelist to express her opinion on the question I just raised: when are the parties better advised to keep the arbitration of statutory disputes informal? When does it make sense to bring in litigation style procedures?

Sitting next to Jackie is one of our two Canadian speakers, Randi Abramsky. Randi is a full-time arbitrator based in Toronto but she is originally from Chicago and the only arbitrator on the panel who does cases on both sides of the border. Randi is a member of the Employment Issues Committee and agreed to write a report on the Canadian approach to cases involving statutory claims. It's a superb article that you will find in your materials.

Elaborating on Randi's explanation of the process for arbitrating statutory claims in Canada is the one panelist whom I think everyone here knows, Michel Picher. Michel is a recent past president of the Academy. Michel was also the first chair of the committee responsible for today's discussion. It was often referred to simply as the "Picher Committee." In Michel's 2009 presidential address, he raised the topic of the *Pyett* decision. I know he holds passionate views about the process in these cases.

There are two guests that I know you are happy to welcome. The first one to my left is Paul Salvatore, an advocate from the New York law firm of Proskauer Rose. Paul is the attorney who successfully argued the *Pyett* case on behalf of Penn Plaza and on behalf of what's called the New York City Realty Advisory Board (RAB) for labor relations.

Sitting beside Paul is Larry Engelstein. Larry is an attorney and executive vice president of Service Employees International Union (SEIU), Local 32BJ, a union that represents the janitors, night watchmen, maintenance employees, and others in commercial buildings in New York. Prior to joining 32BJ as general

counsel, Larry served as associate general counsel for SEIU and associate general counsel for the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

Again, Paul Salvatore and Larry Engelstein are the advocates whose parties negotiated the language in the *Pyett* decision. Paul, would you like to get us started?

Paul Salvatore: Thanks, Sharon. I'm the devil incarnate who conceived of and, in 1999, helped negotiate into the SEIU-Realty Advisory Board Collective Bargaining Agreement the clear and unmistakable waiver language of the union member's right to go to court, to sue their employers on employment discrimination claims in favor of those claims being heard in arbitration.

I'm also the shameless advocate who lost the *Pyett* motion to compel arbitration in the District Court in New York, who then lost 3–0 in the Second Circuit, and who argued and won the *Pyett* case 5–4 in the U.S. Supreme Court, changing 35 years of labor law.

I'm also the chief architect on the employer side of the *Pyett* protocol, a ground-breaking mediation and arbitration system that is successfully handling the discrimination claims of more than 80,000 New York City area SEIU-represented building service workers.

I view *Pyett* as a quadruple win. Certainly, the employers won the ability to enforce their arbitration promise in the CBA.

Low-wage workers also won. These employees are often pro se in our overburdened court system trying to pursue their employment discrimination claims. What they want is a viable forum to have their discrimination claims heard, often ably represented by Union counsel.

Unions won here too because for the first time in many, many years, the U.S. Supreme Court recognized their central role and power in the collective bargaining process. When you read the transcript, you'll see that Chief Justice Roberts made a comment that is one of my favorites from the oral argument, where he asked the Assistant Solicitor General of the United States, "Why isn't this a good idea? " When the solicitor fumbled that question, the Chief Justice blurted out that being in a union gives these workers leverage that they otherwise don't have: "That's what being in a union is all about, Mr. Gannon." That's what the Chief Justice of the United States said. I thought that was a telling comment.

The fourth winner here was the institution of arbitration. Once again, the U.S. Supreme Court found that arbitrators and

arbitration are capable of competently deciding workplace disputes including disputes involving employment discrimination claims, statutory rights.

Many of the American arbitrators in the room here today may disagree with my assessment. As you will hear from Larry and me, there are many benefits to the dispute resolution system that we've developed post-*Pyett*. We call it "the protocol." Despite Justice Souter's dissent, where he minimized the widespread possible impact of *Pyett*, employers and unions in the United States are actually negotiating these clauses and systems. I'm aware of several forthcoming academic articles that will catalog the post-*Pyett* developments. The party-propelled dispute resolution systems in the union-management contracts are innovating in this area to try to provide one-stop shopping for dispute resolution of not only the contractual collective bargaining just cause-type claims but also the statutory employment discrimination claims.

This all started back in the early 1990s. Congress had added jury trials and compensatory and punitive damages to the key employment discrimination statutes. There was a huge surge in these types of filings. Employers were feeling it, particularly employers in the New York City real estate industry. I believe that, at some point in the 1990s, 20 percent of the federal docket was comprised of employment discrimination claims. This was an increase from 7 or 8 percent in previous years.

Our client, the RAB, which is the multi-employer group representing more than 3,000 unionized New York City office and residential buildings, asked "Why are employers getting sued twice over the same set of facts?" We fire a doorman or a cleaner because he or she allegedly had stolen from us. We win when we go to an arbitrator under the CBA. Then, afterwards, we find ourselves facing a federal court lawsuit based on the same set of facts but styled under a different legal rubric, alleging race discrimination or sex discrimination based on the same underlying facts and circumstances.

How do we get out of these claims, the employers asked? How do we have them all resolved in one forum? One-stop shopping was what employers were looking for, one forum for resolution. That's what led to our negotiation of the CBA language that is at issue in *Pyett*. Eventually, that language was approved in the *Pyett* decision itself.

Now, after *Pyett*, the SEIU and the RAB disagreed on the scope of the Union's waiver of court in favor of arbitration. Perhaps

Larry can explain that in greater detail. Nevertheless, the resolution of that issue resulted in what we call the protocol, which is a mediation and arbitration system that is working very well today and that we believe incorporates the best practices in dispute resolution and due process for all involved.

The protocol involves two steps. One is mandatory mediation and the second is freely available arbitration. Mediation is the star here. We call it "muscular" mediation because all Union members with discrimination claims must mediate. We have empowered the mediator with broad authority to try to bring the parties together to reach a resolution. If the union doesn't take the case, we've made American Arbitration Association (AAA) employment arbitration under those rules, and under that list, available to the parties. But the key is mediation. Mediation results in a very small percentage of cases going to arbitration.

The employers, the union, and the employees are very happy with this system as Larry will describe.

Larry Engelstein: Thanks, Paul. I came to the local in 1999. Paul had preceded me, representing the employer side prior to that. Over the years we had our battles. I'd say we've come through the *Pyett* case in a way that I think has exemplified the best of traditional labor relations. We have preserved our principal grounds of difference, but found a constructive and practical way to move forward to accomplish the needs of the Union and the industry; to get the business done every day as best we can to serve our mutual interest. The world would be better if those kinds of relationships continued to exist in more places than they currently do.

To contextualize the *Pyett* protocol and the institutional arrangements from which it arose, it is necessary to understand those arrangements. Our union represents 80,000 workers in New York City on the apartment side and the commercial side. Almost all of the major building workers are represented by the Union. The union and the employer association grew up alongside each other starting in the 1930s when the union was first built.

The employer association provides counsel to its employer members. On the apartment side, for the most part, each apartment building is a separate bargaining unit and a separate member. There are thousands of individual units, which may have as few as three employees or as many as 20 or 30 employees depending on the level of staffing in the building or the size of the building. Each one of those buildings, arguably, would be a separate

defendant were there to be a court case brought to them, brought against them for jurisdictional or other purposes.

At this time, the union maintains a staff of 15 lawyers who do a variety of work including presenting arbitrations.

Over the years, the union and the employer association created a separate arbitration office called the Office of the Contract Arbitrator. It is a partnership in the legal sense that it is maintained between the RAB and the union. It rents separate space and has its own staff that administers the agreement. It's in the tradition of the old concept of an umpire system that lives close to the needs of the parties and remembers its place in the world.

We have a permanent panel that we negotiate together that hears the cases. Cases are assigned to the arbitrators on a rotating basis. Under our agreements, both sides have agreed that cases of statutory discrimination are appropriate to be brought through the contract arbitration panel. When we believe a case has merit that not only implicates just cause but also statutory discrimination, the union brings those cases on behalf of the union and obviously on behalf of the affected grievants.

To date, in the cases that we have brought in that way where it has been warranted, the parties have resorted to or utilized American-style discovery proceedings in conjunction with the prosecution of those claims. The cases, to the extent they've gone to award, have been litigated adhering to those principles. In fact, we've had to make sure that our arbitrators are comfortable and conversant with those practices because they tend not to deploy them, obviously, in the ordinary contract arbitration cases.

In the wake of *Pyett,* the union and the employer continued to disagree. The union makes a determination that the statutory claim that the grievant may be asserting lacks merit; if the union believed the case had merit, it would arbitrate the case. Where does the grievant go when the union determines that the case has no merit? Does the grievant have the right to go to court or is the grievant required to go to some other process? We actually reached a resolution of that grievance between us—a temporary resolution of it—by using the services of a very skilled and I think well-known New York arbitrator called Marty Scheinman, who, ironically, mediated that dispute between us and helped us come up with the *Pyett* protocol.

Our membership in New York is like the United Nations or it's like taking the subway in New York. Our members speak every language of which you may be aware—Albanian, Polish, Russian,

Spanish—you name it, our members speak it. We really are, as the president is now inclined to say, the nation of immigrants, the current phase of that.

Given the diversity of our membership, there are many different issues and claims that arise in our workplaces. We are probably 60/40 percent male/female. We also have frontline supervision often included within the bargaining unit, particularly on the residential side. This results in issues about the agency and the Union representing a more complex bargaining unit than it may traditionally have.

If the union chooses not to pursue the case because it lacks merit, but the grievant wants to go forward and bring a lawsuit, the grievant is required to go to mediation. We have argued in court that the court case should be deferred until the grievant has exhausted the contractually negotiated procedure. The protocol is an attachment and an exhibit to the CBA as much as any other provision of the agreement is. The grievant must go through that mediation process.

The employer association and the union have selected a separate panel of mediators, diverse in its composition in both gender and ethnicity, to sit and hear only the mediation claims. They're a different panel than our contract arbitration panel. The union and the RAB pay the cost of the mediation. The grievant goes or the potential litigant goes to the mediation session. The mediators have the authority to mandate production of evidence, to require documents to be brought forward, to require the articulation of the claim, and obviously their goal is to reach a settlement. More than half of the members who have gone before the mediation process have been pro se. Some portion of them have counsel. One of the advantages of mediation is it is an opportunity for the grievant to hear about the case for the first time from a person other than a union representative, as the union has already told the grievant that it does not believe the case has merit. It also provides the grievant's lawyer, when there is one, a chance to hear what a neutral mediator actually believes about the merit of the case.

The process has been successful. It has helped drive these cases to settlement or withdrawal as the lack of merit becomes apparent to the grievant. In other situations, it also provided appropriate remedies or adjustments.

The other part of the protocol provides that where the grievant does not reach a settlement with mediation, and the grievant and

the employer both agree, the matter will go to arbitration. This is a third panel of arbitrators that the union and the employer pick off the AAA list that will hear these cases as statutory discrimination cases. It's not the contract arbitration panel but it's a different panel. We make available to those parties the offices and suites available at the office of the contract arbitrator to hear those cases.

We have managed to corral and channel the overwhelming variety of cases that have not made it through the union's arbitration process and have resolved them through the mediation process. The very few cases left after that need to go on to some form of adjudication, which would in most cases we assume be arbitration given the relative advantages of that in terms of speed and cost.

Our members make between $35,000 and $40,000 in New York City. The rest of our members outside of New York City make less than that. These are not high wage workers. The legal market that is available to prosecute claims for members like this is very small. The employment bar does not exist, for the most part, to take these kinds of cases. They're more interested in stockbroker cases or highly compensated employees as a matter of economic logic. So whatever I would say is a matter of practical reality providing an efficient, cost-effective vehicle for low wage workers (and most of the United States is low wage workers)—to have some measure of access to justice for violations of their basic rights or perceived violations is a key requirement.

It's now four years since the decision and the world has moved forward. We're continuing to innovate ways to try to meet the needs of the industry and also the needs of the workers for justice and fairness on the job.

Sharon Henderson Ellis: Thank you, Larry and Paul. Now we're going to move across the border to Canada.

Michel G. Picher: In Canada, the approach to arbitration of statutory rights has a considerable history. It started with a case called *McLeod v. Egan,* in which an arbitrator was required to interpret the provisions of an Employment Standards Statute in Ontario and the matter went on judicial review. It was then confirmed ultimately by the courts that arbitrators not only have the right but sometimes have the obligation to interpret and apply statutes. Subject, of course, to a lesser standard of judicial deference, the judicial review of any such analysis will be on a standard of correctness.

That, essentially, has been the case ever since. The federal *Canada Labour Code* and virtually all of the provincial labor rela-

tions statutes which govern arbitration contain language which essentially says that the powers of the arbitrator extend to interpreting and applying human rights and other employment related statutes despite any conflict between those statutes and the terms of the collective agreement.

The courts have enhanced that jurisdiction or clarified it in a couple of important decisions. One Supreme Court of Canada case is particularly relevant: *Weber v. Ontario Hydro*. In that case, the Supreme Court of Canada effectively affirmed that not only do arbitrators have jurisdiction in respect of statutory matters and in some tort matters that may arise in the context of the employment relationship, but they have the exclusive jurisdiction to deal with those matters. The courts have no such jurisdiction. That scope of our powers has been well defined and enhanced by the courts.

That was further enhanced in a case, which I believe was arbitrated by Paula Knopf: *Parry Sound*. In *Parry Sound,* the Supreme Court of Canada required the arbitrator to look at certain statutory standards and rights and to interpret those. The Supreme Court of Canada effectively said that statutory rights are now implied to be part of the collective agreement and the arbitrator is to interpret and apply those. That is the arbitrator's jurisdiction.

With respect to process, none of these things I've just mentioned have changed anything as to what goes on inside an arbitration hearing room. In Canada, from the beginning of arbitration in the late 1940s to today, an arbitration hearing dealing with statutory rights looks like any arbitration hearing. An arbitrator sits at the head of the table. Parties are on both sides. As was just mentioned, there may have been some preliminary conference calls about production. The matter proceeds in a very informal way.

The union representatives, who are generally not themselves lawyers, commonly come before us in arbitration and plead statutory rights having been violated. They do it in the same way they would do any part of the collective agreement. They might table the language of a statute. They'll say, "Now here is the law and here's what's happened and this is discrimination contrary to the statute."

But it goes beyond discrimination to other areas of law, such as employment standards. I personally have had a case or two that involved occupational health and safety and the right to refuse unsafe work. These are statutory rights. They are not rights that arise out of the collective agreement but we deal with them, especially after *Parry Sound,* as though they were in the collective

agreement. And, yes, it is a one forum, one-stop shop for organized employees. That's the way our system has developed and I've never heard anyone complain about that or think it needed reform or that somehow arbitrators, including arbitrators who are not legally trained (there are a few of those around), are somehow not competent to deal with these matters.

As I indicated to you, these cases are commonly presented and argued by laymen. I think if you're talking about discrimination you don't need to have done graduate work at the Harvard Law School to know what that is. I think the system works fairly well. What we've managed to do in this country is to simply blend in statutory rights as though they were part of the language of a collective agreement. "No big deal" is probably the best way I can describe that.

Sharon Henderson Ellis: Before Jackie responds, I want to refer to the question I raised in my introduction—a question for all of you. Having heard how statutory claims are handled in Canada, what do you think, if anything, the United States has to learn or can apply from the Canadian experience, whether speaking of individual employment arbitration or a *Pyett*-type arbitration? Jackie has a great deal of experience in both employment and labor arbitration. We'll hear her opinion and then put the question to the other panelists.

Jaquelin F. Drucker: We want to take a look at the process. Before we do, though, with regard to employment arbitration, I think we must recognize what we mean when we use the shorthand term "employment arbitration" in the United States. Much of the debate over the past two decades has been about the arbitration of statutory claims that have arisen and end up in arbitration through employer-promulgated plans. The reality is that much of the employment arbitration that has taken place in the United States in these past few decades has gone forward into arbitration as the result of individually negotiated contractual arrangements to arbitrate. Now we have sort of a third category of *Pyett* claims.

Within the category of individually negotiated arbitration agreements, however, we see a great mixture of claims. These are not only statutory claims, on which we are focusing today, but very often contract claims and common law claims. That affects how we look at the process and how the process should play out.

The question that we want to ask, and following up on the questions that Sharon has posed, is how best do we make employment arbitration happen in these three contexts in a way that fulfills

the promise of arbitration while at the same time recognizing the need for fairness, for the opportunity for the employer to present a proper and full defense, and, of course, presenting the opportunity for the employee to achieve full vindication of his or her statutory, contract, or common law claims.

The two greatest areas of concern are discovery and dispositive motions. If we are becoming overly legalistic in our approach to employment arbitration, those are the two areas that perhaps are causing that legalistic approach.

When we talk about discovery, I think it's useful to revisit traditional labor arbitration and think about that process. There is a beauty to the process. There's a rhythm to traditional labor arbitration that is one of the many things we love about the process. It's not just the beauty and the rhythm of the hearing itself, which is something that I always marvel at, but it's also the beauty and the rhythm of the structure of the entire grievance arbitration process.

We've often said that in the labor context we don't need discovery because we have this meaningful grievance process, which we all have to remain vigilant about to make sure that it's used. We have this process through which information is exchanged. The cards are put on the table early in the process to enhance the likelihood of the parties coming to an agreement on their own, short of arbitration. When they don't, they come to arbitration and they know what the evidence is. There's been no need for any kind of formalized discovery option.

That, however, is, I think, something of an oversimplification. It's not just the grievance process, but it's the relationship in the entirety that has made formalized discovery unnecessary in traditional labor arbitration. There is a union with equal bargaining power dealing with an employer. There are two parties with a history and a future, but especially a history. There is the representative of the employee being aware of the information and very often having access to or at least knowing of all of the information that may be relevant to come to bear, even in a statutory case.

This is in contrast to employment litigation that occurs with an individual employee without a union. That employee does not have any of those opportunities. The employee does not have the grievance process through which information would be conveyed and certainly not the idea of the representative that is meaningfully engaged and has a historic relationship with the employer, such that a great deal of information is already available.

That leads to the realization that there is a need for some form of information exchange and production if we're going to arbitrate statutory claims. We can't recreate the grievance structure and the reality of union involvement and union representation. So we move into something that looks like litigation discovery; sometimes a lot like litigation discovery, depending on what the claims are. It plays out through preliminary conferences. It can be done in an informal way. It may involve interrogatories. While interrogatories are not my favorite aspect of employment arbitration, sometimes the lawyers are so accustomed to that, it can be an efficient way of exchanging information. There does need to be some sort of structured way that the parties can exchange information to prepare for the presentation of the claims.

The more controversial issue with respect to discovery and employment arbitration relates to depositions. I know many arbitrators, who do a lot of employment work, who take the position that depositions have no place whatsoever in employment arbitration. Arbitrators who come from a very stark commercial background very often take that view.

I take a slightly different view with regard to the value of depositions when carefully used and carefully controlled. There are two very valuable purposes that depositions can serve in employment arbitration.

One is that carefully chosen depositions, not deposing every potential witness, but carefully chosen and limited depositions, can substantially increase the likelihood of settlement, as there is not the full awareness of things that may have happened in relationships that may have existed. There may not be access to the witnesses in the workforce. I've been told by attorneys who have handled cases before me that it was a deposition that really enabled them to settle short of arbitration.

Then from a practical standpoint, again, carefully chosen depositions can substantially streamline the hearing process and cut down on the number of days in a very significant way. I'm sure that many of the arbitrators have heard and many of the advocates in the room have said on cross examination—sometimes even on direct examination—"I'll ask for some latitude here, I have not had the opportunity to depose this witness." The absence of formalized discovery is a rationale for our great flexibility in terms of the evidence that we admit at hearing. The more discovery, the more elaborate and extensive the discovery, the more restrictive

we can be with regard to what we admit and the application of certain rules of evidence.

The other issue of primary concern with respect to legalism in employment arbitration in the United States relates to dispositive motions. I think we need to differentiate between two kinds of dispositive motions: motions for summary judgment and motions to dismiss. These are motions that address the case in its entirety—getting rid of the whole case—or motions that address individual claims.

The process of a motion for summary judgment, of necessity, comes in most instances after there has been some discovery. I think that the opportunity of the parties to move into motions for summary judgment sometimes results in increased discovery. What is important with motions for summary judgment, motions to dismiss, motions that are dispositive, is that the arbitrator retain control over whether that happens at all. The AAA in Rule 27 of the Employment Rules has created a process whereby the parties first seek from the arbitrator permission to proceed with a dispositive motion. The standard to be used is whether there is substantial cause shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

Summary judgment very often blocks the momentum toward hearing. The parties are moving ahead. Much of what they do to support a motion for summary judgment is what they would do and accomplish at hearing. We usually get into the hearing and get out of the hearing without bogging things down with a motion for summary judgment. That's not to say that I have never allowed them. I have granted them. I think we have to be very, very sparing in the instances in which we allow them.

Assume the case includes 25 causes of action. It is clear to me and it is clear to everybody in the room that at least 10 of them are not going anywhere. The idea, very often, is we file a motion for summary judgment to get rid of those and that will streamline the process. Nevertheless, there must be a very realistic approach taken to such theories because those claims often are just "kitchen sink" claims. They are not the claims that are going to elongate the process. Getting rid of them very often is not going to shorten the process at all because they are the claims that fall away anyway. Before closing arguments, they are the claims for which the claimant's lawyer very often will say "We're withdrawing claims 5 through 10." We cannot be lulled into this idea that we are

enhancing the efficiency of the process by engaging in a motion for summary judgment that may just cull or narrow the issues.

Motions to dismiss are different in that they go to the question of whether the matter should go to hearing at all—especially a global motion to dismiss the claim in its entirety. For example, if a matter is time barred, then why should everyone move into a hearing and engage in the time and expense associated with hearing the case? If it's going to dispose of the entire case, then it certainly makes sense to entertain something like a motion to dismiss at the outset of the process. It need not be called a motion to dismiss. We can simplify it because, with the assistance of the parties, we can shape the process as we proceed. I think there is some real value to be had in considering in the appropriate case a motion to dismiss, especially when it relates to the case in its entirety and is posed early in the process.

Those are just some reflections on the way some of the elements of litigation, unfortunately, or fortunately, have made their way into employment arbitration in the United States. I think we can learn by looking at the Canadian experience. There are some aspects that I think are very similar. What we're doing is somewhat automatically and intuitively similar to what is happening in Canada. We need to always keep in mind that the context in which employment arbitrations go forward, other than *Pyett*, is so very different and that has to inform how we proceed in terms of discovery and motions.

Sharon Henderson Ellis: Jackie, if I understand you correctly, on the subject of court-style procedures, you agree it's possible and perhaps advisable to draw a distinction between the discovery process and dispositive motions. Clearly, there's a need for adequate discovery but less need, if any, for dispositive motions.

Before we move to another question, does anyone else on the panel want to expound upon that?

Larry Engelstein: I want to throw in another wrinkle. As to the "two bites of the apple" and the statistics about individual or discrimination claims arising, many employers began buying insurance to cover these kinds of claims. The insurance policies often implicate a different set of lawyers, who are not the lawyers who are handling labor relations for the employer. The worst thing, from my perspective as a union advocate, is to have an insurance company-retained lawyer show up at a forum. They have all different kinds of incentives than those to which all of us are accus-

tomed. I don't mean this maliciously. It's just the structure of their business.

When these are linked, we must think through what that means in terms of people's practice behaviors, in terms of what their financial incentives are, and how the litigation is structured. Then we must consider how that links to the core values of a mature labor relations approach to solving workplace disputes, whatever titles or labels we put on the nature of the claim that's asserted. It's just another wrinkle that has, I think, complicated the situation and made the process even more difficult to navigate.

Michel G. Picher: I have an amplification, which I think perhaps some of our American friends may not appreciate. I'm not sure I'm truly at peace with this dimension of our law in Canada. While statutory rights are to be dealt with through labor arbitration, those rights are entirely carried by the trade union. After the decision of the Supreme Court of Canada in *Weber,* we find ourselves in a situation where the unionized employee must have the approval from his or her trade union to proceed with the statutory claim. The employee will not be able to go independently to the courts, whereas the unorganized employee will be able to do that. I happen to think that's a bit of an illusory right for the nonorganized but that's another story.

There are some interesting tensions that arise out of this whole structure and I think it's important to remember that.

Sharon Henderson Ellis: It may be interesting to hear about the genesis of this particular panel discussion. A couple of years ago, I was a participant in an early discussion of the *Pyett* decision and its implications. After the panelists concluded, one of Boston's leading union attorneys took the microphone to pose the following: He said he would never negotiate a *Pyett* provision into a CBA. Nonetheless, he feared that some courts might interpret a standard grievance arbitration clause as a *Pyett* provision forcing the union to arbitrate a statutory claim.

Despite the attorney's vast experience, he stated that considering discovery and the motions process, he was not certain he'd feel competent to represent the grievant in such a case. I responded that in Canada, discrimination claims in the unionized workplace are always arbitrated. I also said it was my belief that in Canada the procedures were kept informal—much as in any labor arbitration.

That attorney's stated concern prompted me to come back to our committee and ask Randi if she'd be willing to study or write

a report on the arbitration process in statutory cases in Canada. This resulted in her excellent paper.

Considering that one need not be an attorney to present a labor arbitration case, how often, if ever, do you think counsel or an arbitrator, would feel outside his or her area of expertise in the arbitration of a serious discrimination claim?

Larry Engelstein: I don't think that there's a reason why union advocates, whether they're lawyers or non-lawyers, in cases in which the union wants to bring a discrimination claim, a statutory claim, cannot go forward. Advocates who are sensitive to the workplace, who understand the context and the work practices and customs, are familiar with how the workforce is organized, are going to be effective advocates because one need not be educated as to what goes on in the workplace.

I think that the arbitrators will do as well in that as they do on the contract claims over time and most of the claims are garden variety claims. If somebody recognizes that it's not a garden-variety claim in that one situation, he or she can determine how to address that particular case in a different way.

But I want to respond to Michel. If I'm a union official and I am obligated to bring every claim that someone asserts, however frivolous or lacking in merit, in my bargaining unit and I have to spend the member's money on that rather than organizing non-union workers or fighting to get a different government elected or whatever the other things that unions do or should do, then that's an odd place to put me in because you're essentially making me an arm of the government to enforce the statutory norms. This is not because I don't endorse the statutory norms, but because I am not a legal services bureau for everybody in my bargaining unit. We all know that not all claims have merit. Many claims can be destructive and divisive and lacking in merit. That's as much an issue for the union as it is for the employer in terms of basic trade union principles, as well as efficiency.

Michel G. Picher: That's right. And I just want to say that we have, as you have, the duty of fair representation. A union is not required to carry each and every grievance no matter the merits of that grievance. A big part of the business of our unions, as I suspect is true in the United States, is to reject claims and say, "No, we're not going to spend our treasury in pursuing this particular claim." There's no automatic right of any employee in Canada to have his or her claim processed and heard through arbitration. If it's meritorious, that's a different matter.

Sharon Henderson Ellis: When we panelists met this morning, Michel asked me why litigation-style procedures are used more in the United States than in Canada. Have courts required that or is it in the laws somewhere? In my opinion, it's quite the opposite. I have a quote here from the *Mitsubishi* and *Gilmer* cases and I'll close with this quote: "An agreement to arbitrate only submits the substantive rights afforded by statute to their resolution in an arbitral rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." That's right out of the *Gilmer* decision and perhaps something for people to keep in mind.

Alvin Goldman: I need a clarification or reaffirmation of what I thought I heard Randi say, that the employee in a unionized workplace can avoid arbitration by not filing a grievance but instead filing a claim with the Human Rights Agency. If my understanding of what Randi said is correct, then it strikes me that that in large measure resolves the concern that Michel has, because the employee is making the decision as to whether to place his or her rights in the hands of the union's discretion rather than bypass the union.

Randi Hammer Abramsky: A unionized employee does have the choice to go directly to the tribunal for enforcement. Very often, however, employees file both a grievance and a complaint. The law has addressed that situation twice. But yes, if the individual decides, I want to go just statutory, he or she may do so.

Paul Salvatore: The U.S. Supreme Court dealt with that in *Pyett* as well, and said that there are multiple forums available for members to bring these types of claims. The Supreme Court decision enshrines that you have a right to go to the public agencies, like the Equal Employment Opportunity Commission. No one is cut off. That's part of the way the conflict with *Gardner Denver* was argued in *Pyett* and resolved.

Paul Rouse: Have you dealt with claims from employees claiming that the CBA itself is discriminatory? For example, the employee may allege a seniority provision is discriminatory. How do you handle that?

Larry Engelstein: Well, you know we're a big city and we've been blessed so far. We've avoided that. That issue hasn't arisen.

Michel G. Picher: I did have a case in the railway industry where a female conductor in British Columbia was told she was being transferred from Kamloops to Vancouver. She said, "I can't do

that. I have children. You can't make me go from here to there." Arbitrator Picher didn't have a whole lot of time for that saying, "Well, that's the reality of the industry you signed on." Off she went to the Canadian Human Rights Tribunal, who said Arbitrator Picher was wrong. Because of her family relations, she could not be discriminated against. So, yes, those things do happen.

Joan Parker: When *Pyett* was first decided I felt, perhaps prematurely and incorrectly, that while it was legally interesting it was not particularly practical or predictive of what would be. This was largely because I did not think unions would want to get involved in negotiating clear and specific waivers of their members' rights to take statutory claims to court. I didn't think that most employers would push unions to that point at the bargaining table. Now four years later, I'm interested in what you have observed of the labor relations landscape. Is *Pyett* becoming, in fact, a reality or is it still something we talk about at conferences?

My second question is about your particular protocol, the third panel that you have empowered. By the time a case goes there three things have occurred: (1) the union has disavowed the case and has made it clear it doesn't think it has merit; (2) the employee is on his or his or her own; and (3) the case has not been resolved in mediation. What has been the experience, if any, with that third neutral panel? It may sound cynical but I think it's pretty clear that the neutral who hears the case at that point is aware that certain people, certain powers, believe the case lacks merit. Is it a procedural window dressing or is something substantive likely to come out of that third panel?

Larry Engelstein: Nothing we're doing is procedural window dressing.

Paul Salvatore: The experience is that mediation is like a giant coffee filter—only a few grounds come out through the filter. We have a limited number of arbitrations every year under the AAA panel proceeding. I think one of them is reported in our paper and it's a full and fair hearing. A written decision is published. That award was confirmed by the federal district judge. There are cases, but not a lot of them, as mediation has taken care of most disputes. It's several handfuls of arbitrators over the last four years or so.

On the first issue, I'm not an academic; but people contact me about *Pyett*. I'm aware that several academics have been cataloging these arrangements. One of the big utilities in Southern California has such a provision. But *Pyett* provisions are suited for

every collective bargaining relationship. I think there have to be the right "soil and atmospheric conditions" existing before there can be the growth of a *Pyett* alternative dispute resolution process between labor and management. These provisions flourish in mature relationships with large numbers of employees where employees have faced the "two bites at the apple" problem. The employer and the union both want to do something about that because it's of value to them from a social justice and a due process point of view.

Larry Engelstein: I'll just say in my negotiations outside of the New York City landlords and their representatives, we have not had employers seeking to effectuate the full scope of the waiver that *Pyett* would permit. It may be that those cities are in less litigious areas and didn't have the history that gave rise to our situation in New York. There are some employers who are getting nervous now about arbitrators possessing the power to award compensatory damages and other forms of relief which are not common, for contract arbitrations; then having those awards subject to very differential standards of review. It has not, to my surprise, been something that we have had employers making proposals outside of the relationship that we have dealt with under the protocol.

Barry Winograd: Incidentally, gentlemen, I was one of the helpers, as it were, on the amicus brief that Mr. Salvatore loved so much. Question number one: What happened after all is said and done with the three security guards who ended up being moved over to the handyman position and then lost on the contract grievance after the age discrimination claim was carved out? What happened to their case? That's always interesting.

The second question is unrelated. Under Part B of the protocol rules, although the AAA national employment rules apply, the fee question is carved out**.**

Larry Engelstein: I think one of the guys retired. I think the other guy's still working. I can't remember the third.

Paul Salvatore: The *Pyett* plaintiffs went back to the Second Circuit, which sent the case back to the District Court. The District Court judge called a conference, and the plaintiffs agreed to go to arbitration. I think one of the plaintiffs retired, and I'm not sure that the arbitration has been pursued to conclusion.

Regarding fees, Justice Ginsburg repeatedly asked that question at oral argument, if you read the transcript. It's very simple really. The RAB has put out a directive to all of its members that the employer must pay for these AAA arbitrations. That means

that the employer is paying for the arbitrator and the arbitration. The room is free, as the collective bargaining parties are providing hearing rooms.

Marty Malin: In some preliminary stages of some empirical research in which I am engaged, my impression from reading the arbitration awards in Ontario, is that the human rights claims that go to award overwhelmingly are disability claims, and most of those seem to be accommodation claims. I was wondering if Michel and Randi could either invalidate or validate that impression. We're not at the analysis stage so I don't have percentages. If my impression is accurate, however, does it make a difference, because in the United States, that's not the case? While disability claims are increasing since the Americans with Disabilities Act Amendments Act, they're still a very small percentage of total discrimination claims. I would imagine in the bargaining unit that Paul Salvatore and Larry described, they're a very small percentage. Does that make a difference? And coupled with that, does it make a difference that in Ontario you either go to arbitration or you go to an administrative tribunal? Whereas in the United States you either go to arbitration or you get a jury trial.

Randi Hammer Abramsky: Anecdotally there are a lot of accommodation cases—disability claims—that arise. I would say of all of the human rights type claims we get, the majority are disability claims. We do get harassment. We do get bullying. We do get just pure old race or sex discrimination–type claims as well.

Jack Clarke: At least a subset of this organization, living south of the border, has heard cases involving statutory claims in a matter not unlike that used in Canada for many years. Those of us who are in that subset are those of us who are hearing cases in the federal sector. Using the grand term familiar to this organization, there is no such thing as external law in the federal sector because it's all internal.

Lisa Gerlertner: I have a question about the judicial review standards. In the United States we still have these very deferential judicial review standards for statutory and constitutional claims. In Canada, as I understand it, the judicial review standard for statutory is close to correctness and for constitutional law is correctness. What should happen in the United States with the judicial review standard both for individual as well as represented employees?

Larry Engelstein: I guess it depends on which president is going to be appointing the judges.

Paul Salvatore: I think the standard could evolve over time to permit greater scrutiny of the arbitrator's award. The *Pyett* decision, however, very clearly states that there must be a forum. The decision is about forum selection. So that what we've done is provide an appropriate, impartial forum for the resolution of these claims. No substantive rights are being in any way infringed or taken away. It's all about forum selection. The same thing that happens in court now happens in arbitrations.