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Choice, But No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada

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This paper explores the question of the proper forum for adjudicating workplace human rights claims for unionized employees in Canada. The author argues that the Supreme Court of Canada has directed a hybrid jurisdictional model, in which arbitrators have exclusive jurisdiction over some but not all such claims. Lower courts and tribunals have largely disobeyed this direction, rejecting the hybrid model in favour of unrestricted concurrency between statutory human rights tribunals and arbitration. A concurrency model theoretically permits unionized employees to choose where to take their claims. The author argues that this choice is more apparent than real, however. Recent developments in statute and case law force employees who chose to take their human rights claims before statutory tribunals to abandon any the additional rights which may flow from their collective agreements, making grievance arbitration the only practical option in almost all cases where it is available. To remove confusion and ambiguity, Canadian legislatures should provide clear direction on available forums. The author argues that arbitration should be confirmed as the exclusive forum for human rights claims linked to collective agreements; recourse to statutory human rights tribunals should be available only in the infrequent case where arbitration is not appropriate because the employee's union has played an active role in the alleged discrimination.

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Using differences between the American and Canadian approaches as its starting point, this paper explores the question of the proper forum for the adjudication of workplace human rights claims of unionized employees in Canada. The Supreme Court of Canada has directed that what the author describes as a hybrid model is to prevail, with arbitrators having exclusive jurisdiction over some but not all of those claims. Nonetheless, the model now prevailing in the lower courts and tribunals is one of unrestricted concurrency between statutory human rights tribunals and arbitration, under which unionized employees may choose where to take their claims. The author argues that this choice is more apparent than real; as a practical matter, recent developments in statute and case law have made grievance arbitration so overwhelmingly advantageous to employees that statutory adjudication is no longer a realistic option. To remove confusion and ambiguity, Canadian legislatures should provide clear direction on which forum has jurisdiction. Arbitration should be confirmed as the exclusive forum for human rights claims that are closely linked to the collective agreement. Recourse to statutory human rights tribunals should be available only in the infrequent cases where, in the light of union control over access to the grievance and arbitration process, union complicity in employer discrimination means that arbitration is not a realistic option. The author argues that in all other circumstances, arbitration is fully capable of vindicating individual human rights claims of unionized employees, relying on a framework that integrates these claims with other rights and interests relevant to equal, harmonious and productive workplaces.

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Introduction

In its 1974 decision in *Alexander v Gardner-Denver Co*, the United States Supreme Court held that a unionized employee could take his individual employment discrimination claim directly to court, even though his collective agreement provided for arbitration of such claims.[1] So strongly did the Court feel about individual autonomy in this context that it permitted the plaintiff to pursue his claim in court, even though it had already been dismissed at arbitration. A quarter-century later, the Court has clearly changed its mind. In *14 Penn Plaza LLC v Pyett*, the Court held that properly drafted arbitration clauses in collective agreements *can* channel employment discrimination claims out of the courts and into arbitration.[2] For Pyett and his fellow union members, the practical effect of this ruling was that their discrimination claim was never heard at all, since their union had declined to arbitrate it.[3]

1. 415 US 36 (1974).

2. 556 US 247 (2009). The Court had already eroded the *Alexander* principle by holding that arbitration agreements between individual (non-unionized) employees and their employers could preclude access to the courts to enforce statutory rights. See *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20 (1991).

3. Oddly, the *Pyett* Court left open the very important question of whether in future cases unions or individual employees would control whether individual statutory discrimination claims would go to arbitration. *Supra* note 2 at 273–74. Union control follows logically from the Court's holding that the issue of forum is subject to collective bargaining.

The decision touched off an energetic debate among American scholars about whether *Pyett* denies unionized employees their "day in court" on human rights issues and relegates them to substandard forms of dispute resolution that subordinate individual interests to collective ones. Many scholars from across the political spectrum have concluded that it does both of these things.[4] In a thorough and thoughtful 2011 article, Shelley McGill and Ann Marie Tracey compare and evaluate the American and Canadian models for adjudicating unionized employees' workplace human rights claims.[5] They argue that the Canadian model has a significant advantage over the post-*Pyett* American model because it gives arbitrators and specialized human rights tribunals (HRTs) concurrent jurisdiction over these claims, thereby offering unionized employees the right to choose their preferred forum instead of compelling them to arbitrate.[6] McGill and Tracey place collective agreement arbitration and adjudication before courts or HRTs at different points on an "access to justice" continuum. They argue that arbitration advances "access" values such as privacy, speed and finality at the expense of "justice" values such as transparency, consistency and fairness. They acknowledge that access values are important, but argue they should not be forced upon individual rights claimants who prefer justice values.[7] McGill and Tracey therefore favour the Canadian model, which they see as allowing employees to satisfy their personal preferences about where on the access-justice continuum their needs would best be met.

4. See e.g. Margaret L Moses, "The Pretext of Textualism: Disregarding Stare Decisis in *14 Penn Plaza v. Pyett*" (2010) 14:3 Lewis & Clark L Rev 825 at 856–58; Alan Hyde, "Labor Arbitration of Discrimination Claims After *14 Penn Plaza v. Pyett*: Letting Discrimination Defendants Decide Whether Plaintiff May Sue Them" (2010) 25:4 Ohio St J on Disp Resol 975; Mark Berger, "A Step Too Far: *Pyett* and the Compelled Arbitration of Statutory Claims under Union-Controlled Labor Contract Procedures" (2009) 60:1 Syracuse L Rev 55. For a view critical of the *Pyett* reasoning but supportive of comprehensive labour arbitration agreements, see David L Gregory & Edward McNamara, "Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: *14 Penn Plaza v. Pyett*" (2010) 19:2 Cornell J L & Pub Pol 429.

5. "Building a New Bridge over Troubled Waters: Lessons Learned from Canadian and U.S. Arbitration of Human Rights and Discrimination Employment Claims" (2011) 20:1 Cardozo J Int'l & Comp L 1.

6. *Ibid* at 67.

7. *Ibid* at 5–12.

I leave it to American scholars to explore the theoretical and practical questions left open by *Pyett*.[8] My purpose in this article is to probe the proposition that the Canadian model is truly a concurrent one in that it gives unionized employees realistic options about where to pursue workplace human rights claims. I argue that whether and when the Canadian model provides for concurrency is a more open legal question than McGill and Tracey acknowledge. Furthermore, even where statutory adjudication is accepted as fully concurrent with arbitration, the Supreme Court of Canada's 2011 decision in *Figliola*[9] has effectively left unionized employees with arbitration as their only practical choice, unless they are prepared to pay for a right of access to statutory forums by foregoing the stronger substantive rights usually set out in their collective agreements. I do not see arbitration as a second-class option, however. Instead, I argue that Canadian labour arbitration has a strong institutional capacity to resolve human rights claims fairly and appropriately, without sacrificing justice to efficiency.

Part I of the paper explains some of the differences between Canadian and American approaches to the enforcement of statutory human rights claims and examines the expanding role of labour arbitration within the Canadian system. Part II explores the Canadian case law on the issue of jurisdictional competition between labour arbitrators and HRTs in human rights disputes. It discusses *Morin* and other decisions of the Supreme Court of Canada and provincial appellate courts that have left Canadian law with a much misunderstood hybrid model, wherein there is concurrent jurisdiction over some employment discrimination claims, while others can only be addressed in arbitration.[10] Part III addresses the potential for duplicative proceedings that inevitably accompanies a concurrency model, and examines the Supreme Court's approach to such duplication in *Figliola*.[11] Part IV explores the concrete dilemma of unionized employees in Canada who wish to enforce both their statutory and collectively bargained employment rights. I suggest that after *Figliola*, arbitration is the only rational choice for individual employees seeking

8. See e.g. Hyde, *supra* note 4 at 999–1003.

9. *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422.

10. *Quebec (AG) v Quebec (Human Rights Tribunal)*, 2004 SCC 39, [2004] 2 SCR 185 [*Morin*].

11. *Supra* note 9.

to pursue workplace human rights claims. Part V returns to comparative law terrain to discuss the claim that arbitration of human rights claims restricts access to justice and argues that, at least as practiced in Canada, arbitration is not a second-class forum for adjudicating human rights disputes. I conclude by calling for clarity on the jurisdictional question through judicial or legislative reform, and acknowledge that a reform agenda must grapple with difficult policy choices about how human rights issues fit within a broader framework of workplace rights.

I. The Legal Framework for Adjudicating Human Rights Claims in Canada

A. Statutory Adjudication of Human Rights Claims

Both Canada and the US provide statutory protection for workplace human rights. Canada does this through a set of provincial and federal statutes usually known as human rights codes.[12] In the US, employment discrimination is prohibited by Title VII of the *Civil Rights Act* of 1964[13] and a variety of ancillary statutes.[14] The statutory regimes in both countries

12. In Canada, workplace human rights protection falls within provincial jurisdiction except for the relatively few employees who work in federally-regulated industries. In addition to general human rights codes in each jurisdiction, there are numerous statutes addressing such human rights-related issues as parental leave, pay equity and employment equity. While these statutes raise their own complex adjudication issues, this paper focuses on the enforcement of claims arising from general codes. Although the codes are not confined to employment discrimination, a significant majority of human rights complaints involve workplace issues. See The Human Rights Tribunal of Ontario, *Annual Report 2009-2010*, (Toronto: Queen's Printer for Ontario, 2010) at 3-4, online: HRTO <http://www.hrto.ca>.

13. 42 USC § 2000 *et seq* (1964). Title VII deals exclusively with employment discrimination; other types of prohibited discrimination are dealt with under other titles.

14. See *Age Discrimination in Employment Act*, 29 USC §621-34 (1967); *Americans with Disabilities Act*, 42 USC § 12101 *et seq* (1990). There are also various state anti-discrimination laws.

offer similar substantive protections,[15] but take different approaches to enforcement. The US treats statutory human rights as civil rights justiciable in the ordinary courts, while Canadian human rights codes channel human rights issues away from the courts and into specialized human rights forums.

Canadian enforcement systems fall into two general categories: gatekeeper models and direct access models. For years, the gatekeeper model was standard.[16] It bears a superficial similarity to the US federal model, in that complaints of statutory violations must be taken to an administrative agency: in the US, to the Equal Employment Opportunities Commission (EEOC), and under the Canadian gatekeeper model, to agencies called human rights commissions (HRCs). There the similarity abruptly ends. For all practical purposes, the EEOC does not filter complaints; it disposes of most of them by issuing a document called a "Notice of Right to Sue", which permits complainants to file a civil action in court.[17] In rare cases, the EEOC itself pursues a claim in court.[18] The Canadian gatekeeper model differs in two critical respects. First, gatekeeper HRCs actively filter complaints by investigating, facilitating mediation and ultimately making discretionary decisions about whether or not complaints will go to adjudication. Second, where a complaint does

15. For protected grounds in Canada, see R Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 16–18. Title VII of the *Civil Rights Act* prohibits discrimination on the basis of race, color, religion, sex or national origin. *Supra* note 13, §2000 e-2. Disability and age discrimination are governed by other statutes. See *supra* note 14.

16. With the exception of Quebec, all Canadian jurisdictions used a form of the gatekeeper system until quite recently. See Howe & Johnson, *supra* note 15 at 37–69. For a description of Quebec's unique system, see Pearl Eliadis, "Human Rights Tribunals and Direct Access to Adjudication: A New Generation of Human Rights Protection?" in Tribunal des droits de la personne & Barreau du Québec, *L'accès direct à un tribunal spécialisé en matière de droit à l'égalité: L'urgence d'agir au Québec?* (Cowansville Que: Éditions Yvon Blais, 2008) 205.

17. For a detailed description of the EEOC approach, see Donald L Carper, John A McKinsey & Bill W West, *Understanding the Law*, 5th ed (Ohio: Thomson Learning, 2008) at 630–31.

18. For example, the EEOC has been involved in a number of lawsuits against Walmart. See e.g. Equal Employment Opportunity Commission, Press Release, "Walmart To Pay More Than $11.7 Million To Settle EEOC Sex Discrimination Suit" (3 January 2010) online: EEOC <http://www.eeoc.gov>.

go on to adjudication, it is heard by a specialized human rights tribunal and not by the courts.[19]

The Canadian gatekeeper model has come under attack in recent decades, both for its "filtering" mechanism and for its administrative dysfunction. The filtering mechanism ensures that the vast majority of complaints are not adjudicated, but are dismissed, settled or abandoned at the HRC level.[20] International agencies question, as a matter of principle, whether a model in which a gatekeeper blocks adjudication conforms to "access to justice" norms enshrined in such instruments as the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.[21] Compounding the filtering issue is the fact that, due at least in part to systemic underfunding,[22] gatekeeping has created bottlenecks that threaten respect for both the statutory human rights of complainants and the constitutional right of respondents to a

19. HRTs were historically regarded as having exclusive jurisdiction to enforce the codes. In *Seneca College of Applied Arts and Technology v Bhadauria*, the Supreme Court of Canada rejected the argument that codes create rights enforceable by civil action. [1981] 2 SCR 181, 124 DLR (3d) 193. See also Janice Payne & Christopher Rootham, "Are Human Rights Commissions Still Relevant?" (2005) 12 CLELJ 65 at 67–72.

20. Estimates of the percentage of human rights complaints that get to a hearing within the gatekeeper system range from approximately two to seven per cent of those filed. See Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Ministry of Citizenship, Policy Services Branch, 1992) at 108 [*Cornish Report*]; Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 46, online: Government of Canada Publications <http://www.publications.gc.ca> [*La Forest Report*]; Joanna Birenbaum & Bruce Porter, "Screening Rights: The Denial of the Right to Adjudication Under the Canadian Human Rights Act and How To Remedy It" (Research Paper delivered at the Human Rights Advocates Workshop, 8 May 1998) at 1 [unpublished] online: University of Toronto Faculty of Law <http://www.law.utoronto.ca>; M Kaye Joachim, "Reform of the Ontario Human Rights Commission" (2000) 13:1 Can J Admin L & Prac 51 at 113. For more current statistics, see *Report of the Ontario Human Rights Review 2012* (Toronto: Queen's Printer for Ontario, 2012) at 203, online: Ministry of the Attorney General of Ontario <http://www.attorneygeneral.jus.gov.on.ca> [*Pinto Report*].

21. *La Forest Report*, *supra* note 20 at 4–5. See also Birenbaum & Porter, *supra* note 20 at 62–64; Eliadis, *supra* note 16 at 209–13.

22. See Howe & Johnson, *supra* note 15 at 70–82.

timely determination of claims against them.[23] In response to extensive policy reviews,[24] two of Canada's largest jurisdictions (Ontario[25] and British Columbia[26]) have now opened the "gate", giving human rights complainants direct access to adjudication before human rights tribunals.[27] The direct access model has very significantly increased the number of human rights complaints that reach adjudication on the merits in these jurisdictions.[28] However, the benefits of direct access to statutory adjudication do not flow unimpeded to unionized employees.

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23. See Joachim, *supra* note 20 at 67–69. In *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, the Supreme Court of Canada heard a respondent's claim that a 30-month delay in getting a complaint to a hearing constituted an abuse of process and violated his section 7 *Charter* right to life, liberty and security of the person. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. While the Court dismissed the claim, it found both these doctrines applicable to human rights proceedings.

24. *Cornish Report*, *supra* note 20; Ontario Law Reform Commission, *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes* (Toronto: Ontario Law Reform Commission, 1995); *La Forest Report*, *supra* note 20; Ontario Human Rights Commission, *Reviewing Ontario's Human Rights System: Discussion Paper* (Toronto: OHRC, 2005) online: OHRC <http://www.ohrc.on.ca>; Ontario Human Rights Commission, *Strengthening Ontario's Human Rights System: What We Heard* (Ontario: OHRC, 2005) online: OHRC <http://www.ohrc.on.ca>. See also Administrative Justice Project, *A Background Paper Prepared for the Administrative Justice Project, Human Rights Review* by Deborah K Lovett & Angela R Westmacott, (Victoria: BC Ministry of the Attorney General, 2004) online: BC Ministry of the Attorney General <http://www.ag.gov.bc.ca>.

25. *Human Rights Code*, RSO 1990, c H-19, s 34 [*OHRCode*] (in effect since June 30, 2008). The HRT that operates under this statute is known as the Human Rights Tribunal of Ontario (HRTO).

26. *Human Rights Code*, RSBC 1996, c 210, s 21 [*BCHRCode*] (in effect since March 31, 2003). The HRT that operates under this statute is known as the British Columbia Human Rights Tribunal (BCHRT).

27. Neither jurisdiction seriously considered moving adjudication to the courts instead of tribunals, although the 2006 Ontario amendments opened the door to claims for human rights remedies from the courts linked to civil suits based on other recognized causes of action. See *OHRCode*, *supra* note 25, s 46.1. Exceptionally, Saskatchewan amended its code in 2011 to provide that its gatekeeper HRC refer complaints directly to the courts rather than to a tribunal. *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 29.6.

28. See *Pinto Report*, *supra* note 20 at 41–43. In Ontario, the historical term "human rights complaint" has been replaced with "application", and "complainants" are now called "applicants". I have retained the historical terms throughout this paper for consistency.

B. The Human Rights Jurisdiction of Tribunals and Labour Arbitrators in Canada

Legislative initiatives to eliminate the gatekeeper have not been the only important mechanisms for expanding access to human rights adjudication in Canada. Although the courts have shown little inclination to take on human rights enforcement themselves (except in an appellate role), they have played an active part in opening adjudication channels by conferring jurisdiction to deal with human rights claims on a variety of non-judicial tribunals. In the 2006 decision *Tranchemontagne*, the Supreme Court of Canada considered whether Ontario's Social Benefits Tribunal (SBT) had jurisdiction to address a claim that statutory restrictions on social benefits for claimants addicted to alcohol violated the code-based prohibition against discrimination on the ground of disability.[29] The Court held that the SBT had both the power and the obligation to deal with the claim: "It is settled law that statutory tribunals empowered to decide questions of law are presumed to have the power to look beyond their enabling statutes in order to apply the whole law to a matter properly in front of them".[30] A key factor in the Court's reasoning was the "fundamental, quasi-constitutional" nature of human rights codes, which "must not only be given expansive meaning, but also offered accessible application".[31] This broad reasoning greatly expands the range of statutory tribunals that can adjudicate human rights issues. As the Court observed in a subsequent decision, "[s]ince *Tranchemontagne*, tribunals other than human rights commissions have rightly assumed that absent legislative intent to the contrary, they have concurrent jurisdiction to apply human rights legislation".[32]

While *Tranchemontagne* created a stir in the broader administrative law community, it came as no surprise to scholars, practitioners and adjudicators who focus on workplace issues. For them, *Tranchemontagne*

29. *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513.

30. *Ibid* at para 14. In 2010, the Court of Appeal for Ontario affirmed the SBT's holding that the challenged restriction was inoperative because it violated the human rights code. *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, 324 DLR (4th) 87.

31. *Supra* note 29 at para 33.

32. *Figliola*, *supra* note 9 at para 21.

was only one in a long series of converging developments that had been gradually eroding the monopoly of HRTs over the enforcement of human rights issues. For unionized employees, the most prominent of these developments was the significant expansion of the jurisdiction of labour arbitrators in *Weber*, a Supreme Court decision which dealt with the interface between courts and arbitrators.[33] The *Weber* Court held that arbitrators have the authority to deal with the tort and constitutional claims brought by unionized employees, *provided that the dispute arises, in its essential character,* "from the interpretation, application, administration or violation of the collective agreement".[34] Where this condition is met, the *Weber* Court said, arbitral jurisdiction is not merely concurrent, but *exclusive*. From the outset, this "essential character of the dispute" test was subject to relentless academic criticism as an abstract concept that could not be readily applied on a principled basis.[35] It has nevertheless remained good law for almost two decades, spawning countless decisions importing both common law doctrines and statutory rights into collective agreements.

Even before the judicial expansion of arbitral jurisdiction in *Weber*, Canadian legislatures had acknowledged the logic of permitting labour arbitrators to apply the general law in light of the many intersections between statutory workplace rights and collective agreements. Subsection 48(12)(j) of Ontario's *Labour Relations Act, 1995* (*OLRA*) is typical of legislative provisions enabling arbitrators to consider statutory rights, giving arbitrators 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".[36] Sections like this

33. *Weber v Ontario Hydro*, [1995] 2 SCR 929, 24 OR (3d) 358.

34. *Ibid* at para 52.

35. See e.g. Ray Brown & Brian Etherington, "*Weber v. Ontario Hydro*: A Denial of Access to Justice for the Organized Employee?" (1997) 4 CLELJ 183; Michel Picher, "Defining the Scope of Arbitration: The Impact of *Weber*: An Arbitrator's Perspective" in Kevin Whittaker et al, eds, *Labour Arbitration Yearbook 1999–2000*, vol 1 (Toronto: Lancaster House, 2000) 99; Bernard Adell, "Jurisdictional Overlap Between Arbitration and Other Forums: An Update" (2000) 8 CLELJ 179 [Adell, "Jurisdictional Overlap"]; Donald D Carter, "Looking at *Weber* Five Years Later: Is it Time for a New Approach?" (2000) 8 CLELJ 231; Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000) 26:1 Queen's LJ 43; John-Paul Alexandrowicz, "Restoring the Role of Grievance Arbitration: A New Approach to *Weber*" (2003) 10 CLELJ 269.

36. SO 1995, c 1, Sched A (originally enacted in 1993).

confirmed that arbitrators may operate in legal territory beyond the four corners of the collective agreement. On their face, however, these sections did not clarify the important question of whether arbitrators have freestanding authority to enforce employment statutes.[37]

That question was answered by the Supreme Court in its 2003 decision, *Parry Sound*.[38] The Court held that the provisions of the human rights code were implicit in collective agreements.[39] The Court offered two distinct reasons for this conclusion. First, it gave an expansive interpretation to section 48(12)(j) of the *OLRA*. It rejected the "moderate" view that the section permitted arbitrators to apply human rights codes only in cases where they already had jurisdiction, in favour of the "radical" view that arbitrators could address workplace human rights complaints regardless of whether they were otherwise linked to provisions of the collective agreement.[40] Second, the Court held that, in addition to and quite apart from section 48(12)(j), human rights codes were incorporated into collective agreements through management rights clauses. It reasoned: "The obligation of an employer to manage the enterprise and direct the work force is subject not only to express provisions of the collective agreement, but also to the statutory rights of its employees, including the right to equal treatment in employment without discrimination."[41] Since employers are obliged to exercise their management powers in conformity with the general law, management conduct could and should be reviewed by an arbitrator for compliance with human rights codes.

II. Is Arbitral Jurisdiction over Human Rights Issues Exclusive or Concurrent?

A. The Supreme Court's Jurisdictional Triumvirate

Although *Parry Sound* confirmed that arbitrators have jurisdiction over unionized employees' statutory workplace human rights claims,

37. See Adell, "Jurisdictional Overlap", *supra* note 35 at 194–97.

38. *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, [2003] 2 SCR 157.

39. *Ibid* at para 23. See also *Tranchemontagne*, *supra* note 29 at para 39.

40. *Parry Sound*, *supra* note 38 at para 1.

41. *Ibid* at para 32.

the Supreme Court expressly declined to answer the question of whether that jurisdiction was exclusive or concurrent. Its conclusion that code-based rights are "implicit in collective agreements",[42] combined with the logic of *Weber*, signaled that it might favour exclusivity. When forced to address the question head-on, however, the Court did not come down unambiguously in favour of either model. Instead, in a triumvirate of important cases decided in 2004 and 2005—*Morin*, *Charette*, and *Vaid*—it counselled that there is no clear answer. The question of whether arbitral jurisdiction is exclusive or concurrent must be resolved on a case-by-case basis.

(i) *Morin*

The first and pivotal decision in the triumvirate is *Morin*.[43] That case involved a claim that certain amendments to the collective agreement covering teachers in Quebec violated the province's *Charter of Human Rights and Freedoms*, its equivalent to the human rights codes of other Canadian provinces.[44] The impugned provisions imposed a freeze on experience increments for teachers who had not yet reached the top of the salary grid. The freeze had been negotiated as a short-term austerity measure through a collective bargaining process involving the umbrella teachers' unions, the employer school boards and the Quebec government. A group of younger teachers whose salaries were frozen filed an age discrimination complaint in the human rights forum, without having asked their union to bring a grievance on their behalf. When the complaint reached the HRT, the responding parties, who had agreed to the

42. *Ibid* at para 15. Provincial appellate courts considering this issue prior to *Parry Sound* had determined that human rights tribunals have jurisdiction to deal with workplace human rights claims of unionized employees. See *Ontario (Human Rights Commission) v Naraine* (2001), 209 DLR (4th), 158 OAC 380 (CA), leave to appeal to SCCA refused, [2002] SCCA no 69 (QL); *Cadillac Fairview Corp v Saskatchewan Human Rights Commission* (1999), 173 DLR (4th) 609, 177 Sask R 126 (CA), leave to appeal to SCCA refused, [1999] SCCA no 492 (QL). See also *Canpar Industries v International Union of Operating Engineers, Local 115*, 2003 BCCA 609, 234 DLR (4th) 221 (where the Court rejected the employer's argument that HRT jurisdiction was exclusive).

43. *Supra* note 10.

44. RSQ, c C-12.

freeze, argued that the complaint should be dismissed on the ground that the dispute fell within the exclusive jurisdiction of grievance arbitration. The HRT rejected the argument and ruled that it could hear the case, a decision eventually upheld by the Supreme Court.

Chief Justice McLachlin, writing for the majority of the Court,[45] treated the problem as a subset of the more general *Weber* issue: that of determining which employment disputes fall within an arbitrator's exclusive jurisdiction.[46] In a much-quoted passage, she commented:

> *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction.[47]

Her judgment acknowledged that a workplace human rights dispute may fall within either the exclusive or concurrent jurisdiction of an arbitrator. The challenge, as she saw it, was to decide which category is appropriate for the particular dispute, based on the "governing legislation, as applied to the dispute viewed in its factual matrix".[48] She laid out a two-step process for making this decision: "The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction. The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator".[49] As with all *Weber* problems, this step involves assessing the essential character of the dispute.[50] Chief Justice McLachlin went on to emphasize, as she had in *Weber*, that the dispute's "legal characterization—whether it is a tort claim, a human rights claim, or a claim under the labour contract—is not determinative, but is only one factor in assessing the 'essential character' of the dispute".[51]

Applying the second step, the Chief Justice characterized the "essence" of the *Morin* dispute as "the process of the negotiation and the inclusion of

45. She was joined by Iacobucci, Major, Binnie and Fish JJ.

46. *Morin*, *supra* note 10 at para 11. Chief Justice McLachlin also authored the majority decision in *Weber*, *supra* note 33.

47. *Supra* note 10 at para 11.

48. *Ibid.*

49. *Ibid* at para 15.

50. *Ibid* at para 20.

51. *Ibid* at para 23.

[the salary freeze] in the collective agreement".[52] A dispute of this sort, she insisted, "does not arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement", giving an HRT jurisdiction.[53] She acknowledged, albeit somewhat grudgingly, that if the complaint had been brought as a grievance under the collective agreement rather than in the human rights forum, an arbitrator could have dealt with it, but arbitral jurisdiction would have been merely concurrent rather than exclusive.[54]

Chief Justice McLachlin pointed to four reasons for this conclusion.[55] First, the dispute involved a claim that the agreement itself was discriminatory, rather than a claim that the agreement had been violated.[56] Second, the unions involved in the matter "were, on the face of it, opposed in interest to the complainants" because they were party to the negotiations that led to the impugned provisions of the agreement.[57] Since the unions controlled access to the grievance procedure, they could block any recourse for the complainants simply by deciding not to grieve. Third, since the arbitration procedure in the collective agreement governed only the school boards and the local unions, the arbitrator would not have jurisdiction over all the parties to the alleged discrimination, which included the umbrella union federations and the government.[58] Fourth, because the dispute involved a "general challenge to the validity of a provision in the collective agreement [and] affected hundreds of teachers", an HRT was a "better fit" than a single arbitrator.[59]

Justice Bastarache wrote a vigorous dissent.[60] He accepted McLachlin CJC's premise that the resolution of the issue required the application of the "essential character of the dispute" test, but reached an entirely

52. *Ibid.*
53. *Ibid* at para 24.
54. *Ibid* at paras 25–27.
55. *Ibid* at paras 27–30.
56. *Ibid* at para 27.
57. *Ibid* at para 28.
58. *Ibid.*
59. *Ibid* at para 30. The complaint in *Morin* was ultimately settled between the negotiating parties and the HRC, and was discontinued before the Tribunal, although without the concurrence of key complainants. For an account of the fate of the complaint, see *Morin c Québec (PG)*, 2009 QCTDP 8 (available on QL).
60. Justice Arbour joined the dissent.

different conclusion as to where that test led on the facts. Unlike the Chief Justice, Bastarache J saw no basis on which to distinguish the *Morin* dispute from conventional grievance matters over which arbitrators have exclusive jurisdiction. In his view, *Weber* stood for the proposition that "labour arbitrators have exclusive authority to deal with all aspects of labour relations between employers and employees".[61] From this starting point, he saw nothing in the legislative scheme to suggest an intent to remove human rights issues from that comprehensive jurisdiction.[62] In response to McLachlin CJC's argument at the second step that the case was exceptional because the teachers were challenging the negotiation of the collective agreement rather than its contents, Bastarache J countered with the common sense proposition that "[i]t is the results, not the talks, that are challenged".[63] What was at issue was what teachers were to be paid. Wage issues, he insisted, "form the very foundation of a contract and working conditions"—issues which, for unionized employees, go to arbitration.[64]

(ii) *Charette*

Morin's split decision highlighted the indeterminacy of a test that turns on the "essential character of the dispute". The second decision in the jurisdictional triumvirate, *Charette*, released at the same time as *Morin*, further illustrated the test's incapacity to predict or determine outcomes.[65] *Charette* involved a jurisdictional competition between two Quebec statutory tribunals, the HRT and the *Commission des affairs sociales*, Quebec's social assistance review board (CAS). The statute governing the CAS provided that the CAS had jurisdiction to decide appeals respecting income security "to the exclusion of every other commission, tribunal, board or body".[66] The issue was whether the CAS had exclusive jurisdiction

61. *Morin*, *supra* note 10 at para 33.
62. *Ibid* at para 34.
63. *Ibid* at para 64.
64. *Ibid* at para 57.
65. *Quebec (AG) v Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 SCR 223 [*Charette*].
66. *An Act respecting the Commission des affaires sociales*, RSQ, c C-34, s 21, as repealed by SQ 1997 c 43, s 184.

to address a claim that the Quebec human rights statute was violated by regulations that excluded women who were collecting maternity benefits from access to supplementary benefits intended for the working poor. The Court split into three camps, with a majority holding that the CAS had exclusive jurisdiction and the HRT had none.

In *Charette*, as in *Morin*, McLachlin CJC and Bastarache J wrote separate judgments both purporting to apply the *Weber* test. Both again arrived at irreconcilable conclusions as to the "essential character" of the dispute. This time, McLachlin CJC wrote the dissent.[67] Despite her affirmation in *Morin* that disputes do not take their essential character wholly from their legal form, she insisted that *Charette* was "essentially a discrimination claim" based on pregnancy, and the HRT was therefore the "best fit" to deal with it.[68] She saw it as formalistic to characterize the dispute as essentially about income security.

Chief Justice McLachlin acknowledged that the matter might have proceeded before the CAS, but insisted that the CAS did not have exclusive jurisdiction. In reaching that conclusion, she relied on factors similar to those on which she had relied in *Morin*. She noted that Charette had challenged the validity of the legislation itself rather than its application, and the complaint had the potential to affect many people.[69] Ultimately, however, her decision turned on her conviction that the legislature created the HRC and the HRT to resolve precisely this type of issue. These bodies were created by the legislature to "promote equality, combat discrimination and provide remedies for individuals who have been treated unfairly".[70] Since the case was about pregnancy discrimination, to her it was obvious, without extended analysis, that the HRT was the "best fit" to deal with the claim.

Justice Bastarache wrote one of the two judgments that made up the majority. He claimed that it was the Chief Justice who was guilty of formalism in characterizing the dispute as essentially about "discrimination".[71] In his view, its "essential character" related to whether Charette qualified for the benefit she was claiming, a matter that fell

67. Chief Justice McLachlin was joined by Iacobucci and Major JJ.
68. *Charette*, *supra* note 65 at paras 12–18.
69. *Ibid* at paras 16, 18.
70. *Ibid* at para 19.
71. *Ibid* at para 25.

within the exclusive jurisdiction of the CAS.[72] Only Arbour J agreed with his analysis, however, giving the swing votes to Binnie and Fish JJ, both of whom had concurred with McLachlin CJC's majority decision in *Morin*.

In *Charette*, Binnie and Fish JJ concurred with Bastarache J in the result, concluding that the CAS had exclusive jurisdiction to hear the matter. Unlike both Bastarache J and McLachlin CJC, however, they declined to engage in an "essential character of the dispute" analysis. In their view, it was the facts of the dispute, not its "essential character", that were decisive. They saw those facts as straightforward: the Minister had discontinued Charette's income security benefit and Charette had objected to that discontinuance. The problem was therefore simply one of statutory interpretation; by "clear legislative direction", the dispute fell within the exclusive jurisdiction of the CAS.[73] By way of explanation for not accepting the Chief Justice's analysis here when they had accepted it in *Morin*, they pointed to the absence of several of the key factors that distinguished *Morin* from conventional grievance disputes. They acknowledged that Charette's claims did have the potential for widespread impact (consistent with McLachlin CJC's fourth factor in *Morin*). They did not see this factor as determinative, however, in the face of what they perceived as clear legislative intent.[74]

(iii) *Vaid*

Morin and *Charette* revealed a badly divided Court, unable to provide a functional template for distinguishing human rights disputes over which an HRT had concurrent jurisdiction with another forum from those over which another body had exclusive jurisdiction. All members of the Court agreed that resolving jurisdictional issues required the application of McLachlin CJC's two-step test, but they did not agree on how that test should be applied.[75] A year later, in the third case in the triumvirate, *Vaid*,

72. *Ibid* at para 23.

73. *Ibid* at para 35, Binnie J, concurring.

74. *Ibid* at para 42.

75. Justices Fish and Binnie expressly agreed in *Charette* that the two-step test governed, although their own analysis did not take them past the first step. *Ibid* at para 35.

the Court managed to reach a unanimous decision.[76] Unfortunately, it did not take advantage of its unanimity to resolve the confusion left in the wake of *Morin* and *Charette*.

Like *Morin*, *Vaid* addressed a contest between HRT and arbitral jurisdictions. Vaid alleged that he had been constructively dismissed from his House of Commons job and brought a complaint in the human rights forum alleging racial discrimination. The issue was whether this complaint was within the exclusive jurisdiction of grievance arbitration, or whether an HRT had concurrent jurisdiction over it. Despite Vaid's express allegation that his treatment was racially motivated, the Court concluded without hesitation that "[t]here is nothing here . . . to lift these complaints out of their specific employment context".[77] Ultimately, it held that arbitration was Vaid's exclusive route to redress.

At first blush, the outcome in *Vaid* would appear to go a long way toward neutralizing the impact of the majority holding in *Morin* by pushing conventional grievance issues such as terminations exclusively into the arbitral forum. The Court observed that "[a] grievance that raises a human rights issue is nevertheless a grievance for purposes of employment or labour relations",[78] a strong hint that the Court saw arbitration as the appropriate forum for such disputes. Reinforcing this hint was the Court's express reference to *Parry Sound* and to its holding that arbitrators have jurisdiction over workplace human rights claims. However, and regrettably for the state of the jurisprudence, Vaid was a parliamentary employee. He was therefore not subject to the general labour legislation applicable to federal employees, but to the *Parliamentary Employment and Staff Relations Act* (*PESRA*).[79] That act contains a provision not found in general labour legislation in Canada, that "nothing in any other Act of Parliament that provides for matters similar to those provided for under this Act . . . shall apply".[80] The Court invoked this unique language in its holding that Vaid's dispute belonged

76. *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667. The explanation for the Court's unanimity may be its preoccupation with the constitutional issue of whether parliamentary immunity barred Vaid's human rights complaint entirely; this issue takes up three-quarters of the decision.

77. *Ibid* at para 94.

78. *Ibid* at para 95.

79. RSC 1985, c 33 (2d Supp).

80. *Ibid*, s 2.

exclusively within the grievance and arbitration procedure established in the *PESRA*.[81] Confronted with apparent inconsistencies between the cases, the Court offered neither any principled reconciliation of the outcomes nor any comprehensive rationalization of the legal principles. It merely fell back on the unhelpful observation that "[t]his is not an area of the law that lends itself to overgeneralization".[82]

B. The Challenges of Applying the Morin *Test*

In the *Morin-Charette-Vaid* triumvirate, the Supreme Court appears to accept a hybrid model with two distinct categories of workplace human rights disputes for unionized employees. In one category, HRTs and labour arbitrators have concurrent jurisdiction, and in the other category—quite possibly a broad one, if the *Vaid* facts are a touchstone—arbitrators have exclusive jurisdiction. The Court clearly did *not* hold that HRTs have concurrent jurisdiction with labour arbitrators in all workplace human rights disputes involving unionized employees. It carefully acknowledged that the *Weber* test continues to apply to these disputes, and may place them within the exclusive jurisdiction of an arbitrator. The *Morin* Court painstakingly articulated specific factors that might identify a dispute as one that fell into the concurrency category.

Unhappily, the analytical tools the Court provided for distinguishing between cases where concurrent jurisdiction is appropriate and those where exclusive jurisdiction is appropriate are patently inadequate to the task. The problem lies in the tension between the Court's commitment to arbitral supremacy, and its equal commitment to statutory human rights as fundamental or quasi-constitutional. The two-step *Morin* test offers little assistance in resolving this tension. While the test gives paramountcy to statutory interpretation at its first step, Canadian legislatures have used

81. It is unlikely that this section was intended to create a special group of employees immune from HRT jurisdiction; more likely, its intent was simply to confirm that general labour legislation like the *Canada Labour Code*, RSC 1985, c L-2, did not apply to this group of employees. Somewhat inconsistently, the Court did not read this language as denying Vaid access to the substantive (as opposed to the procedural) rights provided by the federal code. *Vaid*, *supra* note 76 at para 82.

82. *Ibid* at para 97. The Court commented that the case did not involve a claim of systemic discrimination, perhaps hinting at some jurisdictional distinction between individual and group-based claims (*ibid* at para 98).

exasperatingly inconclusive language to express their intent on the scope of arbitral jurisdiction. Nevertheless, courts have generally construed labour statutes as favouring very expansive arbitral jurisdiction. As LeBel J put it in his majority judgment in *Bisaillon v Concordia University*:

> This Court has considered the subject-matter jurisdiction of grievance arbitrators on several occasions, and it has clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement.[83]

This formulation falls short of Bastarache J's assertion in *Morin* that "labour arbitrators have exclusive authority to deal with all aspects of labour relations between employer and employees",[84] but it comes very close. Since human rights codes are "implicit" in collective agreements,[85] workplace human rights claims logically fit under this broad umbrella.

The Supreme Court's commitment to broad arbitral jurisdiction is further demonstrated by the very fact that there is a second step in the *Morin* test. The Court could have resolved the issue in *Morin* at the first step simply by interpreting Quebec human rights legislation as providing for individual access to statutory enforcement mechanisms in all cases. Instead, it mandated a second step—an inquiry into the precise nature (the "essence") of each individual dispute before jurisdiction can be determined. Its cautious language here is best understood as an effort to protect the principle of arbitral exclusivity without slamming the door on access to the adjudication of human rights claims in exceptional cases like *Morin*, where the grievance procedure is not realistically available.

Pushing against the principle of arbitral exclusivity, however, is the concept that statutory rights are *individual* rights, and not just ordinary individual rights, but individual rights of a special "quasi-constitutional" nature. Legislative initiatives such as Ontario's and BC's removal of HRC filtering, and the Court's own decisions such as *Tranchemontage* reflect a policy trend towards broadened individual access to enforcement of those rights. To resolve the tension between these two principles, the Court

83. 2006 SCC 19 at para 33, [2006] 1 SCR 666.

84. *Supra* note 10 at para 33.

85. The Court in *Parry Sound* made this clear. *Supra* note 38.

offers only an "essential character of the dispute" test, a test that is much too abstract to do this work.

There are two problems in applying the *Morin* test. The first problem is that, as we see only too clearly from *Morin* and *Charette*, what "essential character" means is very much in the eye of the beholder. Although the inquiry is said to be contextualized, the application of the test is heavily influenced by individual judges' preconceptions about the relative institutional capacity of labour arbitrators and HRTs to address workplace discrimination.[86] Justice Bastarache's clear preference for arbitration led him to adopt a fundamentalist position in favour of arbitral exclusivity even where this choice would preclude a claim from being heard altogether, as it almost certainly would have in *Morin*. Chief Justice McLachlin's equally clear preference for specialized HRTs led her to adopt "discrimination" (clearly a formal category) as an acceptable characterization of the essential nature of a dispute despite her adherance of the *Weber* principle that form cannot determine "essential character". Her failure to offer criteria for distinguishing human rights claims that are "essentially" discrimination claims (such as Charette's and presumably Morin's) from those that are not (presumably Vaid's, on which she concurred with the Court's unanimous decision) seriously undermines the utility of this approach.

This brings us to the second problem in applying the *Morin* test: the four factors relied on by the Chief Justice to flesh out the two-step test cannot on their own assist in distinguishing between the essential nature of the two categories of cases. The first factor—that the challenge is to the agreement itself rather than to its application—simply rewards creative pleaders; in an era in which there is no longer a salient legal distinction between direct and indirect discrimination, virtually any human rights claim in a unionized workplace can be "packaged" as a challenge to the agreement that enabled the alleged discriminatory conduct, rather than to the conduct itself.[87]

86. As Binnie J observes in *Charette*, the "essential character of the dispute" approach invites judges "to substitute the Court's procedural review preference for that laid down by the legislature". *Supra* note 65 at para 35.

87. See e.g. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*].

The third factor—that an arbitrator would lack jurisdiction over all of the parties—appears superficially more helpful. However, courts have consistently rejected arguments that a lack of arbitral jurisdiction over named parties should permit unionized employees to bring *Weber* claims to court rather than to arbitration.[88] Courts are rightly suspicious of jurisdictional rules that depend on how claims are framed, seeing them as invitations to "forum shop". Accordingly, they have concluded that, for tort and contract claims, the essential character of the dispute cannot be determined by whom the claimant chooses to sue. This rationale is logically just as applicable to human rights claims.

The fourth factor—that a case may have widespread impact—is not of obvious conceptual relevance to the jurisdictional question. In large bargaining units, arbitration decisions frequently have broad application. The language of "best fit" used by the Chief Justice to discuss this factor suggests a concern going beyond the mere numerical scope of the claim, reflecting a judgment about the relative institutional capacity of the competing tribunals to address the issues.[89] In his dissenting opinion in *Morin*, Bastarache J accuses McLachlin CJC of attempting to replace the "essential character of the dispute" test with a new "best fit" test.[90] A careful reading suggests that this was not her intent. As she explained it, determining the essence of the dispute within its factual matrix "facilitates a better fit between the tribunal and the dispute".[91] "Best fit", then, can be understood simply as the *outcome* of a properly conducted *Weber* analysis.[92] The "widespread impact" factor is therefore misleading; indeed, in *Charette*, it is repudiated altogether by Binnie and Fish JJ as a stand-alone factor.

88. See *Ruscetta v Graham*, 114 OAC 320, 36 CCEL (2d) 177 (CA), leave to appeal to SCCA refused, [1998] SCCA no 220 (QL); *Oliver v Severance*, 2007 PESCAD 2, 277 DLR (4th) 393, leave to appeal to SCC refused, [2007] SCCA no 74 (QL); *Cherubini Metal Works Ltd v Nova Scotia (AG)*, 2007 NSCA 38, 280 DLR (4th) 235, leave to appeal to SCCA refused, [2007] SCCA no 278 (QL); *KA v Ottawa (City of)*, 80 OR (3d) 161, 269 DLR (4th) 116 (CA); *Bisaillon*, *supra* note 83.

89. See *Morin*, *supra* note 10 at para 45.

90. *Ibid.*

91. *Ibid* at para 15.

92. Chief Justice McLachlin's conception of the role of "best fit" is clearer in *Charette* than in *Morin*. She describes the two-step test as fulfilling the dual purpose of ensuring that legislative intent is respected and that "the tribunal with the best fit with the dispute will have jurisdiction". *Charette*, *supra* note 65 at para 7.

The second *Morin* factor—the fact that the union was opposed in interest to the *Morin* claimants because it was an active party to the alleged discrimination—is the most promising of the four factors as a useful tool for identifying cases arising in unionized workplaces over which HRTs should retain concurrent jurisdiction. Since the unions who controlled access to the grievance procedure had been actively involved in negotiating the impugned wage freeze, there was no realistic prospect that the dispute would make its way through grievance channels to arbitration. It is not surprising that the majority of the Court saw an access-to-justice vacuum here that only an HRT could fill. Unfortunately, however, the Court failed to articulate a clear distinction between human rights complaints that will not get to arbitration because the union was an active party to the alleged discrimination (such as the complaint in *Morin*) and those which will not get to arbitration simply because the union, carrying out its normal grievance screening functions, decides that the grievance should not proceed. Recognizing this distinction is crucial if the balance the Court seeks between arbitral exclusivity and individual access to justice is to be maintained.

C. The Morin *Test and an Emerging Concurrency Consensus*

The Supreme Court's efforts in *Morin* and its progeny to reconcile its commitment to arbitral exclusivity with the special nature of human rights claims have been less than successful; certainly, they have been almost universally misunderstood. McGill and Tracey read the Court's case law (wrongly, in my view) as establishing a general regime of concurrency between labour arbitration and human rights tribunals, with a "best fit" test available to sort out conflicts between concurrent regimes.[93] They are not alone in glossing the Supreme Court's case law in this way. In fact, they are in distinguished company, since post-triumvirate Canadian jurisprudence in the lower courts shows a clear consensus in favour of a concurrent rather than a hybrid jurisdictional model.[94]

93. *Supra* note 5 at 4–5, 42–44, 53–54, 64, 67.

94. See e.g. Dana F Hooker & Carman J Overholt, "Defending Claims in Different Fora: The Competing Jurisdiction of Arbitrators and Tribunals in British Columbia" (2010) 43:1 UBC L Rev 47.

The courts in Quebec, the province from which *Morin* emerged, stand virtually alone in acknowledging clearly that the Supreme Court has recognized two categories of workplace human rights disputes: those that fall within the exclusive jurisdiction of an arbitrator and those that do not. In two decisions rendered shortly after *Morin*, the Quebec Court of Appeal acknowledged that under the *Morin* two-part test, the jurisdictional competition between labour arbitrators and the HRT cannot be resolved by recourse to the legislation alone, but demands an examination of the nature of the dispute in its full factual context. In *Université Laval c Commission des droits de la personne et des droits de la jeunesse*, a pay equity complaint, that Court applied the *Morin* factors and determined that the "essence" of the dispute was the negotiation and validity of the agreement rather than its violation or application, and so it belonged in the concurrency category.[95] The Court also noted that no grievance had been filed. A year later, in *Université de Montréal c Commission des droits de la personne et des droits de la jeunesse*, another pay equity dispute, the Quebec Court of Appeal again applied the same logic.[96] In contrast to *Université Laval*, a grievance had been filed in this case, providing an additional factor to consider.[97] After conducting a contextual analysis, the Court was nonetheless persuaded that the case was properly before an HRT because the complainant sought remedies that the Court saw as beyond an arbitrator's competence.[98]

More typically, Canadian courts have not conducted any contextual analysis of the nature of the specific dispute. While paying lip service to the *Morin* two-step test, they have resolved the jurisdictional question entirely at the first step: as a matter of statutory interpretation. This is illustrated in companion Alberta decisions issued in 2007: *Calgary Health Region v Alberta (Human Rights & Citizenship Commission)*[99] and

95. 2005 QCCA 27 at paras 41–46, [2005] RJQ 347. For a discussion of this and other Quebec decisions, see Jean Denis Gagnon, "Les droits de la personne dans un contexte de rapports collectifs de travail. Compétence de l'arbitre et d'autres tribunaux. Quand l'incertitude devient la règle" (2006) 66 R du B 1 at 45.

96. 2006 QCCA 508 at paras 68–69 (available on QL)

97. *Ibid* at para 35.

98. The complaint sought extensive retroactivityand declaratory relief.

99. 2007 ABCA 120, 404 AR 201, leave to appeal to SCC refused, [2007] SCCA no 280 (QL).

Amalgamated Transit Union, Local 583 v Calgary (City of).[100] Both dealt with challenges to arbitral decisions to take jurisdiction over human rights issues. *Calgary Health Region* reflects a common scenario: an employee filed both a grievance and a human rights complaint alleging that he had been terminated on grounds of physical and mental disability. The grievance invoked various provisions of the collective agreement, including an anti-discrimination clause and a just cause clause. When the matter came before an arbitration board, the union, with the support of the grievor, sought an adjournment until the HRC/HRT had completed its proceedings.[101] The employer urged the arbitration board to proceed, arguing that arbitrators have exclusive jurisdiction over such disputes. In a preliminary decision, the arbitration board concluded that it did not have exclusive jurisdiction over the human rights issues, but that arbitration was a "better fit" than an HRT for dealing with them, so they should be absorbed into the arbitration proceeding.[102] On judicial review, the Alberta Court of Queen's Bench upheld the board's decision on the basis that arbitral jurisdiction was exclusive.[103]

The Alberta Court of Appeal found that jurisdiction was concurrent.[104] It relied on *Morin*'s first step, which it interpreted to mean that in the absence of legislative language that "clearly point[s] to exclusivity", arbitral jurisdiction is not exclusive.[105] The Court found no language in the Alberta legislation favouring arbitral exclusivity. It took particular comfort from the fact that the Alberta code did not give the HRC power to defer to other tribunals, a factor suggesting unimpeded access

100. 2007 ABCA 121, 404 AR 102 [*ATU*], leave to appeal to SCC refused, [2007] SCCA no 294 (QL).

101. Alberta retains a gatekeeper HRC.

102. *Calgary Health Region v United Nurses of Alberta, Local 115 (Hurkens-Revrink Grievance)* (2004), 136 LAC (4th) 176 at para 2 (available on QL). As I have argued above, this is an improper use of "best fit"; it is not intended to be a separate test, but instead describes the outcome of a properly conducted two-step test.

103. Applying *Morin* and *Weber*, the Court determined that the essential nature of the dispute was the "validity of termination of employment", a matter within the exclusive jurisdiction of an arbitrator. *Calgary Health Region v Alberta (Human Rights and Citizenship Commission)*, 2005 ABQB 384 at paras 62, 64–66, 378 AR 385.

104. *Supra* note 99. The Court's reasons are more fully articulated in the *ATU* decision, and subsequent references to the Court's reasoning are primarily to that decision. See *supra* note 100.

105. *Calgary Health Region*, *supra* note 99 at para 30.

to that commission.[106] While it acknowledged that *Morin* required a determination of the "essential nature of the dispute", the Court did not engage in a *Morin*-type analysis of the factors particular to this dispute that might militate for or against exclusive arbitral jurisdiction.[107] The factors the Court expressly identified as salient to its conclusion on concurrency—the "wording of the exclusivity clause in the Alberta *Labour Relations Code*, the clear legislative intent that all persons should have access to the complaints procedure under the *Human Rights Act*, and the lack of a deferral clause in that *Act*"[108]—would apply to any workplace human rights dispute, regardless of its "essential nature".[109] The Court's holding was also influenced by a factor implicit, although not expressly enumerated, in *Morin*—the quasi-constitutional nature of human rights legislation.[110] In the result, however, the Court of Appeal did not quash the arbitral decision. Since the arbitration board had concurrent jurisdiction, the Court permitted the entire matter to proceed before that board over the objections of the employer and the union.

On its face, *Calgary Health Region* appears to support the proposition that the jurisdictional race goes to the swiftest; if there is concurrent jurisdiction and the arbitration is convened first, the arbitrator can take jurisdiction over the entire dispute, including statute-based human rights

106. *ATU*, *supra* note 100 at para 60. The Alberta legislature has since amended its human rights code to give the HRC power to defer or dismiss a complaint where it has already been dealt with in another forum, or where it "could or should be more appropriately dealt with" in another forum. See the *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 22(1.1), as amended by SA 2009, c 26, s 16.

107. *Calgary Health Region*, *supra* note 99. The Court's conclusion that the legislation does not mandate arbitral exclusivity for human rights disputes leads to its statement that "[t]here is nothing in the nature of this dispute that would remove it from the jurisdiction of one of those tribunals and place it exclusively within the jurisdiction of the other" (*ibid* at para 37). In *ATU*, *supra* note 100, the Court purports to perform an "essential nature" analysis, but applies that analysis only to the form and not to the substance of the grievance. Further discussion of this case is at 488, below.

108. *Ibid* at para 61.

109. The comprehensive scope of the Court's analysis here is confirmed in *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65 at paras 14–16, 331 DLR (4th) 715 ("the [HRC] has undisputed jurisdiction over human rights complaints, including a complaint arising out of facts identical to those within the jurisdiction of the labour arbitrator" at para 27).

110. See *Calgary Health Region*, *supra* note 99 at para 34; *ATU*, *supra* note 100 at para 59.

claims.[111] However, as the Court of Appeal's companion decision in *ATU* makes clear, the law is not so straightforward in Alberta. Like *Calgary Health Region*, the *ATU* case involved both a termination grievance and a human rights complaint. At the employer's insistence and over the union's objections, the arbitration board held that the human rights issues were inseparable from the other issues surrounding the employee's termination, and that it had exclusive jurisdiction over the entire dispute. The Court of Queen's Bench quashed the arbitration decision, taking the view that exclusive arbitral jurisdiction would oust the quasi-constitutional individual rights enshrined in the *Code*.[112]

Consistent with its decision in *Calgary Health Region*, the Court of Appeal in *ATU* held that arbitral jurisdiction was concurrent. This time, however, the Court did not permit the arbitration board to deal with the human rights issues. Instead of upholding the board's decision to hear the whole dispute, as it had done in *Calgary Health Region*, the Court quashed the decision, based solely on the wording of the grievance. In contrast to the grievance in *Calgary Health Region*, the grievance in *ATU* did not invoke the discrimination clause, alleging only a lack of progressive discipline.[113] The Court of Appeal agreed with the union that the human rights issues were therefore not part of its case.[114] As the Court saw it, the issues raised in the grievance defined the dispute, and the union had sole control over how the grievance was framed. If the union chose to exclude human rights issues from the scope of the grievance, those issues could not form part of the "essential character" of the dispute at arbitration.[115]

The result in *ATU* may be defensible on the facts, although many experienced arbitrators, not to mention almost all employers, would

111. The record before the Court reflected various legal efforts on the part of the employer to prevent the HRC from dealing with the matter, including an application for an order of prohibition which was still pending at the time of the arbitration board's hearing. *Supra* note 99 at paras 7–8.

112. *Supra* note 100 at para 12.

113. *Ibid* at para 5. But see the concurring judgment of Ritter J, in which he expressed the view that the issue of gender discrimination was clearly raised by the grievance (*ibid* at para 76).

114. *Ibid* at paras 5, 8–9. The union did not explain its reasons for excluding human rights issues from the grievance, although it is a fair inference that it did so because the grievor wanted it that way (*ibid* at para 64).

115. *Ibid* at paras 64–65.

disagree with the unqualified proposition that the proper scope of a grievance is a matter over which the union has sole control. The Court's analysis, however, is perplexing. Twice in the course of its decision, the Court stated that the arbitration board and the HRT had concurrent jurisdiction over the dispute.[116] Having made that finding, the Court should have left well enough alone, as it had done in *Calgary Health Region*. Instead, it embarked on a circular critique of the board's jurisdictional reasoning. Picking up on McLachlin CJC's concern in *Morin* that if HRT jurisdiction were rejected, an employee may have no forum for a complaint, the Court appeared to assume that in the case before it, the union could and would persist in declining to pursue the employee's human rights claims even if an arbitrator ruled that those claims were within the scope of the grievance. On the basis of this improbable scenario, the Court concluded that permitting the arbitrator to proceed would effectively leave "the unionized employee without a forum in which to air her discrimination allegations".[117] The Court acknowledged that its decision might result in duplication of proceedings, but it observed that "efficiency alone is not a reason to restrict access to the human rights complaints process".[118]

In both *Calgary Region* and *ATU*, the Alberta courts misunderstood and misapplied the *Morin* test. Decision-makers in other provinces addressing the test in the context of their own legislation have done the same. In *Halifax*,[119] the Nova Scotia Court of Appeal dealt with an attempt by an employer to shut down an HRC investigation into an employee's allegations of racial discrimination connected with various aspects of his treatment in the workplace. The employer argued that the allegations fell within the exclusive jurisdiction of an arbitrator. The Court carefully laid out *Morin*'s two-step test. However, in determining the "essential character of the dispute", the Court simply examined the allegations in the formal human rights complaint, and observed that "[a]ll of the incidents and discriminatory treatment complained of by [the employee] occurred, he says, because he is an African-Canadian". Since "racial discrimination

116. *Ibid* at paras 3, 62.

117. *Ibid* at para 67.

118. *Ibid* at para 69. Query whether this decision would survive the efficiency-oriented *Figliola* decision and the cases that follow it. See *supra* note 9; discussion in Part III, below.

119. *Nova Scotia (Human Rights Commission) v Halifax (Regional Municipality of)*, 2008 NSCA 21, 264 NSR (2d) 61.

lay at the heart of the conduct and practices he alleged against the city",[120] the essential nature of the dispute was characterized as "discrimination".[121] The Court found no legislative intent to place "discrimination" within the exclusive jurisdiction of an arbitrator.[122] Indeed, it made an express finding that the legislature did not intend to "deny access for . . . unionized employees to the processes, resources and remedies offered by the Nova Scotia Human Rights Commission, for matters the essential character of which falls squarely within the statutory jurisdiction of the NSHRC".[123] Like the Alberta Court of Appeal, the Nova Scotia Court of Appeal relied heavily on "[t]he nature of human rights law—quasi-constitutional, fundamental, and the law of the people" as a reason for concurrency.[124] On this analysis, there is no room under the Nova Scotia legislation for a hybrid model and no category of workplace discrimination allegations that fall within the exclusive jurisdiction of an arbitrator; concurrency would be appropriate in all cases.

Despite its defects, the Supreme Court in the *Morin* decision delivered one clear message: there is no blanket exclusivity or concurrency model, but a hybrid model to be applied on a case-by-case basis. Lower courts are clearly not heeding this message. They have interpreted the legislation before them as confirming concurrency in all cases, compounding the likelihood that individual human rights disputes will end up before more than one forum. Concurrency creates a host of practical difficulties for rights claimants and even more obviously for employers, who are faced with the potential for double jeopardy and conflicting decisions, with attendant expense and inefficiency. Now that lower courts appear to have discarded the hybrid approach in favour of universal concurrency,

120. *Ibid* at paras 51–52.

121. *Ibid* at paras 49–52.

122. *Ibid* at paras 58–59, 63. Nova Scotia labour legislation, unlike most labour legislation in Canada, does not mandate arbitration as the sole dispute resolution mechanism for disputes under the collective agreement. See *Trade Union Act*, RSNS 1989 c 475 (mandating that collective agreements contain a provision for "final settlement . . . by arbitration or otherwise", s 42(1)).

123. *Halifax*, *supra* note 119 at para 79.

124. *Ibid* at para 33.

how have Canadian human rights codes and adjudicators addressed the challenge of parallel proceedings and duplicative litigation?[125]

III. Multiple Forums and the *Figliola* Decision

Problems flowing from multiple forums are neither new to the Canadian legal system nor unique to human rights enforcement. Over time, courts have developed approaches to address these problems, including procedural mechanisms such as deferral, as well as substantive rules like *res judicata*, issue estoppel, abuse of process and the rule against collateral attack. These common law tools give claimants a fair opportunity to vindicate their rights, but ensure that they do not get multiple opportunities to secure the result they seek.[126]

While HRTs have always had these tools, prior to the elimination of HRCs as gatekeepers they rarely had to use them. Gatekeeper codes typically endowed HRCs with explicit discretionary power not just to defer complaints, but also to dismiss them summarily where other appropriate avenues for litigation were available.[127] As demand for HRC services began to outstrip their resources in the 1980s and 1990s, some HRCs began dismissing complaints filed by unionized employees on the ground that the grievance procedure was a "more appropriate" forum. Critics claimed that HRCs exercised their dismissal powers without regard to whether there actually was a grievance that proceeded to arbitration, or to the contents of particular collective agreements.[128] This policy of dismissal minimized access by unionized employees to statutory HRTs,

125. McGill & Tracey frankly acknowledge duplication as a serious negative side effect of concurrency. *Supra* note 5 at 44–45, 47–49.

126. See e.g. *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 (the leading case on the application of these common law tools in the context of overlapping proceedings in the employment context).

127. See e.g. *OHRCode*, *supra* note 25, s 34(1), as repealed by *An Act to amend the Human Rights Code*, SO 2006, c 30, s 5.

128. Etherington, *supra* note 35 at 56–58; Payne & Rootham, *supra* note 19 at 86–88; *Thomas v Ontario (Human Rights Commission)*, (2001) 37 Admin LR (3d) 149 at para 24, 151 OAC 188 (CA) (where the Ontario Court of Appeal held that it was patently unreasonable for the HRC to apply a blanket policy of dismissing complaints by unionized employees; whether the grievance procedure was more "appropriate" must be considered on a case-by-case basis).

which consequently dealt only rarely with disputes that had gone or were going to arbitration. Likewise, labour arbitrators were rarely called upon to address human rights issues already or about to be dealt with by HRTs.

The statutory elimination of the HRC as gatekeeper in Ontario and BC significantly increased the potential for multiple proceedings. This problem is recognized and directly addressed in the legislation of both provinces in two ways. First, both codes give the HRT an explicit and broad power of procedural deferral,[129] routinely used to adjourn HRT hearings where related grievances are proceeding to arbitration.[130] Second, and more substantively, both codes give HRTs the power to summarily dismiss a complaint "if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application".[131] While HRTs developed a practice of dismissing complaints under this power if the dispute had already gone to arbitration,[132] they did not invariably do so. In *MacRae v Interfor (No 2)*, for example, the BCHRT held that since the individual complainant had not been a party to the arbitration, his complaint could proceed.[133] Even more controversially, in *Barker v Service Employees International Union, Local 1 Ontario*, the HRTO agreed to hear Barker's complaint even though her termination grievance had been dismissed by an experienced and respected arbitrator, on the ground that the arbitrator had "not appropriately dealt with the human rights components of this case".[134] The HRTO gave the dismissal power an explicit "quality control" function, mandating an examination of whether the arbitration award was based on "proper principles"

129. *OHRCode*, *supra* note 25, s 45; *BCHRCode*, *supra* note 26, s 25(2).

130. For the approach to deferral in Ontario, see e.g. *Cray v Rouge Valley Health System*, 2008 HRTO 120 (available on CanLII); *Monck v Ford Motor Company of Canada*, 2009 HRTO 861 (available on CanLII); *DeSousa v Toronto (City of)*, 2010 HRTO 2209 (available on CanLII); *Melville v Toronto (City of)*, 2012 HRTO 22 at para 1 (available on CanLII). For the approach in BC see *Young v Coast Mountain Bus Company Ltd*, 2003 BCHRT 28 at paras 19–27 (available on CanLII); *Complainant X v British Columbia (Ministry of Children and Family Development) (No 2)*, 2012 BCHRT 98 (available on CanLII); *Szepat v British Columbia (Ministry of Children and Family Development)*, 2012 BCHRT 185 (available on CanLII).

131. *OHRCode*, *supra* note 25, s 45.1; *BCHRCode*, *supra* note 26, s 27(1)(f).

132. See e.g. *Bradt v Metro Ontario Inc*, 2010 HRTO 480 (available on CanLII).

133. 2005 BCHRT 462 (available on CanLII).

134. 2010 HRTO 1921 at para 44 (available on CanLII).

and "due consideration" of "the facts and relevant law".[135] Employers expressed concerns that such decisions unfairly exposed them to "double jeopardy".[136]

In its 2011 decision of *Figliola*,[137] the Supreme Court responded to such concerns, interpreting BC's summary dismissal provisions in a manner decidedly unsympathetic to multiple proceedings. *Figliola* dealt with a challenge to a BCHRT decision to hear a complaint on issues previously addressed by a review officer of the Workers' Compensation Board (WCB). The complainant alleged that a WCB policy of granting fixed rather than customized awards for chronic pain was discriminatory on grounds of disability. The review officer found that the policy did not contravene the human rights code. For reasons largely connected with the summary nature of the review officer's procedures, the BCHRT held that the complaint had not already been appropriately dealt with and could proceed before it.[138]

In two separate judgments, the Supreme Court unanimously quashed that decision. Justice Abella, writing for the majority,[139] held that an HRT has no role in supervising either the substantive or procedural correctness of another tribunal's decision. She interpreted the HRT's discretion under its dismissal power as limited to making three determinations:

> whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies

135. *Ibid* at para 9.

136. The employer applied for judicial review but Barker withdrew her complaint prior to the hearing. See *Barker v Services Employees International Union, Local 1 Ontario*, 2011 HRTO 2010 (available on CanLII).

137. *Supra* note 9.

138. *Figliola v British Columbia (Workers' Compensation Board) (No 2)*, 2008 BCHRT 374 (available on QL). The *Figliola* complainants' recourse from the review officer's decision, an appeal to the Workers' Compensation Appeals Tribunal (WCAT), had been cut off when the BC government amended the *Administrative Tribunals Act*, SBC 2004, c 45 in the wake of *Tranchemontagne* to remove the WCAT's power to apply the BCHRCode, *supra* note 26: *Figliola*, *supra* note 9 at paras 11–12, 72–73; *Tranchemontagne*, *supra* note 29.

139. It is interesting that Abella J wrote the Ontario Court of Appeal decision in *Naraine*, which came to a very different conclusion about the appropriateness of multiple proceedings in human rights cases. *Supra* note 42.

to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. [140]

If the answer is yes to all three questions, Abella J held that the HRT should dismiss the complaint. She saw the statutory summary dismissal power as a legislative choice to replace the "precise doctrinal catechisms" of common law doctrines like *res judicata* and issue estoppel with considerations like finality and "the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them".[141] She was not persuaded by the argument that "access to justice" in human rights cases is enhanced by "serial access to multiple forums, or that more adjudication necessarily means more justice".[142] Instead, "[j]ustice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved".[143] The ultimate test is a pragmatic one—"whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute".[144] Justice Abella's decision acknowledges no unique status for HRTs in the adjudication of human rights complaints; HRTs are just one of many tribunals with a concurrent mandate to enforce human rights legislation. For an HRT to hear a complaint already dealt with elsewhere is simply "lateral adjudicative poaching".[145]

Writing for the minority, Cromwell J saw the scope of the HRT dismissal power as considerably more expansive. He criticized Abella J for giving primacy to "efficiency" at the expense of other aspects of fairness that might assist the HRT in determining whether the real substance of the complaint had been previously disposed of.[146] In his view, the legislative history behind the statutory dismissal power reflected an intent to give HRTs *broader* discretion than common law doctrines provided, permitting more fine-grained contextual decision-making.[147] Nevertheless,

140. *Figliola*, *supra* note 9 at para 37.
141. *Ibid* at para 36.
142. *Ibid* at para 35.
143. *Ibid.*
144. *Ibid* at para 37.
145. *Ibid* at para 38. See also *ibid* at para 45.
146. *Ibid* at para 96.
147. *Ibid* at paras 79–91, 92–95.

he found the HRT decision deficient and joined the majority in quashing it; while finality should not be the dominant value, the tribunal failed to give it sufficient weight. Justice Cromwell simply placed more emphasis on the scope of discretion and the specialized expertise of the HRT. He would have given the HRT another chance to get it right.[148]

Figliola did not involve labour arbitration, and it was not a foregone conclusion that it would be applied in the labour arbitration context. The third prong of the *Figliola* test requires an opportunity for "the complainants or their privies to know the case to be met and have the chance to meet it".[149] Since the formal party to a labour arbitration is the union rather than the individual employee, HRTs might have decided that a labour arbitration does not stand in the way of an individual employee complaint.[150] However, both the BCHRT and the HRTO have unhesitatingly applied *Figliola* to labour arbitration.[151] Because of *Figliola*'s "hard line" on multiple adjudication, there is no doubt that it will have a significant impact on unionized employees seeking to file complaints. I will now explore just how comprehensive that impact may be.

IV. Unionized Workplaces and Access to Human Rights Tribunals After *Figliola*

This part explores the options available to unionized employees after *Figliola* for adjudicating their human rights disputes.[152] To make those options more concrete, I examine the dilemma facing a unionized employee—we'll call her Madeleine—who has been discharged on performance-related grounds that arguably raise disability discrimination

148. *Ibid* at paras 98–99.

149. *Ibid* at para 37.

150. At least some courts had taken this approach in issue estoppel cases. See e.g. *Naraine*, *supra* note 42 at para 64; *MacRae*, *supra* note 133.

151. See e.g. *Gilinsky v Peel District School Board*, 2011 HRTO 2024 (available on CanLII); *Gomez v Sobeys Milton Retail Support Centre*, 2011 HRTO 2297 (available on CanLII); *Paterno v Salvation Army*, 2011 HRTO 2298 (available on CanLII) [*Paterno 2*]; *Melville v Toronto (City of)*, 2012 HRTO 22 (available on CanLII); *Gammada v Mount Pleasant Group of Cemeteries*, 2012 HRTO 1097 (available on CanLII); *Howell v National Steel Car*, 2012 HRTO 1589 (available on CanLII); *Randhawa v Vancouver Police Department and Wager (No 2)*, 2012 BCHRT 261 (available on CanLII).

152. See e.g. *Danyluk*, *supra* note 126.

issues. Madeleine works in the private sector in Ontario,[153] a jurisdiction with a direct access system. On the face of Ontario's legislation, Madeleine has the same right as a non-unionized employee to file a human rights complaint alleging that her discharge violates the code. But is that formal right a practical one? Does she really have access to the HRTO to resolve the human rights aspects of her termination, and if so, what price will she have to pay for that access?

Madeleine is well informed about her rights. She understands that her collective agreement provides the same protection as the human rights code. She also understands that her agreement provides valuable additional rights and remedies for discharged employees. First, typical "just cause" clauses impose more comprehensive obligations on management than human rights codes. Second, seniority-based rights may come into play. Third, Madeleine's collective agreement may demand accommodations for disability that go beyond the statutory boundaries of "undue hardship". Finally, entrenched employment practices or prior grievance settlements may create additional rights for employees in her situation. Madeleine wants to take full advantage of this enriched menu of employment rights. However, she has concerns about putting all of her human rights "eggs" in the arbitration basket. She knows there are downsides to arbitration. Within the grievance procedure, she will not control key aspects of the decision-making around her case. It is her union that will decide whether her grievance will go to arbitration, or be settled or withdrawn. If her grievance goes to arbitration, her union, together with her employer, will choose the arbitrator. The union will have carriage of the case: the power to frame the issues and to decide what evidence will be called and what arguments will be made. While Madeleine trusts her union, she knows that the union's interests may legitimately diverge from her own. The union may be reluctant to challenge the validity of collectively bargained limitations on disability leave or to repudiate a negotiated "last chance agreement".[154] The union will likely favour accommodations for Madeleine that respect the seniority rights of other employees, and do not upset existing understandings with the employer about the reasonable

153. Employees in the public sector in Ontario are covered by a variety of collective bargaining statutes that may make some difference to the analysis.

154. See Adell, "Jurisdictional Overlap", *supra* note 35 at 215–18 (discussion of last chance agreements).

limits of accommodation. Madeleine's union has a statutory duty to represent her fairly, but labour boards have traditionally cut unions considerable slack in rejecting individual claims that clash with collective interests, even where human rights issues are involved.[155] Madeleine's job is at stake, and she wants to make sure all her bases are covered. What are her options?

Most adjudicators in Ontario would not have permitted Madeleine to litigate her case twice even before *Figliola*. After *Figliola*, she is absolutely precluded from pursuing her claim both at arbitration and before an HRT. But Madeleine is not seeking to litigate her case twice. She wishes only to maximize and protect all her rights. One strategy Madeleine might consider is to "split her case"—to segregate the human rights issues from the collective agreement issues, placing the human rights issues before the HRTO and the collective agreement issues before an arbitrator. She may be able to persuade her union to agree to this strategy, but she will still face serious practical and jurisprudential obstacles. The practical obstacle is that she will not be able to control the sequence in which the complaint and the grievance are heard. Logically, she might be able to get "two bites at the cherry" if she can get her human rights claims heard by the HRTO before her grievance gets to arbitration. But as long as there is a grievance pending and proceeding to arbitration, the HRTO will almost certainly exercise its statutory authority to defer its own proceedings until the arbitration is completed.[156] Madeleine's case will therefore reach an arbitrator before she is able to bring it before the HRTO. Once it comes before an arbitrator, an employer seeking to avoid double jeopardy may demand that the human rights issues be folded into the collective agreement issues.

If Madeleine worked in Alberta, her union might rely on the *ATU* decision to resist this demand, arguing that it is up to the union to determine whether or not the grievance is framed to include or exclude human rights claims. However, Madeleine works in Ontario, where the consequences of attempting to employ an *ATU* strategy are likely to be fatal to the human rights claims. The consequences of case-splitting are

155. See Bernard Adell, "The Union's Duty of Fair Representation in Discrimination Cases: The New Obligation to be Proactive" in Kevin Whittaker et al, eds, *Labour Arbitration Yearbook 2001–2002*, vol I (Toronto: Lancaster House, 2002) 263 at 276.

156. See *supra* note 130.

addressed in *Paterno 2*, an Ontario case where a terminated employee filed both a termination grievance and a human rights complaint.[157] Paterno's union, with his consent, had sought to exclude the human rights issues from arbitration, but the employer persuaded the arbitrator to fold them into the collective agreement issues. While the arbitrator set aside the termination, he expressly held that there had been no violation of the *OHR Code*. Unsatisfied with that result, Paterno then sought to activate his human rights complaint.[158] Applying *Figliola*, the HRTO held that Paterno's termination complaint should be dismissed under section 45.1, notwithstanding that the human rights claims had been brought before the arbitrator only over the objections of Paterno and the union.[159]

The *Paterno* decision does not turn on the fact that the arbitrator explicitly addressed the human rights issues.[160] The HRTO emphasized that it would have reached the same result regarding Paterno's complaint even if there had been no explicit reference to or findings on human rights issues. As the HRTO saw it, "[t]he essence of a holding by an arbitrator that there was just cause for discipline or discharge incorporates the conclusion that discharge did not violate the *Code*".[161] The decision is unequivocal that it is "not analytically correct or appropriate" to attempt to segregate human rights from collective agreement issues in disputes of this type.[162] The HRTO leaves open the question of what consequences might flow if the union's decision not to raise human rights issues at arbitration was made without the individual employee's consent. There is no doubt, however, that where the grievor is complicit in this strategy, as Paterno was and as Madeleine would be, the human rights complaint

157. *Supra* note 151.

158. *Ibid* at para 2.

159. The HRTO found that two relatively minor allegations that were not part of the matters grieved could proceed before it. See *ibid* at para 37. The application appears to be continuing. See *Paterno v Salvation Army in Canada (Governing Council)*, 2012 HRTO 205 (available on CanLII).

160. Not all arbitrators in Ontario would have agreed to take jurisdiction over the human rights issues in the face of the union's objection. See e.g., *University Health Network v Ontario Nurses' Assn (Vedd Grievance)*, 159 LAC (4th) 298 (available on QL) (Arbitrator: Marcotte). See also *Kawartha Pine Ridge District School Board v Ontario Secondary School Teachers' Federation (Mr S Grievance)*, 197 LAC (4th) 83 (available on QL) (Arbitrator: Knopf).

161. *Paterno 2*, *supra* note 151 at para 29. The decision does not cite *ATU*, *supra* note 100.

162. *Paterno 2*, *supra* note 151 at para 28.

will be dismissed in the same way it would have been had the issues been raised and addressed at arbitration:

> An applicant who fails to raise alleged discrimination with his or her union or who asks the union not to raise such arguments about just cause in an arbitration will face dismissal of a subsequent application at the Tribunal regarding the discipline or dismissal. It would be an improper review of the substance of an arbitrator's decision, contrary to the principles in *Figliola*, to continue an application related to discipline or discharge where an arbitrator has found there was just cause.[163]

This means that in Ontario, "case-splitting" is not a viable strategy in termination cases.[164] If Madeleine's case gets to arbitration before it gets to an HRT, as it almost certainly will, she must raise her human rights claims at arbitration or not at all.

If Madeleine's grievance proceeds to arbitration, her human rights complaint will become redundant. But she might feel there is value in supplementing her grievance with a human rights complaint simply as "insurance", seeking to hold it in abeyance to be revived if her union does not arbitrate her grievance. Even this strategy provides no guarantee of a hearing. Whether Madeleine can continue to pursue her human rights complaint in the absence of an arbitration will depend on what happens to her grievance. The HRTO has applied section 45.1 (and other related grounds for summary dismissal) not just to grievances that have been arbitrated, but also to grievances that have been otherwise finally disposed of prior to arbitration. In cases where the grievance has been merely withdrawn, the HRTO has refused to make summary dismissal orders under section 45.1, holding that a withdrawn grievance is not a "proceeding" within the meaning of that section, and withdrawal does not appropriately deal with the substance of the matter.[165] If the grievance is settled, however, the HRTO may well find that the settlement precludes

163. *Ibid* at para 29.

164. See *Howell*, *supra* note 151 (the *Paterno* approach is applied notwithstanding clear evidence that no human rights issues or arguments had been raised or addressed in the arbitration at para 28).

165. *Paterno v Salvation Army, Centre of Hope*, 2010 HRTO 10 (available on CanLII); *Yakymova v Slovenian Linden Foundation*, 2012 HRTO 1075 (available on CanLII). See also *Shannon v Renfrew (County of)*, 2010 HRTO 930 (available on CanLII); *Poste v Metro Ontario Inc*, 2012 HRTO 2128 (available on CanLII).

a hearing on the merits.[166] It will almost certainly make this finding where the grievor has assented to the settlement, even if she subsequently repudiates it.[167] Where the employee has not signed off on the settlement, HRTO jurisprudence has been inconsistent, with some decisions insisting that employee consent to a settlement is required before it can be a basis for summary dismissal,[168] while others have taken a more contextual approach, insisting that the issue must be addressed on a case-by-case basis.[169]

In the current state of the law, therefore, an employee who invokes the grievance procedure triggers serious risks that any related human

166. In *Van Barneveld v IOOF Seniors Homes*, 2009 HRTO 448 at para 13 (available on CanLII), the HRTO expressly reserved the question of whether section 45.1 applies where the grievor does not consent to the settlement. See also *Holowka v Ontario Nurses' Association*, 2010 HRTO 2171 (available on CanLII); *Vere v Wescast Casting Wingham and the Canadian Auto Workers*, 2011 HRTO 748 (available on CanLII); *Shaw v Pepsico Foods*, 2012 HRTO 1152 (available on CanLII); *Dunn v Sault Ste Marie (City)*, 2008 HRTO 149 (available on CanLII). Where there has been a settlement, dismissal may occur under section 45.1, or under the Tribunal's general power to dismiss as an abuse of process. See *Corbiere v University of Sudbury*, 2012 HRTO 309 (available on CanLII).

167. *Teske v Canadian Union of Public Employees Local 4685*, 2012 HRTO 1450 (available on CanLII). This case reflects remarkably thorough precautions on the part of both the employer and the union to secure releases from the grievor that would protect them from subsequent proceedings. The employee argued unsuccessfully that because she had returned the settlement cheque she was no longer bound by the releases.

168. See *Lemieux v Guelph General Hospital*, 2010 HRTO 1267 at para 20 (available on CanLII) [*Lemieux* 2010]. The complaint was subsequently dismissed on the merits. *Lemieux v Guelph General Hospital*, 2011 HRTO 2241 (available on CanLII). See also *Barry v St Michael's Hospital*, 2011 HRTO 387 (available on CanLII); *Lumley v Trillium Lakelands District School Board*, 2010 HRTO 1117 at para 23, (available on CanLII). A categoric requirement that the grievor must have consented to the settlement before section 45.1 applies is arguably inconsistent with the HRTO's decisions applying *Figliola* to arbitration notwithstanding that the employee is not a formal party. The HRTO has clearly acknowledged that the union has legal authority to settle a grievance with or without an individual employee's consent. See *Lemieux* 2010, *supra* note 168 at para 19; *Lumley*, *supra* note 168 at para 23; *Bhandari v Ontario (Minister of Education)*, 2010 HRTO 1676 at para 13 (available on CanLII); *Teske*, *supra* note 167 at para 49; *Healey v McMaster University*, 2010 HRTO 1874 (available on CanLII). If a settlement with consent is deemed equivalent to an arbitration decision under section 45.1, it hard to see how a lawful settlement without consent would not have equivalent status under the *Figliola* test.

169. See *Bhandari*, *supra* note 168. See also *Melendez v Toronto (City of)*, 2012 HRTO 403 (available on CanLII); *Healey*, *supra* note 168. The latter two cases qualify *Bhandari*.

rights complaint will be dismissed without adjudication. This means that if Madeleine puts priority on preserving her individual right to adjudicate her human rights issues before an HRT, her safest strategy is to file no grievance at all, and simply to take her claim before an HRT. But this strategy entails substantial risks and costs of its own. There is nothing remarkable about Madeleine's case. It resembles *Vaid* much more closely than it resembles *Morin*. In *Vaid*, the Supreme Court found that allegations of race discrimination did not "lift" Vaid's claim of constructive dismissal "out of its specific employment context".[170] If arbitral exclusivity still has any vitality in human rights cases under Ontario law, Madeleine's failure to file a termination grievance leaves her vulnerable to the risk that her human rights claim will be dismissed by the HRTO for lack of jurisdiction.

To date the HRTO appears to have followed the same path as the Alberta and Nova Scotia courts and adopted a blanket concurrency rule.[171] The risk may therefore be small that failure to file a grievance will result in no forum at all for a determination of Madeleine's statutory rights claim. However, pursuing a statutory human rights complaint instead of a grievance unquestionably means relinquishing Madeleine's collectively bargained rights. The HRTO in *Paterno* lays out the stark choice faced by employees in this situation, and the high price of failure to file a grievance:

> [Paterno] could have foregone the benefits that he had as an employee under a collective agreement—including just cause protection, the grievance procedure and representation by

170. *Supra* note 76 at para 94.

171. See e.g. *Paterno 2*, *supra* note 151; *Howell*, *supra* note 151; *Bernard v Lakehead University*, 2011 HRTO 2039 (available on CanLII); *Nash v Ottawa-Carleton District School Board*, 2012 HRTO 2299 at paras 19, 43 (available on CanLII). These decisions all assume concurrency; the HRTO has not yet been forced to decide the issue. A *Weber*-based exclusive jurisdiction argument was raised in *Monck* in support of an argument to defer a complaint pending arbitration. *Monck v Ford Motor Company of Canada*, 2011 HRTO 457 (available on CanLII). Citing *Naraine* and *Morin*, the HRTO commented that "cases subsequent to *Weber* have consistently held that the arbitrator's apparently exclusive jurisdiction does not oust the jurisdiction of human rights tribunals who may share overlapping or concurrent jurisdiction over a dispute" (*ibid* at para 8). The Tribunal ultimately sidestepped the exclusive jurisdiction issue, however, by concluding that jurisdictional issues were not relevant to deferral. It refused to defer because the grievance was not proceeding at a normal pace towards arbitration. The application was subsequently dismissed on its merits (*ibid*).

union counsel—by not pursuing a grievance or arbitration. He then could have proceeded at the Tribunal with his human rights Applications without them being affected by the arbitrator's determination.[172]

A unionized employee exercises her autonomy to pursue a human rights complaint only at the cost of abandoning her rights under the collective agreement. In these circumstances, she will also likely abandon the moral and material support of the union in litigating the human rights issues.[173]

Abandoning the benefits of a collective bargaining agreement is not a wise choice for an employee to make. In Madeleine's case, there is no doubt that her best course of action is to file a grievance, along with a human rights complaint as "insurance". She should take steps to ensure that the grievance is worded comprehensively enough to encompass her human rights claims. She should consent to deferral of her human rights complaint. She should press her union for an early and thorough arbitration of her grievance, based on the assumption that the arbitrator's decision will almost certainly be not just her best shot, but her only shot at litigating all the issues. She should actively participate in any settlement negotiations, and she should seek to reactivate her human rights complaint only if the grievance is withdrawn or abandoned. In a world in which she cannot have both arbitration and HRT adjudication, arbitration is the better option by a wide margin.

We have examined Madeleine's situation under a direct access system and a tribunal governed by statutory language virtually identical to the BC language considered in *Figliola*. In the gatekeeper systems in other provinces, *Figliola* has no direct application. Even in different statutory contexts, however, courts have begun to invoke the *Figliola* principle of finality to dismiss attempts to relitigate.[174] This is a trend that is likely to continue. No matter where Madeleine works, then, she will encounter

172. *Paterno 2*, *supra* note 151 at para 33.

173. Unions do occasionally support employees in statutory human rights adjudication procedures but they are not obliged to under labour law. Furthermore, when individual employees pursue their human rights claims before an HRT, unions may be named as respondents, or intervene to protect their own interests, placing them in structural conflict with employees even if they sympathize with the claim.

174. See *Canada (Human Rights Commission) v Canadian Transportation Agency*, 2011 FCA 332 at paras 22–28, 426 NR 113; *Chiasson v Happy Valley-Goose Bay (Town of)*, 2011 NLTD 156 at paras 24–25, 316 Nfld & PEIR 95.

roadblocks if she attempts to hedge her bets by splitting her case. For unionized employees with human rights complaints, arbitration has become the only practical option.[175]

Rules designed to prevent multiple adjudications have placed an unacceptably high price on unionized employees' capacity to access statutory adjudication of their human rights claims. To gain access to HRTs, unionized employees must give up their rights under collective agreements. Employees unwilling to pay this price will find their human rights claims effectively channeled into arbitration regardless of whether arbitral jurisdiction is exclusive or merely concurrent. It is therefore important to address the question of whether arbitration is a forum capable of truly vindicating employee human rights claims, or whether it is indeed a second-class mode of adjudication, as some critics have claimed, which denies unionized employees meaningful access to statutory rights and remedies. I turn now to that question.

V. Does Labour Arbitration Restrict Access to Statutory Human Rights and Remedies?

American critics of *Pyett* denounce arbitration as an exclusive forum for adjudication of workplace human rights disputes from three perspectives.[176] Liberal critics argue that human rights are quintessentially individual rights, and their enforcement should lie within the control of the rights holder. This liberal critique shades readily into an institutional critique that arbitration deprives claimants of procedural and practical benefits available in non-arbitral forums. Institutional critics argue that arbitration is not designed to deal with complex human rights claims. They see arbitration as sacrificing specific advantages of civil litigation that increase an employer's exposure to costs and damages. For example,

175. The obvious exception to this generalization is the situation in which the union refuses to support to the employee's dispute; in those cases, the collective agreement issues will not be arbitrated in any event (subject to the duty of fair representation) and the employee has nothing to lose by pursuing her claim as a human rights complaint before an HRT.

176. See Moses, *supra* note 4; Hyde, *supra* note 4; Berger, *supra* note 4. These critical perspectives shade into one another and I make no attempt to "slot" these scholars into critical categories.

in the US, the availability of class actions before civil juries and the potential for punitive cost awards give plaintiffs significant leverage in negotiating attractive settlements. They also charge that arbitration lacks tools of due process such as pre-trial discovery and civil rules of evidence. Additionally, arbitrators, appointed by the parties on an ad hoc basis with no allegiance to the public interest, are not experts in human rights issues—indeed, they may not even be experts in law. These concerns segue into a third critical perspective: a critique of the collective nature of labour arbitration. Collectivization critics emphasize that placing human rights enforcement in the hands of arbitrators gives unions control over which rights-holders get their day in court and consequently over which rights claims are enforced. They point out that unions are legally entitled, even obligated, to weigh individual rights concerns against the collective interests of the other employees they represent. Collectivization critics charge that unions will use their carriage rights at arbitration, in collaboration with employers (and arbitrators), to shape the jurisprudence in favour of collective rather than individual conceptions of code-based rights.

Aspects of all three of these critiques are reflected in *Alexander*, where the US Supreme Court's concerns over collective control of individual rights led to its refusal to allow arbitration to preclude individual employee access to a judicial forum for enforcement of statutory rights.[177] In *Pyett*, the same Court swept aside those concerns to express complete confidence in arbitration as a forum for the enforcement of statutory rights.[178] American scholars who have followed the Court's trajectory on employment issues over the past several decades are understandably suspicious of its glib dismissal of the potential pitfalls of the *Pyett* approach. Alan Hyde's apocalyptic conclusion that "*Pyett* will contribute to the dissolution of federal labor law and of the golden age of labor arbitration"[179] reflects an academic consensus that *Pyett* is bad news for unionized American workers.

For Canadian labour lawyers and scholars, however, Hyde's critique simply highlights the cultural divide between Canada and the US on the role of labour arbitration. What is regarded as unthinkable in the US is

177. *Supra* note 1 at 56–57.
178. *Supra* note 2 at 268–72.
179. *Supra* note 4 at 1022.

the status quo in Canada. Hyde is concerned about the fate of unionized employees' individual rights protections—a concern grounded in the history and practice of labour relations and arbitration in the US. Hyde argues vigorously that statutory disability rights "will essentially become dead letters for unionized employees if they cannot sue on their claims, but are instead forced against their will by decision of their employers and unions to submit them to collective bargaining arbitration".[180] He argues that "[i]t is hard to think of a legal obligation less suitable for labour arbitration" than disability rights.[181] He charges that American unions have no expertise in dealing with these issues.[182] That charge has no application in Canada, where unions have processed disability grievances for decades. Canadian unions and employers are experienced at arbitrating employee disability claims and at addressing complex accommodation issues.[183] Hyde argues that in the US, "[a]rbitration has contributed little or nothing to the development of the law of discrimination and other workplace claims".[184] In Canada, the reverse is true—many major workplace human rights decisions emerging from the Supreme Court over the last decade have had their origins in labour arbitration, and in most of those cases, the Court has upheld the arbitrator's decision.[185] The hegemony of arbitration has not been unproblematic, but so far, it has been workable.[186]

The liberal critique that human rights can only be appropriately vindicated through courts and court-like procedures has never had as much resonance in Canada as in the US. As we have seen, human rights enforcement was initially assigned to administrative tribunals rather than courts. Acknowledgement by Canadian courts that human rights are fundamental and "quasi-constitutional" has led not to more court

180. *Ibid* at 984.

181. *Ibid* at 1006–08. Hyde contends that it would be "[e]ven more absurd, if possible" to submit statutory pension claims to arbitration. In Canada, pension claims go to arbitration in unionized workplaces. See *Bisaillon*, *supra* note 83.

182. Hyde, *supra* note 4 at 1007.

183. See Adell, "Jurisdictional Overlap", *supra* note 35.

184. *Supra* note 4 at 1014.

185. See e.g. *Meiorin*, *supra* note 87; *Parry Sound*, *supra* note 38; *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161.

186. See *supra* note 35.

involvement, but to decisions like *Tranchemontagne* which see the public interest as best served by dispersing human rights enforcement broadly throughout the legal system. Likewise, the charge of the institutional critics that arbitration is a private process with no role in protecting the public interest has much less legitimacy in Canada. Here, labour arbitration has always been more regulated than in the US, by both statute and administrative law. Arbitrators are accountable to the courts on judicial review, particularly when they enforce general law.[187] Arbitrators may well have the same power to award human rights remedies as HRTs (although they have been slow to use it).[188] While scholars may disagree about whether the increasing "public law" nature of labour arbitration is a positive development, they agree that it is a reality in Canada.[189]

The collectivization critique does have some resonance in Canada. Unions control access to arbitration, and their decisions will determine whether the claims of unionized employees get before arbitrators and how they are presented when they get there. Union decisions on these issues are largely governed by the duty of fair representation. In his article, "Jurisdictional Overlap Between Arbitration and Other Forums: An Update", Bernard Adell argued that the duty of fair representation, in which union conduct is assessed against the standard of whether it was "arbitrary, discriminatory or in bad faith", is inadequate to the task

187. Canadian courts are much more likely than US courts to intervene in arbitrators' decisions on judicial review. See David A Wright, "'Foreign to the Competence of Courts' Versus 'One Law for All': Labor Arbitrators' Powers and Judicial Review in the United States and Canada" (2002) 23:4 Comp Lab L & Pol'y J 967. The debate continues, of course, as to whether standards of review should be made more or less stringent. See McGill & Tracey, *supra* note 5 at 69–70.

188. See Michael Lynk & Lorne Slotnick, "The Final Frontier: Labour Arbitrators and Human Rights Remedies" in Kevin Whittaker et al, eds, *Labour Arbitration Yearbook 1999-2000*, vol I (Toronto: Lancaster House, 2000) 23 at 35–39, 49–54. See also Fay Faraday, "The Expanding Scope of Labour Arbitration: Mainstreaming Human Rights Values and Remedies" (2005) 12:3 CLELJ 355 at 365–71. Both articles argue that the limits of arbitral jurisdiction to award human rights remedies have not yet been fully explored.

189. See Lynk & Slotnick, *supra* note 188 at 28–34. See also Peter A Gall, Andrea L Zwack & Kate Bayne, "Determining Human Rights Issues in the Unionized Workplace: The Case for Exclusive Arbitral Jurisdiction" (2005) 12:3 CLELJ 381; Claire Mummé, "Labour Arbitration as Translation: The Transformation of Canadian Labour Arbitration in the Twentieth Century from a Semi-Autonomous Institution of the Shop to an Institution of the State" (2008) [unpublished] online: SSRN <http://ssrn.com>.

of ensuring that unionized employees have fair access to enforcement of human rights claims.[190] Adell offered a remedy: individual access to arbitration for the enforcement of human rights claims.[191] There is a consequence to this remedy, however. Workplace human rights disputes are rarely bilateral disputes. They implicate a wide range of competing interests with compelling claims, including the rights of other individuals and identifiable groups of employees, as well as the efficiency and profitability of business enterprises. Issues of accommodation in which human rights claims challenge seniority rights are only the most obvious example of such complexity.[192] Arbitration processes in which unions have carriage of the case ensure that rights claims can be fully contextualized, and will better ensure that all rights and interests get appropriate and fair consideration. Adell's solution risks reducing arbitration to an attenuated contest between employer and employee, which would strip out these important contextual dimensions.

Statutory human rights are undeniably important rights. But notwithstanding their characterization by the courts as "quasi-constitutional" rights, they are not necessarily more important or more valuable to individual employees than employment rights based on the common law, other statutes or collective agreements. In run-of-the-mill cases—cases in which, to paraphrase the *Vaid* court, there is nothing to lift the case out its employment context except the fact that *Code*-based arguments will be made—there is no principled reason why arbitrators should not have exclusive jurisdiction, and why unions, as the collective representatives of employees, should not have the same power to filter, shape and adjudicate the disputes as they do in other complex disputes where rights and interests, including critical job interests, may clash.

A key challenge for the system, however, will be to craft analytical tests and tools that can draw clear boundaries between the type of case where arbitral exclusivity over the dispute can be defended on the same *Weber*-based grounds courts apply to other disputes linked closely to

190. *Supra* note 35 at 223–28.

191. This solution is also hinted at by the US Supreme Court in *Pyett* in the Court's refusal to resolve the question of whether an arbitration agreement that clearly gave the union power to block arbitration of individual statutory rights claims would be enforceable. *Supra* note 2 at 273–74.

192. See M Kaye Joachim, "Seniority Rights and the Duty to Accommodate" (1998) 24:1 Queen's LJ 131.

collectively bargained rights, and exceptional cases like *Morin* where arbitral exclusivity would be a fundamental denial of access to justice. Some commentators who favour arbitral exclusivity have suggested that the solution lies in recognizing a jurisdictional exception for cases in which the union is named as co-respondent to a human rights complaint; such cases could proceed before HRTs.[193] While this proposal touches the essence of the problem, it suffers from the weakness that it is not grounded in the principles that establish and protect arbitral exclusivity, and consequently it is very open to manipulation. More work must be done to distinguish between cases where a complainant names her union as a respondent to a complaint because a genuine conflict of interest over a human rights issue has denied her access to arbitration of the underlying dispute, and cases where a complainant names her union because she disagrees with that union's bona fide assessment of the merits of her case and whether it warrants arbitration. Cases in the first category warrant exceptional access to the statutory adjudication system for dealing with the substance of the dispute; cases in the second category do not.

Conclusion

I have explored the claim that HRTs and labour arbitrators have concurrent jurisdiction over human rights disputes arising in unionized workplaces in Canada, and argued that it fails to account for important aspects of the Supreme Court's decisions in its jurisdictional triumvirate. Regardless of whether or not HRTs have concurrent jurisdiction with arbitrators, however, it is clear that for all practical purposes, unionized employees in Canada must arbitrate their statutory human rights claims unless they are prepared to abandon the collectively bargained rights that supplement their statutory rights under human rights legislation. This reality leaves them in much the same position as their unionized US counterparts after *Pyett*.

The channeling of individual statutory human rights claims into arbitration raises legitimate policy concerns about individual access to justice and the nature of adjudication in the arbitral forum. Those concerns need to be addressed. But we must keep those concerns in

193. See Gall, Zwack & Bayne, *supra* note 189 at 398.

perspective. In 2009, Canadian arbitrator Michel Picher used the occasion of his presidential address to the National Academy of Arbitrators to suggest, respectfully but firmly, that much of the criticism that has greeted *Pyett* in the US is misplaced, and that *Pyett* might significantly *improve* meaningful access to justice in human rights adjudication for unionized employees.[194] There are sound reasons to credit this thesis, particularly in Canada, where we have a long and relatively successful tradition of arbitrating complex rights claims in unionized workplaces.

I have argued that there is no principled reason for courts to take a different approach to determining arbitral jurisdiction in cases that raise human rights claims than they do in other cases in which competing jurisdictional claims are present. I have also argued that a consistent approach would place most such claims within the exclusive jurisdiction of an arbitrator. I have acknowledged, however, that there are exceptional cases like *Morin* in which concrete conflicts of interest between union and employee over human rights issues make arbitration inaccessible. In such cases, justice demands that employees get their day in "court" to vindicate their rights. But justice does not demand that every rights claimant get a day in court just because the claim invokes statutory human rights issues, any more than justice demands that every grievance must go to arbitration.

The tests and tools that have emerged from the Supreme Court's *Morin-Charette-Vaid* triumvirate have been of little assistance in helping to identify these *Morin*-type cases. In the absence of guidance from our highest court, lower courts and tribunals have essentially tried to solve the problem by ignoring it, articulating a post-*Morin* consensus that HRTs have concurrent jurisdiction with labour arbitrators in all cases. This may be a pragmatic solution, but it is not a principled one. It exposes respondents to double jeopardy and leaves the issue of forum to be determined largely by a "race to the courthouse door". In direct access jurisdictions, and probably in other jurisdictions as well, individual employees will inevitably lose that race unless they are prepared to

194. Michel Picher, "Enhancing Access to Justice: Grievance Arbitration and the U.S. Supreme Court's decision in *Pyett*" in Allen Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook (2d) 2012-2013* (Toronto: Lancaster House, 2011) 349 at 351, 356–57. Picher is a fairly recent convert to the benefits of arbitrating claims involving statutory rights. See Picher, *supra* note 35.

abandon their rights under the collective agreement. This system may give employees a formal choice of forum, but that choice is not a meaningful one.

If the courts cannot provide principled solutions to the jurisdictional problem, the task must fall to legislatures. Within a legal framework in which legislative intent is said to be paramount, more clarity in the relevant statutes on the forum question is the logical remedy. If the policy choice is to place the enforcement of statutory rights unequivocally in the hands of arbitrators, there are legislative models available to achieve that end. An Ontario example is legislation requiring unionized employees to take their employment standards claims to grievance arbitration rather than through the statutory channels available to non-unionized employees.[195] Amendments to human rights codes or labour relations statutes could produce the same result for human rights claims. If, in contrast, the policy choice is to leave statutory enforcement channels unequivocally open in all cases, there are legislative models available for implementing that choice as well. A bill that has now come twice before the US Congress, designed to reverse the impact of *Pyett* and permit unionized employees to pursue Title VII claims in court, would have had this effect.[196] The preferable approach, however, would be for legislatures to adopt a more nuanced approach by statutorily enshrining a jurisdictional distinction between garden variety workplace human rights claims, where conflicts between grievors and their unions can be sorted out in accordance with the normal rules governing the duty of fair representation, and exceptional cases like *Morin*, where arbitration channels are effectively closed to rights claimants because their union has been an active and continuing institutional party to the alleged discrimination. In the first type of case, exclusive arbitral jurisdiction would be the order of the day, making maximum use of the forum most capable of vindicating the full range of employment rights. In the second type of case, statutory adjudication should be available.

To date, legislatures have been slow to act, preferring to leave the resolution of jurisdictional conflicts to courts and tribunals. For

195. *Employment Standards Act, 2000*, SO 2000, c 41, s 99.

196. Martin Malin, "The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition" (2012) 87:1 Ind LJ 289. The version of this bill introduced in 2011, was not enacted. See govtrack.us, *S. 987 (112th): Arbitration Fairness Act of 2011*, online: Civic Impulse <http://www.govtrack.us>.

politicians, this approach has the merit of avoiding possibly controversial decisions about whether and when unionized employees will have unimpeded access to HRTs and when they must arbitrate their claims. But when legislatures avoid the hard questions about how we want the system to work, there are likely to be negative consequences for equality and social justice, workplace harmony and productivity in the workplace. Lawmakers charged with addressing these questions must have regard to the "fundamental" nature of human rights, to the history of discrimination by majorities against minorities, and to the institutional differences between statutory adjudication and labour arbitration. But they must also have regard to the benefits of treating human rights issues as only one component of an overall workplace rights framework enforced as an organic whole. In a unionized workplace, where arbitrators already have exclusive jurisdiction over a broad spectrum of workplace rights, arbitration is clearly the best forum in which to deliver such an integrated approach.