Chapter 14

YOU WANT A PIECE OF *PYETT* WITH THAT?

I. The Adjudication of Statutory Claims: The Canadian Experience

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In Canada, labour arbitrators routinely adjudicate statutory claims that involve "employment-related statutes," including human rights legislation. This article discusses the approach taken by advocates, arbitrators, and the courts to these claims.

The Ontario Canadian Experience

In Ontario, the governing legislation for labour arbitration is the Ontario *Labour Relations Act*, S.O. 1995, c.1, Sch. A. The legislation requires every collective agreement to provide for "the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration, or alleged violation of the agreement. …"[2] If there is no such provision in an agreement, one is "deemed" to be included.[3]

The statute also prescribes the "powers of arbitrators."[4] Included is the power "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement."[5]

This statutory power followed a number of significant court decisions, which recognized that external employment-related statutes have a substantial impact on the employment bargain,

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[1]Member, National Academy of Arbitrators, Toronto, ON.
[2]S.O. 1995, c. 1, Sch. A, Section 48(1).
[3]*Id.*, Section 48(2).
[4]*Id.*, Section 48(12).
[5]*Id.*, Section 48(12)(j).

including a collective agreement. In *McLeod v. Egan*[6] the Supreme Court of Canada told arbitrators that they were not only permitted to consider external law in interpreting a collective agreement, but indeed "must" do so. In that case, the interrelationship between a collective agreement and the Ontario *Employment Standards Act* was at issue. The *Act* provided that "working hours of an employee shall not exceed eight in the day and 48 in the week," unless the employer received a permit from the director of the Employment Standards Branch and the consent or agreement of the employee or his agent. When an employee refused to work overtime in excess of 48 hours in the week and was disciplined, the Union grieved, asserting that the employee could not lawfully be required to work in excess of 48 hours in the week. The arbitrator determined that overtime was compulsory under the collective agreement and was unaffected by the provisions of the *Employment Standards Act*. The Supreme Court of Canada set aside the arbitration award, stating:[7]

> Any provision of an agreement which purported to give to an employer an unqualified right to require working hours in excess of those limits would be illegal, and the provisions of… the collective agreement, which provided that certain management rights should remain vested in the Company, could not, insofar as they preserved the Company's right to require overtime work by its employees, enable the Company to require overtime work in excess of those limits.… By operation of the statute, the right to require overtime beyond 48 hours per week from any individual had been taken away from the employer and became subject to the right of the employee under [the *Employment Standards Act.*]

In joining the decision, Chief Justice Bora Laskin added the following important point:[8]

> Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relationship between the parties but a general public enactment of the superior provincial Legislature. On such a matter, there can be no policy of curial deference to the adjudication of an arbitrator…. That is not to say that any arbitrator, in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a court as being wrong.

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[6] (1974), 46 D.L.R. (3d) 150 (S.C.C.).
[7] *Id.* at p. 155.
[8] *Id.* at p. 151–52.

Arbitrators were generally quick to endorse the *McLeod* decision, particularly when an external law rendered a collective agreement provision illegal. External law was also used as an "aid to interpretation" of the collective agreement, and the concept of "just cause" was held to include a consideration of the Ontario *Human Rights Code*.[9] In addition, a statute might be explicitly or implicitly incorporated into a collective agreement. Often quoted was an older decision by Lord Denning in *David Taylor and I Son Ltd. v. Barnett*:[10] "There is not one law for arbitrators and another for the court, but one law for all. If a contract is illegal, arbitrators must decline to award on it just as the court would do."

More recently, in *Re Parry Sound (District) Social Services Administration v. OPSEU, Local 324,*[11] the Supreme Court of Canada further expanded the jurisdiction of arbitrators in regard to external law. At issue was the discharge of a probationary teacher who alleged that she had been terminated for taking pregnancy leave. The collective agreement contained language that "a probationary employee may be discharged at the sole discretion of and for any reason satisfactory to the Employer and such action by the Employer is not subject to the grievance and arbitration procedures and does not constitute a difference between the parties." A majority of the Board of Arbitration, chaired by Paula Knopf, found that Section 48(12)(j) imported the substantive rights of the *Human Rights Code* into the collective agreement over which an arbitrator has jurisdiction. The Ontario Divisional Court granted the Employer's application for judicial review, holding that Section 48(12)(j) conferred power on a board of arbitration to interpret and apply the *Human Rights Code* when and if it already had jurisdiction to hear a grievance, but not otherwise. It determined that because the grievance was not a "difference arising out of the collective agreement," the board did not have jurisdiction to resolve the dispute. The Ontario Court of Appeal set aside that decision on another basis and the matter was appealed to the Supreme Court of Canada.

In a 7–2 decision, the Supreme Court of Canada determined that Section 48(12)(j) incorporated into every collective agreement the substantive rights and obligations of the *Human Rights*

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[9] *E.g., Re Stelco Wire Products Inc. and United Steelworkers Local 3561* (1986), 25 L.A.C. (3d) 427 (Brent)(holding that just cause under the collective agreement cannot include any prohibited grounds as set out in the *Code*).

[10] [1953] 1 All.E.R. 843 (C.A.).

[11] [2003] 2 S.C.R. 157 (S.C.C.).

Code. The Employer's right to manage was subject not only to the express provisions of the collective agreement, but also to the statutory provisions of the *Human Rights Code* and other employment-related statutes, and those rights were enforceable through the arbitration process. As the Court concluded in *Re Parry Sound*:[12]

> … [T]he Board [of Arbitration] was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes.

A number of other employment statutes in Ontario also deal with the arbitration of statutory claims. The Ontario *Employment Standards Act,*[13] which is somewhat similar to the *Fair Labor Standards Act* in the United States, explicitly states that the *Act* "is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act" and that an employee covered by a collective agreement "may not file a complaint [under the enforcement mechanism of the Act] alleging a contravention …."[14] Consequently, under this legislation, unionized employees covered by a collective agreement *must* utilize the grievance arbitration process to enforce their statutory rights.

The Ontario *Human Rights Code* contains the following provision in Section 45.1:[15]

> The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

Unlike the situation for a unionized employee under the *Employment Standards Act,* a unionized employee who pursues a grievance alleging a violation of the *Code* may file an application with the Ontario Human Rights Tribunal, established under the *Code,* if unsatisfied with the outcome at arbitration. The Tribunal would then make a decision under Section 45.1 as to whether the arbitration process has "appropriately dealt" with the substance of

[12] *Id.* at par. 23.
[13] S.O. 2000, C.1.
[14] S.O. 2000, C.1, Sections 99(1) and (2).
[15] S.O. 1990, C.H.19, Section 45.1.

the application.[16] How that language has been interpreted is addressed below.

The end result of the jurisprudence and the legislation is that arbitrators have jurisdiction to interpret and apply not only human rights legislation, but all employment-related statutes—even where they conflict with a collective agreement. Indeed, it has been noted that "[t]he Canadian experience has been that the majority of our human rights jurisprudence has in fact developed out of the arbitral context as opposed to from the human rights tribunal."[17] It has been observed that[18]

> The world of arbitration is increasingly the world of human rights. Seldom is a grievance filed that does not contain, at least as a component, an allegation that the grievor has been harassed or discriminated against under the applicable human rights legislation.

The Practice of Arbitrating Statutory Claims

Prehearing "Discovery"

In adjudicating statutory claims in a labour arbitration context, arbitrators have not imposed the "discovery" processes used in civil litigation, such as depositions (examination for discovery), requests to admit, or interrogatories. Instead, arbitrators have utilized the traditional, far more limited "discovery" tools used in labour arbitration generally.

Under Section 48(12) of the Ontario *Labour Relations Act,* arbitrators have the following powers:[19]

> (a) to require any party to furnish particulars before or during a hearing:
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> (b) to require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing.

These are the "discovery" tools used in labour arbitration, in addition to information learned during the steps of the grievance procedure. It is expected (though it does not always happen) that the parties will learn about the issues and allegations through

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[16] *Id.*

[17] "Arbitrating Human Rights Based Claims: The Ontario Experience," p. 2, Katherine E. Ford and Michael Sherrard, presented at the Regional 7 NAA meeting in Phoenix, Arizona, March 2012 (hereinafter "Arbitrating Human Rights Based Claims").

[18] Arbitrating Human Rights Based Claims, p. 1.

[19] S.O. 1995, c. 1, Sch. A, Section 48(12).

the steps of the grievance process. The grievance form itself usually identifies the nature of the dispute and the relief sought. As Ontario Chief Justice Warren Winkler has stated: "For parties to a collective agreement, the grievance procedures *is,* or at any rate should be, their discovery process."[20]

Particulars

When the grievance procedure falls short of informing the opposing side, a request for particulars may be made. Arbitrator Ted Weatherill, in *A Practical Guide to Labour Arbitration Procedure,* stated the following under the heading "What are Particulars?":[21]

> These are the particular facts which will be relied on as leading to the conclusion that the tribunal is asked to reach. They are the "who, what where and when" of what is complained of. They are not the same as a statement of the evidence which may prove those facts, although in some cases the distinction between these is slight.

The underlying basis of the requirement for particulars is the concept of natural justice, as it is known in Canada, and due process, as it is known in the United States—specifically, that a party is entitled to know the case it must meet. It is not entitled to know, however, the particular evidence upon which the other party relies. The other basis is arbitral efficiency—to avoid the need for adjournments when a party is taken by surprise.

As a practical matter, most counsel routinely provide particulars upon request of the opposing party in advance of the hearing. Disputes as to the sufficiency of the particulars do arise, which can require the intervention of the arbitrator. This can occur prior to the hearing—usually through a conference call—but, at times, it is addressed at the first day of hearing.

Production of Documents and Other Things

In terms of documents, arbitrators have the power to require a party to produce documents (including electronic documents) that "may be relevant" to the issues in dispute. The general standard is that the requested document must be "arguably relevant," and not just a "fishing expedition." Some of the key principles in

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[20]"Arbitration as the Cornerstone of Industrial Justice," School of Policy Studies, Queens University, Kingston, Ontario, 2011, p. 20. (emphasis supplied) (hereinafter "Arbitration as the Cornerstone").

[21]Weatherill, *A Practical Guide to Labour Arbitration Procedure*, 2nd Ed., Canada Law Books, Aurora, Ontario, 1998, at p. 14.

regard to the production of documents were set out in *Re West Park Hospital*:[22]

> Let us start with the principle that labour arbitration is effective providing a speedy and efficient resolution for the parties of important issues in a forum they can control and which they have designed. Boards of arbitration exist to assist the parties. The decision evolves from concepts which are intended to foster fairness, harmony and sensible labour relations. Anything which can assist in the preparation of cases, the refining of issues or which will facilitate settlement should be encouraged. As a general proposition, pre-hearing disclosure will assist with all these matters and should occur wherever possible. … However, where the disclosure is contested, the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the board of arbitration should be satisfied that the information is not being requested as a "fishing expedition". Fourth, there must be a clear nexus between the information being requested and the positions in dispute at the hearing. Further, the board should be satisfied that disclosure will not cause undue prejudice.

Another, more liberal, standard that is sometimes utilized is the "semblance of relevance" test adopted by Arbitrator Owen Shime in *Re Toronto District School Board and C.U.P.E., Local 4400*.[23]

The application of these criteria can be significantly contested and, in some cases, lead to additional hearing days. There are also consequences for the failure to particularize a claim or for not providing documents, after being ordered to do so by an arbitrator. For example, the evidence may not be led at the hearing. In extreme cases, such as blatant, repeated disregard of arbitral orders for production, a grievance might also be dismissed.[24]

In terms of the power to order production of "other things," arbitrators have ordered grievors to produce medical documentation and, in appropriate cases, to undergo a medical or a psychological evaluation. This type of information may be required in an accommodation case where the grievor's physical or mental health condition is in issue and there is a clear need for such evidence.[25] Such production orders are usually accompanied by orders restricting the disclosure and use of such medical information.

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[22] (1993), 37 L.A.C. (4th) 160 (Knopf).

[23] (2002), 109 L.A.C. (4th) 20 (Shime).

[24] *Re National-Standard Co. of Canada Ltd. and C.A.W. Local 1917* (1994), 39 L.A.C. (4th) 228 (Palmer); *Re Budget Car Rentals Toronto Ltd. and U.F.C.W., Local 175* (2000), 87 L.A.C. (4th) 154 (Davie).

[25] *Re Canada Post Corp. and C.U.P.W.* (1998), 69 L.A.C. (4th) 393 (Burkett); *Re Oliver Paipoonge (Municipality) and L.I.U.N.A., Local 607* (1999), 79 L.A.C. (4th) 241 (Whitaker).

Dispositive Motions

There is no Canadian equivalent to a motion for summary judgment, as used in the United States. The Canadian semi-equivalent that is occasionally used is a Motion for a Non-suit. Unlike a motion for summary judgment, however, it may only be presented after the first party completes its case in chief. The motion is basically a claim that the first party's case is so weak that there is nothing for the second party to answer, and it should be rejected without the need for the second party to present its evidence. If successful, the case is over and the first party loses.

Such a motion, however, is not widely utilized in Ontario because the party bringing a non-suit motion must make an "election" not to call any evidence. There is no option, if the motion is unsuccessful, to then call evidence. As a result, this type of dispositive motion is rarely made.

Arbitration Hearings

The arbitration hearing involving a statutory claim is the same as any other hearing. If the claim involves an alleged breach of the duty to accommodate or discrimination on a prohibited ground under the Ontario *Human Rights Code,* the onus (burden of proof) is on the Union/grievor. If the claim is that the grievor was terminated improperly under the *Code,* the onus, as it is in a regular discharge case, is on the Employer to establish that it had just cause. Who has to lead its evidence first, usually, but does not always, follow the onus. At times, the Employer has more information and may lead its evidence first, while maintaining that the onus of proof lies with the Union.

Hearings generally start with opening statements, where the parties set out what they expect the evidence to establish and how the collective agreement/statute was—or was not—violated. Evidence is under oath. Arbitrators, under Section 48(12)(d) and (e) of the Ontario *Labour Relations Act* have the power to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath "in the same manner as a court of record in civil cases" and "to administer oaths and affirmations." There is examination-in-chief of a witness, cross-examination, and re-examination, which is equivalent to direct, cross-examination and re-direct. But, in Canada, it ends there. There is no re-

redirect or re-cross-examination. The arbitrator, however, may ask questions of a witness.

Documents, to be admitted into the record, must be "relevant" to the issues in dispute. While the standard for production of documents is "arguably relevant," the standard for admissibility is relevance. Summaries are permissible, provided the underlying documents are available to the opposing side.

The Rules of Evidence generally apply, but an arbitrator, under Section 48(12)(f), has the power "to accept the oral or written evidence as the arbitrator or the arbitration board … in its discretion considers proper, whether admissible in a court of law or not."[26] This provision allows an arbitrator to accept evidence that might not be acceptable in court, such as hearsay. Conversely, some arbitrators have concluded that this provision also allows arbitrators to reject evidence that might be accepted in court. An example of that, although there is no arbitral consensus, is video surveillance evidence of an employee while off work.[27] Other examples include the exclusion of evidence deemed "improper," such as discussions during a mediation session, grievance discussions, and settlement negotiations under a "labour relations" or "shop steward" privilege.[28] While some of these exclusions are based on a Wigmore-type[29] analysis, they clearly demonstrate that arbitrators do have the power to exclude relevant evidence.

In labour arbitrations, including the adjudication of statutory claims, transcripts are not taken. Nor, with some exceptions, are the proceedings audio recorded. The parties, however, take copious notes, as does the arbitrator. The arbitrator's notes, however, are not compellable in the event of an appeal.[30]

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[26] S.O. 1995, c. 1, Sch. A, Section 48(12)(f).

[27] *See, e.g., Re Canadian Pacific Ltd. and B.M.W.E. (Chahal)* (1996), 59 L.A.C. (4th) 111 (M. Picher)(video surveillance evidence admissible where it is reasonable to have undertaken the surveillance and it is conducted in a reasonable way); *Re Hershey Canada Inc. and C.A.W.-Canada Local 462* (2008), 176 L.A.C. (4th) 170 (Levinson)(decision to videotape was unreasonable, so evidence inadmissible).

[28] *Re British Columbia (Ministry of Transportation) and B.C.G.E.U., Local 1103* (1990), 13 L.A.C. (4th) 190 (Larson) ("shop steward" privilege should extend to confidential labour relations information of the employer as well).

[29] The "Wigmore" criteria has long been used in civil litigation in Canada to ascertain whether certain communications are to be regarded as "privileged." J.H. Wigmore, *Evidence in Trials at Common Law,* vol. 8, 3rd ed., rev. by J.T. McNaughton (Boston: Little, Brown, 1961) at s. 2285.

[30] *Re Alberta (Labour Relations Board) v. I.B.E.W., Local 1007* (1991), 83 Alta. L.R. (2d) 253 (Alta. Q.B.); *Re Yorke v. Northside-Victoria District School Board* (1992), 90 D.L.R. (4th) 643 (N.S.C.A.); *Re Faradella v. The Queen* (1974), 2 F.C. 465 (F.C.A.).

After the conclusion of the evidence, closing arguments are made. The party with the onus proceeds first, followed by the opposing party, and the first party then has a right to reply. On rare occasions, the parties will submit written "submissions" or briefs. In my personal experience, closing arguments have some advantages over written briefs. The first is that the arbitrator gets to ask questions of counsel, and hear what they have to say in response. The second is that the responding party usually addresses all the points made by the first party, and the first party can respond in reply. That does not always happen when the parties file simultaneous briefs to the arbitrator, which can leave arguments unaddressed.

Once the hearing is complete, the arbitrator then writes a written decision, with reasons. Under the Ontario *Labour Relations Act,* Section 48(7), a single arbitrator "shall give a decision within 30 days after the hearings on the matter submitted to arbitration are concluded." Under Section 48(8), with a board of arbitration, the decision must be given within 60 days. However, under Section 48(9), those time periods may be extended by agreement of the parties, or in the arbitrator's discretion "so long as he, she or it states in the decision the reasons for extending the time." These time limits have not been enforced.

Finally, in Canada, arbitrators routinely "remain seized" in regard to the interpretation and implementation of the award. This means that the arbitrator retains jurisdiction to deal with any issues in regard to the implementation and interpretation of the original award.

Scope of Review

Although the standard of judicial review of arbitration decisions seems to be a constantly moving target, the current jurisprudence is that there are two applicable standards: reasonableness and correctness.[31]

The "reasonableness" standard is a standard of deference. The court will look at the qualities that make a decision "reasonable"—the justification provided, the transparency and intelligibility of the decision, and whether it falls within a range of possible, acceptable outcomes.[32] Factors include whether there is a "privative" clause—a provision in the legislation that limits judicial review and

[31] *Dunsmuir and New Brunswick* [2008], 1 S.C.R. 190 (S.C.C.).
[32] *Id.* at par. 47.

whether the decision-maker is interpreting his or her own statute or a statute closely connected to its function and with which he or she is particularly familiar.[33] As explained in *Re Dunsmuir:*[34]

> Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D.J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies in the Canadian constitutional system.

The "correctness" standard employs no deference. The court will engage in its own analysis and decide whether or not it agrees with the determination. If not, it will provide the "correct" determination. Again, as explained in *Re Dunsmuir:*[35]

> …When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination or decision of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

Generally, an arbitrator's findings of fact and interpretation of a collective agreement will be given deference and reviewed under the "reasonableness" standard. Unfortunately, the standard to be applied when an arbitrator interprets employment-related statutes is not entirely clear. In the past, when an arbitrator decided questions of law, under an external statute, the "correctness" standard would be applied. But the Court in *Dunsmuir* stated as follows: "The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan,*[36] where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review." [37]

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[33] *Id.* at par. 52.
[34] *Id.* at par. 49.
[35] *Id.* at par. 50.
[36] [1974] 1 S.C.R. 517 (S.C.C.).
[37] *Dunsmuir, supra* note 31, at par. 54.

The Court in *Dunsmuir* further stated:[38]

> [Q]uestions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

In terms of legal issues, the standard is affected by whether the issue is a true question of jurisdiction or of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise." The Court stated:[39]

> Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Or where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context. The adjudication of labour law remains a good example of this approach.

Consequently, it remains to be seen whether an arbitrator's determination that an employer has violated the Ontario *Human Rights Code* is interpreting a "statute closely connected to its function" in light of the statutory jurisdiction (and requirement) to interpret and apply the *Code*, or whether such a decision is a decision of general applicability and of "central importance to the legal system as a whole. …" Also at issue is whether arbitrators will be given less deference than adjudicators under the *Human Rights Code*.

In an even more recent decision, the Supreme Court of Canada determined that an arbitral award applying common law and equitable remedies, such as estoppel, deserved deference and should be reviewed on a standard of reasonableness, rather than correctness.[40]

The scope of judicial review is, of course, highly significant to all parties. A recent study by Alan Ponak and Erika Ringseis of arbitration awards in Alberta from 1997 to 2001, entitled "Judicial Review of Arbitration Awards in Alberta: Frequency, Outcomes and Standard of Review,"[41] suggests that the standard of review is a factor in appeals of arbitration awards. The study found that 7 per-

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[38] *Id.* at par. 51.
[39] *Id.* at par. 54.
[40] *Re Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals* [2011] S.C.R. 59 (S.C.C.).
[41] Canadian Labour & Employment Law Journal, 13 C. L.E.L.J. 415.

cent of arbitration awards were judicially reviewed, with approximately 3 percent of those awards being overturned. The outcome of whether or not they were overturned was dependent on the standard of review applied. As stated by the authors:[42]

> [T]he choice of the standard of review appears to be important; the relatively few awards which were reviewed on the correctness standard were much more likely to be quashed.

The Interrelationship Between Grievance Arbitration and the Human Rights Tribunal

In June 2008, the Ontario *Human Rights Code* was significantly amended. With the amendments, the Ontario Human Rights Commission ("Commission") no longer served as the point of access to the adjudication process and, instead, "applicants" could file their complaint directly to the Human Rights Tribunal of Ontario (HRTO or Tribunal).

Under the former statute, the Commission had discretion not to deal with a complaint where "the complaint is one that could or should be more appropriately dealt with under an Act other than this Act."[43] This section was often used to defer complaints filed by unionized employees when a grievance had been filed on the same issues in order to avoid duplication of proceedings. The revised statute provides, in Section 45.1, as follows:[44]

> The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substances of the application.

When these amendments took effect, there was significant concern that the Tribunal would act as an appellate review body over labour arbitration decisions in human rights cases. Although some initial decisions of the Tribunal appeared to interpret the words "appropriately dealt with" as providing a mandate to the Tribunal to review an arbitrator's award for conformity with the Tribunal's view of the law, the decision of the Canadian Supreme Court in *Re British Columbia (Workers' Compensation Board) v. Figliola*,[45] has significantly limited the scope of an agency's "review" under a provision like Section 45.1. In *Figliola,* a Review Officer of the British

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[42] *Id.* at p. 426.
[43] Ontario *Human Rights Code*, R.S.O. 1990, C. 19, Section 34(1)(a).
[44] *Id.* at Section 45(1).
[45] 2011 S.C.R. 52 (S.C.C.).

Columbia Workers' Compensation Board rejected the complainants' contention that the Board's policy in regard to compensation for chronic pain violated the complainants' rights under the British Columbia *Human Rights Code*. The complainants initiated an appeal to the Workers Compensation Appeal Tribunal, but before it could be heard, the legislation was amended to remove jurisdiction to hear *Code* issues, although judicial review was still available. Instead of applying for judicial review, however, the complainants filed new complaints with the British Columbia Human Rights Tribunal, which enforces the B.C. *Human Rights Code,* repeating the same contentions concerning the chronic pain policy. The B.C. Workers' Compensation Board intervened and moved to dismiss the complaints pursuant to Section 27(1)(f) of the B.C. *Code*. That provision, like Section 45.1 of the Ontario *Code,* allows the Tribunal to dismiss all or part of a complaint where "the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding."[46] The B.C. Tribunal would not dismiss the complaints and the matter was appealed to the Supreme Court of Canada.

A majority of the Court determined that the Tribunal ought to have dismissed the complaints, concluding that Section 27(1)(f) was not a "statutory invitation either to 'judicially review' another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome."[47] Instead, it determined that the tribunal should restrict its determination to three questions:[48]

1. Did the previous decision maker have concurrent jurisdiction to decide human rights issues?
2. Was the previously decided legal issue essentially the same as what is being complained of to the Tribunal?
3. Was there an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it?

The Court determined that it was "these questions [which] go to determining whether the substance of the complaint has been

[46] *British Columbia Human Rights Code*, R.S.B.C. 1996, c.210, s. 27(1)(f).
[47] *Figliola, supra* note 45, at par. 38.
[48] *Id.* at par. 37.

'appropriately dealt with.'" The Court stressed the importance of finality in administrative adjudication, explaining:[49]

> The section [Section 27(1)(f)] is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. …

In the majority's view, relitigation in a different forum was "exactly what the complainants in this case were trying to do" by seeking "fresh proceedings before a different tribunal in search of a more favourable result."[50] The merits of a decisionmaker's determination under the *Code* was "properly the subject of judicial review, not grounds for a collateral attack by a human rights tribunal under the guise of s.27(1)(f)."[51]

The Ontario Human Rights Tribunal has determined that the decision in *Re Figliola* applies under Section 45.1 of the *Code*.[52] Similarly, in *Paterno v. Salvation Army Centre of Hope*,[53] the Tribunal rejected an applicant's argument that he and the union (at the individual's request) did not pursue *Code* issues before the arbitrator. The Tribunal determined that an arbitrator, in determining that an employee is discharged for just cause, implicitly determines that the discipline is consistent with the employer's statutory obligations, including the *Code*. The Tribunal stated:[54]

> The *Code* is not separate from just cause; rather, it infuses this concept and is an important part of it. It is not analytically correct or appropriate to ask an arbitrator to ignore possible *Code* breaches in finding whether there was cause, or to allow a grievor to save for later his or her *Code* objections to the cause for discipline. This would be contrary to the policy intentions of s.45.1 in preventing duplicative litigation. A grievor who pursues a grievance that discipline is without cause should raise all the arguments for that belief in the collective agreement proceeding he or she has commenced.

Consequently, the concern that Section 45.1 would allow the Tribunal to sit in review of arbitration awards interpreting the

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[49] *Id.* at par. 38.
[50] *Id.* at par. 47.
[51] *Id.* at par. 50.
[52] *Gomez v. Sobeys Milton Support Centre* [2011] HRTO 2207 (Ont. HRT).
[53] [2011] HRTO 2298 (Ont. HRT).
[54] *Id.* at p. 28.

Ontario *Human Rights Code* has been alleviated by the decision in *Figliola*.

Mediation

Section 48(14) of the Ontario *Labour Relations Act* empowers an arbitrator or a board of arbitration to "mediate the differences between the parties at any stage in the proceedings with the consent of the parties."[55] It further provides: "If the mediation is not successful, the arbitrator or arbitration board retains the power to determine the difference by arbitration." This provision applies to all arbitrations, including those involving statutory claims. Very often, the first day of the "hearing" is devoted to mediation. Mediation is often successful in resolving the grievance.[56]

Selection of Arbitrators

One of the perceived advantages of labour arbitration is the ability of the parties to select their arbitrator. Many factors go into the selection process, but certainly the arbitrator's knowledge of and experience with human rights matters is one of them.

Publication of Awards

Unlike the United States where arbitration is essentially a "private" process, in Canada it is viewed as both public and private. It is public because arbitration is not the result of a private bargain, but the result of legislation—an arbitration clause is deemed to be included in every collective agreement. As a result, all awards that are issued under the legislation are supposed to be filed with the Ontario Ministry of Labour, Office of Arbitration, and become available to the public. The permission of the parties is not required. In addition, there are a number of private publishers of arbitration awards. The result is that arbitral jurisprudence is widely available and accessible. That, in turn, is useful to advocates and arbitrators and the development of the law.

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[55]S.O. 1995, c.1, Sch. A, Section 48(14).

[56]The 2010–2011 Crown Employees Grievance Settlement Board Annual Report, concluded that, for the past three fiscal years, the number of cases resolved through settlement or withdrawal after mediation at the Board was over 80%.

Remedial Issues

The power of arbitrators to "interpret and apply" employment-related statutes includes the power to apply the remedies available under such laws. Under the Ontario *Human Rights Code,* these include an order to accommodate; damages for mental distress; damages for injury to dignity, feelings, and self-respect; and "systemic orders," such as ordering training in human rights issues or a change in policies, among other more traditional remedies such as reinstatement and back pay. There is also jurisdiction to award punitive damages. There is some concern that labour arbitrators, who are selected consensually, might shy away from big damage awards and systemic-type remedies because of concern for their continued acceptability. In addition, arbitrators may be more conservative in terms of remedies due to the perceived impact of such awards on the parties (the employer and union), and the impact that significant awards might have on obtaining settlements. But, as such awards are seen as required and basic to a full remedy, and the parties expect such awards in appropriate cases, those concerns may be alleviated.[57]

The Downside of Arbitrating Statutory Claims

As arbitral jurisdiction has expanded, the basic goals of labour arbitration as a quick, inexpensive method of fostering industrial justice, has gotten harder to achieve. In a provocative article, "Arbitration as a Cornerstone of Industrial Justice," Chief Justice of Ontario Warren Winkler laments the passage of the "golden age" of labour arbitration—when "grievance arbitration worked well in delivering on its goals of speedy, cost-effective, fair, and efficient justice for the parties."[58]The expansion of arbitral jurisdiction[59] has added significant legal complexity to arbitration, as well as added to the volume of cases routed to arbitration. Parties have also increasingly felt that they needed to be represented by lawyers to ensure that all legal arguments were presented.[60] There

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[57]*Re Charlton and Ontario (Ministry of Community Safety and Correctional Services* 2007 O.P.S.G.B.A. No. 4 (Carter); *Re Greater Toronto Airport Authority (GTAA) and Public Service Alliance* 2011 ONSC 487 (Ont. Div. Ct.).

[58]Arbitration as the Cornerstone, *supra* note 20, at p. 9.

[59]This includes not only employment-related statutory claims, but also the power to address all disputes that arise "in their essential character" from the interpretation, application, administration, or alleged violation of the collective agreement, including a number of tort claims. *Re Weber v. Ontario Hydro* (1995), 2 S.C.R. 929 (S.C.C.).

[60]Arbitration as the Cornerstone, *supra* note 20, at pp. 13–14.

has also been a cultural shift from a problem-solving, labour relations model of grievance arbitration to a "litigation" type model.[61] The result, at times, has been that "labour dispute resolution has become too slow, costly, inflexible, and legalistic to meet the true needs of the parties." On the other hand, the developments "have been, nonetheless, quite beneficial overall for the parties."[62]Arbitrators "are able to provide the parties with a much-needed, expert, 'one-stop shop' approach to resolving all related disputes."[63]

The "answer" to these delay and cost issues, according to Chief Justice Winkler, is not to undo all the changes that have occurred, but to take steps to bring some rationality to the process, beginning with the concept of "proportionality." Proportionality means "the practice of maintaining a reasonable balance between the time and money expended on the case on the one hand, and the significance of the case to the parties and the value of what is involved on the other." [64] Justice Winkler states: "A case must be resolved in a manner that reflects the complexity, monetary value, and importance of the dispute."[65] He also posits some suggestions such as the use of agreed facts and admissions, limiting witnesses to "necessary" witnesses, use of expedited processes, deadlines for scheduling hearings, selecting arbitrators and issuing awards, increased pre-hearing preparation and disclosure, and the use of pre-determined arbitrators, among other suggestions. He concludes by stating:[66]

> It is essential to bring the parties back into the process. By encouraging parties to design and take charge of their own grievance procedures, and to do so in a manner that reflects proportionality and innovation, it is possible to achieve the fundamental goal of delivering fair, timely, and affordance mid-contract dispute resolution. …

Conclusion

In Ontario and Canada, generally, labour arbitration has approached the adjudication of statutory claims by utilizing and adapting traditional labour arbitration approaches, rather than importing civil litigation procedure into the arbitration process.

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[61] *Id.* at p. 15.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at p. 20.
[66] *Id.* at p. 22.

It is a model that—largely—works. Whether it offers any guidance for the adjudication of such claims in the United States, however, remains to be seen.

II. The Forum for Litigation of Statutory Employment Claims After *Pyett:* A New Approach From Management and Labor

Terry Meginniss[67] and Paul Salvatore[68]

Introduction

In 2009, the U.S. Supreme Court decided that a provision in a collective bargaining agreement (CBA) entered into between an employer and a union that waives the right of covered employees to pursue statutory claims of discrimination in a judicial forum is enforceable, provided that the waiver is both specific and clear, and provided that the bargaining agreement creates a sufficient alternative forum for the pursuit of those claims. *See 14 Penn Plaza LLC v. Pyett.*[69] The Supreme Court's holding has been cheered by some and denigrated by others. Those who have welcomed the decision emphasize that (1) the decision authorizes the use of arbitration, a cost-effective and speedy forum, for employers and employees to resolve employment discrimination disputes by a neutral party; (2) the decision will have the salutary effect of easing the burden on an already crowded judicial system; and (3) the Court honored the abilities of arbitrators to hear and rule on these matters.

The Supreme Court's ruling left open a vexing question, however. In *Pyett,* the employees argued that the bargaining agreement's arbitration provision provided the union with the exclusive right to determine whether to bring their discrimination claim to arbitration. They asserted that, because the union had declined to bring the claim to arbitration, they had to be afforded the opportunity to pursue the claim in court; otherwise the mandatory arbitration provision would have effectively extinguished altogether

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[69]14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 105 FEP Cases 1441 (2009), *rev'g* 498 F.3d 88, 104 FEP Cases 807 (2d Cir. 2007).