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The “Right To Sue” as Access to Justice: Discrimination in Employment before the Courts in Canada and California

*Sheila Osborne-Brown**

This paper provides a comparative analysis of the Canadian and U.S. approaches to the adjudication of discrimination claims arising from employment. The author presents an overview of the main structural elements of the U.S. system (focusing on the state of California) as compared to the Canadian system, having regard to causes of action, forums, the type and extent of remedies, costs awards, and participants in the process. She then considers the impact of those contrasting structural elements on a complainant’s ability to access a court process, rather than an administrative process alone, and on the scope of individual monetary remedies that may be available in addition to systemic ones. Weighing the advantages and disadvantages of the Canadian and U.S. approaches, the author asks whether the system in Canada, with its pronounced “public” character, could not coexist with a more “private” system in which claims could be pursued in court, in a way that would benefit both individual complainants and society as a whole. At the same time, the author suggests that enhancing the quantum of individual remedies, whether in an administrative forum or in court, could well prove to be an effective tool for encouraging complainants to come forward and to enable them to secure effective legal representation in prosecuting their complaints.

1. INTRODUCTION

My interest in the subject-matter of this paper was born out of personal experience. I have practised employment law in both Canada and the United States (the State of California in particular), and I

* Counsel, Canadian Human Rights Commission, Ottawa. This paper is dedicated to the memory of Denise Gilliland, a remarkable woman who ran her own barber shop in Osgoode, Ontario for 31 years. She was devoted to her family, friends and customers. Denise passed away on October 31, 2012, and is dearly missed. Although the views expressed in this paper are informed by my work, the views expressed herein are mine alone and do not necessarily coincide with the position of the Canadian Human Rights Commission. I wish to thank colleagues at the Commission who commented on an earlier version of this paper, and Professor Jennifer Bond for her invaluable help in the early stages of this endeavour. I take responsibility for any inaccuracies, and would be happy to receive comments at sosbornebrown@yahoo.com.

have dealt with matters in which an employee has alleged adverse treatment at work based on a prohibited ground of discrimination.¹ In my experience, one striking difference in employment discrimination law in the two countries was the disparity in a complainant's potential monetary remedy; an employee in Canada who experienced the same discrimination at work as an employee in the United States was often limited to a lower range of monetary remedies. Another difference was the broader choice of forum in the U.S. — the ability of a complainant to access a court process, in contrast to the Canadian system's historic limitation of employment discrimination complaints to administrative forums. Assuming that my experience accords with reality, why should an employee in one country who experiences the same discrimination at work as an employee in the other be limited to a lower range of monetary remedies, and be prevented from taking her claim to court?

One could jump to the conclusion that the explanation lies in the largely preventive goals of Canadian human rights legislation. In theory, the law in Canada seeks a remedial solution that will preclude discrimination from recurring. Systemic remedies often outweigh individual ones. In other words, there is a strong public interest component in the Canadian anti-discrimination regime. Could this reflect a choice of values that focuses less on providing remedies for the individual and more on cultivating a society that allows people to thrive without being hindered by discriminatory attitudes or policies?

Before that hypothesis is accepted, it should be noted that the United States Equal Employment Opportunity Commission (EEOC) was a pioneer in the area of systemic discrimination. When that agency was founded in 1965, it had only limited powers, but in

1 This paper will not examine what could be called human rights claims arising out of alleged constitutional breaches, under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, or under the United States *Bill of Rights*, US Const., amend I-X. Nonetheless, U.S. anti-discrimination law was largely born out of the anti-discrimination principle recognized in *Brown v Board of Education*, 347 US 483 (1954), which was a constitutional case. George Rutherglen, *Employment Discrimination Law*, 3d ed (New York: Foundation Press, 2009) at 4.1. In Canada, the animating principles of equality of opportunity and non-discrimination are reflected both in the *Charter* and in human rights (anti-discrimination) statutes, which (as noted below) are quasi-constitutional in nature.

1972 those powers were expanded to include the authority to initiate lawsuits. It used this broader mandate to bring cases targeting adverse-impact discrimination in employment.² The EEOC and other administrative bodies, including the California Department of Fair Employment and Housing, still do a great deal of systemic work, often resulting in significant remedies.

Furthermore, for many years the U.S. Supreme Court was very reluctant to approve agreements that required statutory employment discrimination claims to be dealt with by arbitration.³ In 1974, in *Alexander v. Gardner-Denver Co.*, the Court held that "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement."⁴ Although the plaintiff's grievance had been dismissed at arbitration, the Court allowed him to continue with his action in District Court alleging racial discrimination under Title VII of the federal *Civil Rights Act of 1964*. Employees who pursue a discrimination claim, although first obliged to file with an administrative agency such as the EEOC, could eventually obtain a "right to sue" letter and then bring an action in court even if their case had already been heard (and even decided) by an arbitrator.

However, the contrast between the Canadian and U.S. systems of employment discrimination law has become less stark over the last two decades or so. Since the U.S. Supreme Court's decisions in 1991 in *Gilmer v. Interstate/Johnson Lane Corp.*,⁵ involving a non-union individual employment contract, and in 2009 in *14 PennPlaza LLC v. Pyett*,⁶ involving a unionized workplace with a collective agreement, both federal and state courts in the U.S. have accepted and even

2 Peter C Robertson, *The Canadian Human Rights Commission as the Enforcement Mechanism under the Employment Equity Act: Recommendations Based on the U.S. Experience* (Ottawa: Canadian Human Rights Commission, 1987); Rutherglen, *supra* note 1 at 171-172.

3 *Alexander v Gardner-Denver Co.*, 415 US 36 (1974) [*Alexander*]; Elizabeth Shilton, "Choice, but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2012) 38:2 *Queen's LJ* 461 at 462, 503.

4 *Alexander*, *ibid* at para 16.

5 500 US 20 (1991) [*Gilmer*].

6 556 US 247 (2009) [*Pyett*].

encouraged mandatory arbitration agreements.⁷ These developments, which will be referred to again in Part 2 below, have cut off access to a judicial remedy for many who claim employment discrimination.⁸

In Canada, employment discrimination complaints in both unionized and non-unionized settings are still usually heard through administrative adjudication. In the province of Ontario, however, major legislative amendments passed in 2006, and in force since 2008, have to some extent opened the way for courts to hear claims of discrimination in breach of the province's *Human Rights Code*.⁹ In Saskatchewan, the Human Rights Tribunal has been eliminated; discrimination complaints that pass initial screening by the Human Rights Commission, if not successfully mediated, proceed to the Court of Queen's Bench. The lay of the land for damages is also changing. Human rights tribunals in Canada have recently ordered damages awards that are higher than traditionally seen, including generous awards for past loss of income.

Against that background of a shifting landscape in both the U.S. and Canada, I look in this paper at some aspects of the employment discrimination systems in both countries. The paper has two main parts. Part 2 deals with structural elements in discrimination complaints, comparing those in California, the state in which I practised, to those in Canada. Part 3 discusses the impact of these structural elements on complainants' access to courts and monetary remedies, and

7 *Gilmer*, *supra* note 5. In addition, although the *Civil Rights Act of 1991* (enacted by Congress just six months after the *Gilmer* decision) increased available judicial remedies under Title VII, it also "included text that explicitly established arbitration as a viable means of resolving Title VII disputes." Section 118 of the 1991 Act has been construed by federal courts as demonstrating "Congress's intent to endorse compulsory arbitration agreements in accordance with the [federal *Arbitration Act*] mandate." Ryan D O'Dell, "Does Title VII Preclude Enforcement of Compulsory Arbitration Agreements? The Ninth Circuit Says Yes: *Duffield v. Robertson Stephens & Co.*" (1999) J Disp Resol 83 at 89. However, *Duffield* has since been overruled. The Ninth Circuit has changed its stance on enforcement of compulsory arbitration agreements. See *Equal Employment Opportunity Commission v Luce, Forward, Hamilton & Scripps*, 345 F 3d 742 (9th Cir 2003).

8 Rutherglen, *supra* note 1 at 175-176.

9 *Human Rights Code*, RSO 1990, c H.19 as am, s 46.1, enacted by SO 2006, c 30, s 8.

considers whether employees who allege workplace discrimination can have access to both arbitral and judicial forums.

It may seem odd at first sight to compare a single U.S. state with all of Canada. However, the interplay between federal and state legislation in American anti-discrimination law is extremely complex,¹⁰ and it is beyond the scope of this paper to cover the law of the U.S. as a whole. Although I will focus on the state of California,¹¹ I will also refer to U.S. federal law, given that employees generally have access to remedies under both state and federal anti-discrimination legislation at the same time.¹²

In Canada, there is a relatively clear distinction between federal and provincial jurisdiction in labour and employment law. A Canadian employer generally falls entirely under provincial or federal jurisdiction in labour and employment matters, including employment-related human rights matters, depending on whether the employer's enterprise itself is within federal or provincial jurisdiction. For example, almost all construction and manufacturing businesses are within provincial jurisdiction, and all telecommunications enterprises are within federal jurisdiction. Therefore, when an employee claims a remedy for discrimination in the workplace, either the provincial

10 In discussing the origins of federal anti-discrimination legislation, Thomas Haggard has written that Congress left to the courts the substantive issues, including the meaning of "discrimination," but that it tried to be more specific in addressing procedural issues. However, Congress chose not to use existing models for enforcing social and labour legislation. "Rather, it started from scratch and created an administrative/judicial, public/private enforcement mechanism of enormous complexity that was more the product of political compromises than rational legislative choices." Thomas R Haggard, *Understanding Employment Discrimination* (San Francisco: Matthew Bender, 2008) at 181. See also Rutherglen, *supra*, note 1 at 159-160; and AT Von Mehren & PL Murray, *Law in the United States* (New York: Cambridge University Press, 2007) at 103.

11 Even within the California context, I have confined most of the discussion to the *Fair Employment and Housing Act (FEHA)*, California Government Code §§12900-12996 (1959) and Title VII of the *Civil Rights Act of 1964*, Pub L No 88-352, 78 Stat 241 (and subsequent amendments to Title VII, discussed below). There are many other laws that apply to or touch on discrimination in the workplace in both California and at the federal level, but they will not be discussed in detail.

12 However, this is subject to rules on exhaustion of state law procedures. Rutherglen, *supra* note 1 at 246-247.

or federal human rights statute (but not both) applies to the claim.¹³ In contrast to the U.S., there is no overlapping jurisdiction.¹⁴ The discussion of the Canadian situation in this paper will include some comparison of the systems in several provinces and in the federal jurisdiction.

2. EMPLOYMENT DISCRIMINATION CLAIMS IN CANADA AND CALIFORNIA: CAUSES OF ACTION, FORUMS, REMEDIES, COSTS, AND ACTORS

(a) Causes of Action

(i) *Canada*

Claims for redress against employment discrimination in Canada are grounded in statutory human rights codes, which have long been recognized by the Supreme Court of Canada as “quasi-constitutional” legislation. In the Court’s words:

When the subject matter of a law is said to be the comprehensive statement of the “human rights” of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.¹⁵

As the common law has not historically given people a way to protect their human rights, legislation was necessary. In the words of Tarnopolsky and Pentney:

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- 13 Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp, looseleaf (Scarborough, Ont: Thomson Carswell, 2006) vol 1 at 21-10 to 21-15; Walter Surma Tarnopolsky & William F Pentney, *Discrimination and the Law*, looseleaf (Toronto: Thomson Reuters Canada, 2004) vol 1 at 3-5.
 - 14 Robertson, *supra* note 2 at 32ff. A very small number of enterprises have both federally and provincially regulated aspects, but even in those cases the jurisdictions do not overlap.
 - 15 *Insurance Corp of British Columbia v Heerspink*, [1982] 2 SCR 145 at 158, 137 DLR (3d) 219 (*per* Lamer J).

Egalitarian civil liberties or human rights are somewhat different from the other civil liberties, except some of the economic ones, in that they require positive legislative support for their existence. The absence of discriminatory laws and administrative practices are not in themselves sufficient to ensure the protection and promotion of human rights, because discrimination may be practised in so many of the daily activities of people. Without legislation forbidding it, the private individual, group, or trade union or corporation, is practically free to discriminate in employment . . . on the ground of the applicant's . . . race, colour, creed, religion, age or sex. That is not to say that the common law provided (or provides) a shield for discrimination in the form of a "right to discriminate." Such a right was never recognized . . . Rather, [the common law] simply did not address equality as a discrete basis of justiciable rights.¹⁶

Accordingly, human rights and anti-discrimination legislation has been enacted in all of the provinces and territories, and federally. However, attempts have also been made to persuade Canadian courts to establish a common law tort of discrimination that would be enforced in court rather than before an administrative body such as a human rights tribunal. In 1979, in *Bhadoria v. Seneca College*,¹⁷ the Ontario Court of Appeal recognized a tort of discrimination, in a judgment written by Justice Bertha Wilson (who three years later would be the first woman appointed as a Supreme Court of Canada judge). The plaintiff, Ms. Bhadoria, had unsuccessfully applied many times to Seneca College for a teaching job, and claimed that the College had discriminated against her on the basis of race. Her claim succeeded in the Ontario Court of Appeal. However, in 1981 the Supreme Court of Canada reversed Justice Wilson's judgment, holding that human rights statutes provided a complete and exclusive scheme for dealing with complaints of discrimination.¹⁸ This effectively meant that claims of discrimination on prohibited grounds, in hiring and employment as in other fields, were shut out of the court system.

In the years subsequent to *Bhadoria*, claimants tried to distinguish the Supreme Court ruling in that case by pleading discrimination-type allegations in creative and interesting ways. One of the most popular was in the context of wrongful dismissal actions, where discriminatory acts by employers toward employees were occasionally held to be "independently actionable wrongs" grounding claims

16 Tarnopolsky & Pentney, *supra* note 13 at 2-2.

17 (1979), 105 DLR (3d) 707, 27 OR (2d) 142.

18 *Seneca College v Bhadoria*, [1981] 2 SCR 181, 124 DLR (3d) 193 [*Bhadoria*].

for punitive damages. This development in the case law was halted by the Supreme Court in 2008 in *Honda v. Keays*,¹⁹ discussed below.

In *Picard v. Air Canada and WestJet*,²⁰ a 2011 case involving alleged discrimination in the provision of services rather than employment, a Quebec Superior Court judge concluded that *Bhadauria* and *Honda* did not necessarily bar discrimination claims in the courts. One of the legislative developments mentioned in *Picard* is the enactment of section 46.1 of the Ontario *Human Rights Code*,²¹ which allows a cause of action based on that *Code* to be brought in the Ontario Superior Court if it is part of a lawsuit that also raises other civil causes of action. An allegation of breach of the *Code* therefore cannot be a stand-alone cause of action, but could be one of the grounds pleaded in (for example) a wrongful termination action.²²

19 2008 SCC 39, [2008] 2 SCR 362 [*Honda*].

20 2011 QCCS 5186 [*Picard*] (available on CanLII).

21 *Supra* note 9. Section 46.1 reads as follows:

46.1(1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

46.1(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

Pursuant to section 34(11)(a) of the *Code*, a person who has brought an action in court alleging a breach of the *Code* may not maintain a complaint before the Human Rights Tribunal of Ontario, whether the action was started before or after the complaint was filed. See *Grogan v Ontario (Human Rights Tribunal)*, 2012 ONSC 319 [*Grogan*] (available on QL).

22 In *Anderson v Tasco Distributors*, 2011 ONSC 269, 87 CCEL (3d) 116, the Ontario Superior Court denied the defendant's motion to strike allegations of breaches of the Ontario *Code*. The Court relied on section 46.1 of the *Code*, and also referred to the Supreme Court of Canada's statement in *Honda*, *supra* note 19, that a plaintiff could advance a breach of the *Code* as a cause of action in connection with another actionable wrong.

(ii) *California*

The particular history of legislation against discrimination in employment in the United States has resulted in a complex interplay between federal and state statutes. Most employees can rely on both federal and state laws to assert a claim of discrimination at work.²³ The California Department of Fair Employment and Housing (DFEH) and the EEOC have entered into a "Worksharing Agreement" to set out procedures to deal with the overlap of jurisdiction.²⁴

One of the primary federal anti-discrimination statutes is Title VII of the *Civil Rights Act of 1964*, which makes it illegal to discriminate against a person on the basis of race, colour, religion, national origin or sex. That statute has been amended by the *Pregnancy Discrimination Act of 1978*, which makes it illegal to discriminate against a woman because of pregnancy, childbirth or a medical condition related to pregnancy or childbirth. The range of remedies available under Title VII was significantly expanded by amendments adopted in the *Civil Rights Act of 1991*.²⁵ Other important U.S. anti-discrimination laws include the *Age Discrimination in Employment Act of 1967 (ADEA)*, Title I of the *Americans with Disabilities Act of 1990 (ADA)*, the *Equal Pay Act of 1963*, and sections 501 and 505 of the *Rehabilitation Act of 1973*, which make it illegal for the federal government to discriminate against a qualified person with a disability.

Title VII and other federal anti-discrimination laws dealing with employment (including those listed above) are enforced by the EEOC. However, there are other federal non-discrimination laws that do not come within the mandate of the EEOC,²⁶ which only has adjudicatory authority over federal government employment.²⁷

23 Robertson, *supra* note 2 at 33. Often city statutes also come into play, but for the purposes of this discussion we have focused on federal and state jurisdiction.

24 "Worksharing Agreement between California Department of Fair Employment and Housing and the U.S. Equal Employment Opportunity Commission San Francisco District Office for Fiscal Year 2013," online: California Department of Fair Employment and Housing <<http://www.dfeh.ca.gov>>. Many other states' anti-discrimination agencies have made similar agreements with the EEOC, and these agreements have been approved by the U.S. Supreme Court. Rutherglen, *supra* note 1 at 164.

25 Haggard, *supra* note 10 at 4.

26 Online: <<http://www.eeoc.gov/laws/statutes/index.cfm>>.

27 Rutherglen, *supra* note 1 at 176.

In California, the primary state statutory causes of action for discrimination in employment are found in the *Fair Employment and Housing Act (FEHA)*.²⁸ Prohibited grounds of discrimination under the *FEHA* include age (40 or over), ancestry, colour, religious creed, denial of family and medical care leave, mental and physical disability, marital status, medical condition, genetic information, national origin, race, religion, sex (which includes pregnancy, childbirth, and medical conditions related to pregnancy or childbirth), gender, gender identity and gender expression, and sexual orientation. The range of prohibited grounds of discrimination is thus broader under California law than under federal law.²⁹

As will be discussed below, a complainant's first recourse in an employment discrimination proceeding will usually be to a state administrative agency, which in California is the DFEH. Subsequently, a complainant can obtain a letter from that agency giving him or her the "right to sue" — i.e. to pursue the same statutory cause of action in court³⁰ — but state procedures first have to be exhausted in accordance with many procedural timelines. The Worksharing Agreement between the state DFEH and the federal EEOC simplifies the process; it is "designed to provide individuals with an efficient procedure for obtaining redress for their grievances under appropriate State and Federal laws."³¹ The DFEH will deal with most claims, although there are some categories that the EEOC will handle.

28 *Supra* note 11.

29 Many other federal and California laws also deal with leaves to which an employee may be entitled, including the *Family Medical Leave Act* and the *Americans With Disabilities Act Amendments Act* (both federal), the *California Family Rights Act*, the *Pregnancy Disability Leave Law*, and the *Fair Employment and Housing Act* (all state laws). The interplay among these laws is complex. California employment lawyers and human resources professionals are often faced with interpreting the overlap and the differing requirements in these laws. Maria Audero, "Navigating the Bermuda Triangle of Federal and California Leave Laws" (Presentation delivered at the State Bar of California 86th Annual Meeting, 10-13 October 2013) [unpublished]; Katelyn Brack, "American Work-Life Balance: Overcoming Family Responsibilities Discrimination in the Workplace" (2012-2013) 65 *Rutgers L Rev* 543.

30 42 USC §2000e-5(f)(1); California *Government Code* §12965(b).

31 "Worksharing Agreement," *supra* note 24, ¶1.B.

The Restatement on Torts does not include a tort of discrimination.³² However, Charles Sullivan has recently argued that the courts may be trying to “tortify” statutory discrimination complaints, largely to the disadvantage of complainants:³³

Although Title VII has often been described as creating a statutory tort, the panoply of tort doctrines has been applied to this statutory scheme only sporadically and then often in forms influenced by specific language of the law. Perhaps most pointedly, that staple of tort law, proximate cause, has not until recently made its appearance in the discrimination setting. *Staub v. Proctor Hospital*,³⁴ decided in 2011, was the first Supreme Court decision to apply the notion in the discrimination context, albeit not Title VII, and the implications of this innovation are far from clear.³⁵

However, in Sullivan’s words, the term “statutory tort” is “mostly metaphorical. Discrimination maps onto no obvious tort, since its paradigmatic form is a refusal to deal — i.e., refusing to enter into or continue a contractual relationship.”³⁶

Causes of action in tort, such as assault, battery and harassment, can be included in a federal or state statutory claim for discrimination. Depending on the facts of the particular case, a claim for the intentional infliction of emotional distress can also be included.³⁷ However, theories of wrongful discharge in violation of the public policy against unequal treatment in the workplace, which is also a tort, “are often found to be preempted by the Title VII or state antidiscrimination schemes.”³⁸

A recent state appellate court decision in California considered the preclusion of a common law racial discrimination claim by an arbitration award pursuant to a collective agreement. In *Wade v. Ports America Management Corp.*,³⁹ the appellant, a unionized employee, had been laid off. He had filed a grievance which included a racial

32 *Restatement (Second) of Torts* (2010).

33 Charles A Sullivan, “Tortifying Employment Discrimination” (2012) 92:5 BUL Rev 1431.

34 131 S Ct 1186 (2011).

35 Sullivan, *supra* note 33 at 2.

36 *Ibid.*

37 Haggard, *supra* note 10 at 7.

38 Paul M Secunda & Jeffrey M Hirsh, *Mastering Employment Discrimination Law* (Durham, NC: Carolina Academic Press, 2010) at 9.

39 218 Cal App 4th 648 (2013).

discrimination allegation. He was not successful before the arbitrator, but then filed an action in California Superior Court alleging wrongful termination in violation of public policy — a common law claim that is comparable to a claim under the *FEHA*. The employer brought a motion for summary judgment, successfully arguing that the employee's cause of action was precluded by the arbitrator's decision on the issue of racial discrimination.

The Court of Appeal upheld the ruling, not accepting the appellant's reliance on the holding in *Camargo v. California Portland Cement Co.*⁴⁰ That case stated that a labour arbitration proceeding under a collective agreement does not preclude a claim under the *FEHA* unless the parties had expressly agreed to arbitrate *FEHA* claims. The Court rejected the appellant's submission that the holding in *Camargo* should be extended to common law discrimination-type claims related to the *FEHA*. The appellant employee had also argued that the arbitration had not addressed his racial discrimination claim, and that therefore the arbitration decision had no preclusive effect. This argument, too, was unsuccessful.

(b) Forum

(i) Canada

In all Canadian jurisdictions, administrative forums are the primary place to seek redress for unlawful discrimination. The most common type of adjudicative forum in this area is the commission/tribunal model, where a claimant files a complaint with a human rights commission, which then exercises a screening function and may take on the investigation of the complaint. If the commission decides that the complaint warrants adjudication, the commission sends it on to a human rights tribunal for an oral hearing. This model, or a variation of it, is currently in place in the federal jurisdiction and in several provinces.

The commission/tribunal model has been replaced in Ontario and British Columbia by a "direct access" model, under which claimants take their complaints directly to a human rights tribunal;

40 86 Cal App 4th 995 (2001).

preliminary screening is no longer done by a commission. In Ontario, the Human Rights Commission continues to exist and to play a policy, research and education role. In British Columbia, the Human Rights Commission was abolished when the direct access model was instituted.⁴¹

The province of Saskatchewan has added another model to the mix — a model with a commission but no tribunal. Complaints are still filed with the Saskatchewan Human Rights Commission, which carries out investigations when appropriate. However, the Saskatchewan Human Rights Tribunal has been abolished. Complaints that are found to warrant a hearing go to the Court of Queen's Bench, although the remedies available are still those set out in the human rights legislation.⁴²

Administrative bodies specializing in human rights used to be the only place for complainants to go in the first instance in search of redress for employment discrimination that was allegedly in breach of human rights legislation. Indeed, one of the reasons why the Supreme Court of Canada found in *Bhadauria* that there was no tort of discrimination was that human rights statutes, in the Court's view, provided a complete adjudicative scheme for resolving human rights claims.⁴³ However, over the last decade or longer, more and more administrative bodies not set up by human rights statutes have taken on the adjudication of discrimination complaints, both in the workplace and elsewhere.

For unionized employees, allegations of workplace discrimination are now adjudicated primarily through grievance arbitration rather than in the human rights forum. In 2003, in the *Parry Sound* case,⁴⁴ the Supreme Court held that the provisions of human rights statutes and other employment-related statutes are incorporated into all collective agreements and labour arbitrators can apply human

41 Nunavut also has a direct access system.

42 *Saskatchewan Human Rights Code Amendment Act, 2011*, SS 2011, c 17. See also "Bill 160 — Proposed Amendments to the Human Rights Code" (8 February 2011), Saskatchewan Human Rights Commission, online: <http://www.shrc.gov.sk.ca/pdfs/bill_160/FAQs-Bill160_February8-2011.pdf>.

43 *Bhadauria*, *supra* note 18 at, *inter alia*, 183, 195.

44 *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, [2003] 2 SCR 157 [*Parry Sound*].

rights legislation. In the *Tranchemontagne* case,⁴⁵ the Supreme Court held that administrative tribunals that are empowered to decide questions of law (not just human rights tribunals) may look beyond their enabling legislation and apply relevant human rights laws in making decisions, unless the particular tribunal's constituent statute expressly states that human rights laws do not apply.

Arbitrators hearing grievances of unionized employees may therefore rule on discrimination allegations that form part of the subject-matter of the grievances before them. Although in practice there is concurrent jurisdiction in discrimination and human rights matters between human rights tribunals and labour arbitration panels, most of these matters are now adjudicated in grievance proceedings. Indeed, Elizabeth Shilton has argued that in light of the 2011 Supreme Court decision in the *Figliola* case⁴⁶ (mentioned below), “[f]or unionized employees with human rights complaints, arbitration has become the only practical option.”⁴⁷

Therefore, in Canada, the reach of human rights and anti-discrimination law has grown to include the entire landscape of administrative adjudication. However, discrimination allegations grounded in human rights statutes have not moved into the realm of judicial decision-making. Some exceptions, discussed below, include processes in Saskatchewan, and also in Ontario pursuant to section 46.1 of the Ontario *Human Rights Code*.

45 *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513 [*Tranchemontagne*], relying in part on *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504.

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

47 Shilton, *supra* note 3 at 502. But in the same article (at 472), with regard to concurrent jurisdiction, Shilton states that the Supreme Court has given “no clear answer” as to when labour arbitrators have exclusive jurisdiction over statutory discrimination claims by unionized employees, and notes that the matter must be determined on a case-by-case basis. She also points out (at 483ff) that the Supreme Court's efforts in *Quebec (AG) v Quebec (Human Rights Tribunal)*, 2004 SCC 39, [2004] 2 SCR 185 [*Morin*] and subsequent cases “to reconcile its commitment to arbitral exclusivity with the special nature of human rights have been less than successful,” and have been misunderstood by lower courts other than those in Quebec.

(ii) *California*

In the state of California, claims of discrimination in employment based on the *Fair Employment and Housing Act (FEHA)* must first be filed with the Department of Fair Employment and Housing (DFEH). However, employees can request and obtain a "right to sue" letter, which allows them to opt out of the DFEH proceeding and file directly in the California Superior Court (or the California District Court) alleging breaches of the *FEHA* and other statutes that may apply in the particular case.⁴⁸ This also gives a complainant employee the possibility of having a trial in front of a jury — a potentially pricey proposition for an employer and for the employer's Employer Practices Liability insurer, given the high level of jury awards.⁴⁹

If a complainant chooses to have the complaint dealt with through the DFEH, that department may investigate the matter. If it concludes that the facts substantiate the allegation of discrimination, it can issue an accusation, thus starting the prosecution of the complaint against the respondent. At that point, until recent legislative changes, the DFEH could choose either to proceed in the Superior Court or to pursue the complaint before the Fair Employment and Housing Commission (FEHC) — an administrative decision-maker that had the power to award remedies similar to those available through Canadian human rights tribunals. However, recent amendments have abolished the FEHC, and every complaint that proceeds to adjudication will now go to the Superior or District Court.⁵⁰

48 Complainants in California seeking remedies under Title VII must initially file with the Department of Fair Employment and Housing pursuant to the Worksharing Agreement between the EEOC and the DFEH. Employees alleging Title VII infringements can also choose either to stay with the administrative law process or to bring their claims to court before a judge (bench trial) or before a judge and jury if compensatory and punitive damages are sought. "Civil Rights Complainants in U.S. District Courts, 1990-2006," U.S. Department of Justice, Bureau of Justice Statistics Special Report (August 2008, NCJ 222989), online: <<http://bjs.ojp.usdoj.gov/content/pub/pdf/crcusdc06.pdf>>.

49 John Barber, "An Introduction to the Basics of Employment Practices Liability Insurance" (March 2011) 25:2 *California Labor and Employment Law Review*.

50 Phyllis W Cheng, "Transformative Year for Civil Rights in CA," *Los Angeles Daily Journal* (2 August 2012), online: California Department of Fair Employment and Housing <<http://www.dfeh.ca>>.

The possibility that employment discrimination complaints will be heard in court is something that distinguishes the California situation from the Canadian one. On the face of it, California employees who allege discrimination in employment appear to have a greater choice of forum than their counterparts in Canada. However, as noted above, employee access to judicial forums for such complaints has been substantially diminished by the fact that since 1991, private arbitration provided for in employment contracts has been increasingly accepted in the U.S. as a dispute resolution mechanism for statutory discrimination complaints in both unionized and non-unionized workplaces. The U.S. Supreme Court's decision in *Gilmer*, upholding a mandatory arbitration agreement between a non-unionized employee and the employer,⁵¹ served to preclude access to the court for a remedy for statutory discrimination. As Secunda and Hirsch have noted, "[n]ot only did the Court find nothing inconsistent with mandatory arbitration in the statutory language of the [*Americans with Disabilities Act*], but it also observed that the employee would not be foregoing his or her substantive rights under that statute."⁵² Ten years later, in *Circuit City Stores*,⁵³ the Supreme Court held that the *Federal Arbitration Act (FAA)*⁵⁴ applied to most employment relationships. Taken together, *Gilmer* and *Circuit City Stores* mean that "arbitration clauses in individual employment agreements are presumptively enforceable" even if they do not contain a "clear and unmistakable" waiver, as is required in collective agreements.⁵⁵

For unionized employees, the *Pyett* decision⁵⁶ limited the ability to bring a discrimination claim to court. In that case, the Court held, in Barry Winograd's words, that "an individual could be compelled under federal law to arbitrate an age discrimination claim based on a

51 *Supra* note 5.

52 Secunda & Hirsch, *supra* note 38 at 38.

53 *Circuit City Stores v Adams*, 532 US 105 (2001).

54 9 USC §§1-14, 201-208.

55 Secunda & Hirsch, *supra* note 38 at 38.

56 *Supra* note 6.

union's clear waiver in a collective bargaining provision of its members' right to litigate their claims in court."⁵⁷

Another issue that has been before the courts is whether employee class action claims are "concerted activities" protected under the *National Labor Relations Act*⁵⁸ (*NLRA*). In 2012, in *D.R. Horton*, the National Labor Relations Board said yes — that workers "have a right under federal law to participate in such class or group litigation."⁵⁹ This decision potentially limited the effect of the Supreme Court's 2011 decision in *AT&T v. Concepcion*,⁶⁰ which "suggested that agreements mandating arbitration while forbidding class-action claims would survive even vigorous state court review because federal law, namely the Federal Arbitration Act, preempts inconsistent state law."

These issues are working their way through the courts. In February 2013, an appeal of the National Labor Relations Board's ruling in *D.R. Horton* was heard in the U.S. Court of Appeals for the Fifth Circuit. The Court issued its decision in December 2013. The Court disagreed with the NLRB on the class action waiver issue and ruled that employee class waivers do not violate section 7 of the *NLRA* unless certain exceptions apply including, *inter alia*, normal contractual defenses or that Congress had issued a "contrary command" such as explicit statutory language that would supplant the *FAA*. This outcome could have an effect on employment discrimination

57 "The Pyett Decision: A Major Shift in Doctrine, but Limited Impact" (July 2009) 23:4 *California Labor and Employment Law Review* at 3. For a strong critique of *Pyett*, including the suggestion that the majority in that case "reinvent[ed] statutes, abandon[ed] precedent, and creat[ed] its own norms in the field of arbitration," see Margaret L. Moses, "The Pretext of Textualism: Disregarding Stare Decisis in *14 Penn Plaza v. Pyett*" (Fall 2010) 14:2 *Lewis & Clark Law Review* 825. See also Shilton's discussion (*supra* note 3 at 502) of the difference between the Canadian acceptance of arbitral jurisdiction over unionized employees' discrimination claims and the American resistance to arbitration in statutory discrimination matters.

58 29 USC §§151-169.

59 *In re D.R. Horton, Inc.*, 357 NLRB No 184 (2012), 192 LRRM 1137; "Fifth Circuit To Hear Appeal of National Labor Relations Board Decision that Class Action Waivers Violate Workers' Collective Rights," Ropes & Gray Alert (2 March 2012), online: <<http://www.ropesgray.com>>.

60 131 S Ct 1740 (2011); "Fifth Circuit to Hear Appeal," *ibid.*

class action lawsuits when arbitration agreements between employers and employees contain class action waivers, and might prompt more employers to implement arbitration agreements.⁶¹ The Ninth Circuit Court of Appeals has also joined other circuits in rejecting the NLRB's *D.R. Horton* decision, holding that an arbitration agreement is enforceable despite its preclusion of class actions.⁶²

(c) Remedies

(i) Canada

Canadian human rights or anti-discrimination statutes have generally provided for a range of remedies in the employment realm: compensatory damages, punitive awards, damages for loss of income, and systemic remedies. The cap on compensatory and punitive

61 *D.R. Horton v NLRB*, Case No 12-60031 (5th Cir, 3 December 2013). The NLRB subsequently petitioned for a rehearing of the matter, but this was denied by the Fifth Circuit Court of Appeals (16 April 2014). On developments in California, see Scott Witlin & Rachel Segal, "California Supreme Court to Review Class Action Arbitration Waivers in Employment Agreements," *National Law Review*, 25 September 2012, online: <<http://www.natlawreview.com>>; Cathleen Flahardy "GCs discuss arbitration in a post-Concepcion environment," *Inside Counsel*, 24 April 2012, online: <<http://www.insidecounsel.com>>; Barbara Reeves Neal, "ADR Report," section entitled "The Continuing AT&T Mobility Follow-On in California Courts" (January 2013) 27:1 *California Labor and Employment Law Review* at 21. The other issue that comes into play in this case is whether the NLRB was properly constituted at the time *D.R. Horton* was issued. If it was not, as Baker Hostetler lawyers have commented, "this could potentially wipe the whole case away." John B Lewis & Todd A Dawson, "United States: Fifth Circuit Rejects NLRB's D.R. Horton Decision — Too Soon For Champagne?" (13 January 2014), online: <<http://www.mondaq.com>>. The likelihood of such an outcome arguably increased with a recent decision in which the United States Supreme Court affirmed the decision of the D.C. Circuit Court of Appeals invalidating President Obama's appointment of three members to the NLRB. *National Labor Relations Board v Noel Canning*, No 12-1281__S Ct__ (26 June 2014), albeit on different reasoning. Mark L Shapiro, "United States: The Supreme Court's Noel Canning Decision and the NLRB's Response" (17 July 2014), online: <<http://www.mondaq.com>>.

62 *Richards v Ernst & Young LLP*, Case No 11-17530. See discussion in Jeffrey T Johnson, "Ninth Circuit Joins Growing Trend — Declines to Follow D.R. Horton and Upholds Arbitration Agreement Prohibiting Class Claims" (26 August 2013), online: <<http://www.employerslawyersblog.com>>.

damages has historically been low; for example, under the *Canadian Human Rights Act* it was at \$5,000 for both heads of damages, but was raised to \$20,000 in 1998.⁶³ Awards at the top end of the scale have been rare, and loss-of-income damages have also tended to be conservative. The rationale for these low caps is linked to the goals of human rights statutes, which are meant to be remedial and preventive rather than punitive.⁶⁴ On the other hand, the same rationale explains why systemic remedies, which are collective in nature, are potentially broad in scope and allow more room for a tribunal to use creativity.⁶⁵

In Ontario, general damages for human rights claims were formerly capped at \$10,000. However, that cap was abolished by the major reforms to the *Human Rights Code* which came into effect in 2008, and which also eliminated the gatekeeper role of the Human Rights Commission and introduced direct access to the Human Rights Tribunal of Ontario (HRTO).⁶⁶ One of the recommendations in Andrew Pinto's report on the functioning of the post-2008 Ontario human rights system was that the HRTO should "reconsider

63 SC 1998, c 9.

64 *Honda*, *supra* note 19 at para 64; Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 8ff, citing, *inter alia*, *Canada (Treasury Board) v Robichaud*, [1987] 2 SCR 84, 40 DLR (4th) 577.

65 See, for example, *Canadian Human Rights Act*, RSC 1985, c H-6, s 53(2)(a); *Ontario Human Rights Code*, RSO 1990, c H.19, ss 45.2(1)3, 45.2(2), 45.4 [OHRC].

66 OHRC, *ibid*. Section 45.2(1) of the *Code* now provides as follows:

On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

its current approach to general damages awards in cases where discrimination is proven” and that “the monetary range of these awards should be significantly increased.”⁶⁷ In Pinto’s view, low damages awards were problematic in three ways:

[T]hey send a message that human rights and breaches of the *Code* are of limited importance.

...

Applicants will be deterred from pursuing valid and worthwhile human rights claims when they can predict at the outset that it will cost more to pursue [the claim] than they are likely to receive in compensation, even if they are successful before the Tribunal.

...

[T]here is a risk that potential applicants may choose to pursue their human rights claims before the courts, where possible, in order to obtain a greater award of damages.⁶⁸

Interestingly, a noticeable increase in damages awards in some recent HRTO decisions has led employers (and their lawyers) to sit up and take notice.⁶⁹ In *Fair v. Hamilton-Wentworth District School Board*,⁷⁰ the complainant was awarded reinstatement (which was unusual in light of how long she had been away from the workplace), as well as significant past loss-of-income damages and \$30,000 for injury to her dignity, feelings and self-respect. In *Morgan v. Herman Miller Canada Inc.*,⁷¹ the HRTO awarded significant damages to an applicant who did not succeed in proving discrimination in employment but did prove that the employer had dismissed him as a reprisal for

67 Andrew Pinto, *Report of the Ontario Human Rights Review 2012*, online: Attorney General of Ontario <<http://www.attorneygeneral.jus.gov.on.ca>> [*Pinto Report*]. That report also recommended that when the HRTO decides to not award a public interest remedy, it should explain why in its decision (Recommendation 11).

68 *Pinto Report*, *ibid* at 70-71.

69 For example, Kristin Taylor, “Human Rights Awards: A Cause For Employer Concern?” *CCH Labour Notes* (6 June 2013), online: <<http://www.casselsbrock.com>>; Melanie D McNaught & Heather Power, “What’s New In Human Rights: The Pinto Report and Other Updates” at 9, online: <<http://fifion.on.ca>>.

70 2013 HRTO 440, [2013] CLLC ¶230-020.

71 2013 HRTO 650, [2013] CLLC ¶230-022 [*Morgan*]; Taylor, *supra* note 69 at 2.

having raised issues of harassment and discrimination. Although he had worked for the employer for less than three years and did not seek reinstatement, he was awarded 14 months' lost wages and \$15,000 for injury to dignity, feelings and self-respect. In that case, the HRTO also granted systemic remedies, including an order that the employer engage an expert to revise its human rights policies and train its key staff members.⁷² This award is particularly significant in light of the fact that the employee did not prove the discrimination initially alleged.

Alberta is another province that has no cap on damages in its human rights legislation. In *Walsh v. Mobil Oil Canada*,⁷³ an Alberta tribunal awarded, *inter alia*, \$35,000 in general damages (\$10,000 in one complaint and \$25,000 in another),⁷⁴ and \$472,766 for loss of income,⁷⁵ to a female land agent who proved gender discrimination. In upholding the award, the Alberta Court of Queen's Bench said: "[T]he compensatory nature of the [human rights statute] which is the basis for the use of tort principles in assessing compensation suggests that tort law could provide guidance on quantum of damages payable in case of psychological injury."⁷⁶ The Court concluded: "In light of the fact that a psychological injury in tort can give rise to non-pecuniary damage awards in the range of \$40,000 and up, I find there is nothing untoward in the sum of \$25,000"⁷⁷

(ii) *California*

The quantum of damages awarded in the United States for discrimination in employment can be extremely high, especially when the matter goes to court for adjudication. However, even in the administrative adjudication realm, compensatory and punitive damages

72 *Morgan, ibid* at para 130.

73 2012 ABQB 527 (available on CanLII).

74 *Ibid* at para 125.

75 *Ibid* at para 21.

76 *Ibid* at para 126.

77 *Ibid*. See also recent decisions of the Canadian Human Rights Tribunal, including *Hicks v HRSDC*, 2013 CHRT 20, [2013] CLLC ¶230-042.

have been higher in the U.S. than in Canada.⁷⁸ Although monetary remedies in the U.S. can at times be in the same range that we see in Canada, the spectre of huge damages at the end of a jury trial means that there is a great deal of pressure on insurance companies and defendant employers to settle before trial. Indeed, the possibility of very high damages has contributed to the popularity of Employment Practices Liability Insurance.⁷⁹

Systemic remedies are an important part of the mandate of anti-discrimination agencies in the United States.⁸⁰ For example, in a recent prosecution of a racial harassment case, the EEOC obtained

78 See, for example, a recent decision of the (former) California Fair Employment and Housing Commission (the equivalent of a Canadian human rights tribunal) in *Department of Fair Employment and Housing v Air Canada* (Case No E200809-R-0120-pe, 14 July 2011, Decision of Reconsideration). The complainant was awarded emotional distress damages of \$125,000, as well as other remedies such as back pay and reinstatement. Air Canada was also ordered to “develop, implement, and disseminate a policy that advises California management and supervisors of their FEHA obligation to make reasonable accommodation for Air Canada employees’ disabilities and to engage in a timely, good faith, interactive process with Air Canada employees to determine what accommodations are appropriate,” as well as to provide training to managers and supervisors.

79 Barber, *supra* note 49; Maria Treglia, “The Current State of the Employment Practices Liability Market” (Spring 2005) 19:1 John Liner Review 71. This observation is also based on anecdotal information I gleaned while practising in California. Similar insurance policies have been introduced in Canada, but from an informal search, they do not yet appear to have permeated the marketplace as they have in the U.S. This paper does not address the substantive details of anti-discrimination law, but it bears mentioning that although intention does not form part of the discourse in Canadian human rights cases, in the United States it is still at play in some circumstances. EPL insurance policies do not provide coverage for discriminatory acts that are proven to be intentional. This can raise conflicts for counsel who defend employers under such policies, and may require the insurance company to retain independent counsel to represent the employer. In California, this requirement is set out in California Civil Code §2860(a), which codifies the ruling in *San Diego Federal Credit Union v Cumis Insurance Society, Inc*, 162 Cal App 3d 358 (1984) (hence the development of the term “Cumis counsel” in that state). See Barber, *supra* note 49 at 17-18.

80 See e.g. Phyllis Cheng, “DFEH Update: How the DFEH Manages to Soar in the Age of Austerity,” *Benders California Labor & Employment Law Bulletin* (May 2012) at 153-154; online: California Department of Fair Employment and Housing <<http://www.eeoc.gov/eeoc/systemic/index.cfm>> and <<http://www.dfeh.ca.gov/About.htm>>.

an order from a federal judge which (in the words of an EEOC press release) "permanently enjoin[ed the defendant company] from engaging in any employment practice which facilitates, condones, or encourages a hostile work environment based on race, or from engaging in any other employment practice which discriminates on the basis of race"81 According to the press release, the Court also ordered the company to "develop a policy and procedures for handling reports of racial harassment; develop an effective investigation process for all complaints of racial harassment; distribute a written policy and provide equal employment opportunity training to all employees, including managerial employees."⁸²

Both the EEOC and the DFEH strive to represent the public interest by addressing discrimination in a proactive way. The EEOC states on its website that "the systemic program is a top priority," and that the "identification, investigation and litigation of systemic discrimination cases, along with efforts to educate employers and encourage prevention, are integral to the mission of the EEOC."⁸³

Over the last four years, the DFEH has reestablished a special investigations unit to address systemic discrimination.⁸⁴ This unit recently handled a class action against Verizon California, alleging that the company's family leave policies failed to comply with portions of the *California Family Rights Act (CFRA)*. Current and former employees alleged that they had been denied medical or family leave, or had been terminated, in violation of the *FEHA* and *CFRA*.⁸⁵ A

81 U.S. Equal Employment Commission, News Release, "Court Orders AA Foundries to Take Extensive Measures to Prevent Racial Harassment" (12 October 2012), online: <<http://www.eeoc.gov/eeoc/newsroom/release/10-12-12.cfm>>, referring to *EEOC v AA Foundries, Inc*, Civil Action No 5:11-cv-792, U.S. District Court for the District of Western District of Texas, San Antonio Division.

82 *Ibid*. The employer appealed but subsequently settled the case on terms that included its agreement to comply with the injunctive relief ordered by the Court. See online: <http://www.eeoc.gov/eeoc/newsroom/release/3-19-14.cfm>.

83 "Systemic Discrimination," online: <<http://www.eeoc.gov/eeoc/systemic/index.cfm>>.

84 California Department of Fair Employment and Housing, *2010 Annual Report*, online: <http://www.dfeh.ca.gov>.

85 "DFEH v. Verizon: Class Action Settlement," California Department of Fair Employment and Housing, online: <<http://www.dfeh.ca.gov/Verizon.htm>>.

settlement in 2012 obliged Verizon to pay up to \$6,011,190 to satisfy the individual claims of class members,⁸⁶ “to adopt and implement policies and procedures designed to facilitate and ensure compliance with the *CFRA* and the *FEHA*,” and to “submit its now revised *CFRA* leave policies to the DFEH for review and approval and to submit periodic reports to the DFEH.”⁸⁷

(d) Costs

(i) *Canada*

The issue of a tribunal’s power to award legal costs in human rights proceedings has been a contentious one, and came front and centre in the 2011 Supreme Court of Canada decision in the *Mowat* case.⁸⁸ The Court found that the wording of the *Canadian Human Rights Act*,⁸⁹ which authorized the Canadian Human Rights Tribunal to compensate a victim of discrimination for “any expenses incurred by the victim as a result of the discriminatory practice,” was not explicit enough to give the Tribunal the authority to award legal costs to a successful complainant.

The *Mowat* decision has been criticized as diminishing access to justice for human rights complainants.⁹⁰ The federal Commission and some interveners in the case had taken the position that there is usually a great disparity in resources between complainants and respondents in human rights matters, and that this was one of the reasons why access to justice required that the Tribunal have the authority to

86 *Ibid.* According to the January 2012 Order Granting Final Approval of Class Action Settlement issued by the California Superior Court, the actual amount paid to the 687 *CFRA* claimants was \$4,518,041.

87 *Ibid.* Memorandum of Points and Authorities in Support of Joint Motion for Preliminary Approval of Class Action Settlement.

88 *Canada (AG) v Mowat*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*].

89 *Supra* note 65, ss 53(2)(c) & 53(2)(d).

90 Kerri Froc, “*Mowat v. Canada* — The difference costs make to access to justice and the human rights culture in Canada,” *Touchstones: The CBA Standing Committee on Equality Newsletter* (June 2011), online: <http://www.cba.org/CBA/newsletters-sections/2011/2011-06_equality.aspx>.

award legal costs to a successful complainant.⁹¹ Respondents, however, received *Mowat* favourably, taking the position that it eliminated a one-sided legal costs regime.⁹²

On the provincial level, statutory provisions on the authority of the human rights adjudicative body to award legal costs are varied. The Supreme Court said in *Mowat* that provincial and territorial legislation "tends to confirm the view that the word 'costs' is used consistently when the intention is to confer the authority to award legal costs," and noted that it was not used in the federal statute.

(ii) *California*

The usual Canadian rule that costs are awarded to a successful party does not apply in the U.S.⁹³ However, many American statutes, especially those with a public interest objective, allow courts to award lawyers' fees against a defendant who is found to have breached the statute.⁹⁴ Under California *Government Code* §12965(b), if a complainant proceeds with an action in court pursuant to a "right to sue" letter, the court may award "reasonable attorneys' fees and costs." In a recent case, a plaintiff who successfully argued that the employer had breached the *FEHA*, and who also prevailed in a wrongful termination claim under state law, was awarded \$50,858.44 in attorney's fees. Interestingly, only \$10,000 in compensatory damages was

91 For example, see *Mowat*, *supra* note 88 (Factum of the Canadian Human Rights Commission), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/factums-memoires/33507/FM010_Appellant_Canadian-Human-Rights-Commission.pdf>.

92 See, for example, Hadiya Roderique, "Canada's Top Court Decides that the Canadian Human Rights Tribunal Cannot Award Legal Costs," Fasken Martineau bulletin "The HR Space" (7 December 2011), online: <<http://www.fasken.com>>.

93 This is known as the "English rule" in the U.S. See James Hughes & Edward Snyder, "Litigation under the English and American Rules: Theory and Evidence" (1995) 38:1 *JL & Econ* 225.

94 Litigation over such issues as which party has prevailed for the purposes of an award of legal fees and costs, and the amount of fee recovery by a prevailing party, has been described as "a boutique area of the law in California." Marc Alexander & William M Hensley, "Mission Statement," online: <http://calattorneysfees.typepad.com/california_attorneys_fees/mission-statement.html>.

awarded in that case.⁹⁵ Similarly, under federal legislation a victim of discrimination may be able to recover lawyers' fees, court costs and expert witness fees.⁹⁶ Plaintiffs who bring unsuccessful *FEHA* claims will not generally be liable for lawyers' fees, unless the court finds that the action was frivolous, unreasonable or without foundation.⁹⁷

(e) **Actors**

(i) *Canada*

The actors in statutory discrimination claims in Canada are often those one would expect to see in any legal dispute: complainants, respondents (often employers), unions (either as complainants' representatives or as respondents), stakeholder and advocacy groups, and of course, adjudicators and lawyers. However, given the relatively low amounts of damages at stake and the diminished ability to seek costs, there is little expectation that members of the bar will be rushing to file human rights complaints on behalf of complainants who may well have little money to pay a lawyer. Certainly the Canadian Human Rights Tribunal has stated in its annual reports that self-representation by complainants is a growing concern, especially given the complexity of the legal issues raised before the Tribunal.⁹⁸

It used to be more common for human rights commission lawyers to take cases forward on behalf of the public interest. Now, because of resource constraints, because of the elimination of commissions

95 *Alamo v Practice Management Information Corp*, Case No B230909 (2d Dist, Div 7, 24 September 2012). See online: <http://www.calattorneysfees.com/cases_civil_rights/>.

96 U.S. Equal Employment Opportunity Commission, *Remedies for Employment Discrimination*, online: <<http://www.eeoc.gov/employers/remedies.cfm>>.

97 California Government Code §12965(b); *Cummings v Benco Building Services*, 11 Cal App 4th 1383 (1992). Cases on legal fee awards to successful defendants are discussed at <<http://www.calattorneysfees.com/cases-employment>>.

98 See, for example, Canadian Human Rights Tribunal, *Annual Report 2006* (Ottawa: Minister of Public Works and Government Services) at 1, online: <<http://chrt-tcdp.gc.ca/ns/pdf/annual06-e.pdf>>. See also Accessibility for Ontarians with Disabilities Act Alliance, "Brief to the Andrew Pinto Ontario Human Rights Code Review" (1 March 2012), online: <<http://www.aodaalliance.org/strong-effective-aoda/04242012.asp>>.

in some provinces, or because of changes in the approach to public interest litigation by the various commissions, commission lawyers do not fully participate in as many cases. However, even where a commission lawyer does not represent the complainant, the commission's participation in hearings can be helpful to complainants if the commission's public interest position is aligned with or similar to that of the complainant. Ontario now has a Human Rights Legal Support Centre, which represents or advises complainants in matters before the Tribunal. Because of resource constraints, however, the Centre cannot represent all of the complainants who seek its services throughout the whole complaint process including up to a hearing. Each applicant for services receives initial legal support. After that point the Centre decides on a case-by-case basis the amount of legal support that will be provided to the applicant. It applies several factors to make this decision, including whether there is a significant public interest in the application, the capacity of the applicant, and whether or not the Ontario Human Rights Commission will intervene in the application.⁹⁹

In unionized workplaces, complainant employees can often count on representation by union staff members or lawyers retained by the union. Because the grievance arbitration process can and must deal with any allegations of discrimination on grounds prohibited by human rights statutes, the matter may never enter the human rights forum.¹⁰⁰

Where employees have civil causes of action against their employers (e.g., for wrongful termination or for defamation) in addition to allegations of breach of the Ontario *Human Rights Code*, and are therefore able (under section 46.1 of the *Code*) to bring those allegations of discrimination to court along with their other causes of action, they may have an easier time finding lawyers to represent them because they can be awarded legal costs if their actions succeed. The downside, however, is that a complainant may well have to pay the other party's legal costs if the action fails.

99 Human Rights Legal Support Centre, "Eligibility Criteria," online: <http://www.hrlsc.on.ca/cn/our-services/eligibility-criteria>.

100 Shilton, *supra* note 3.

(ii) *California*

An additional actor in California is the insurance company. As noted above,¹⁰¹ many respondents have Employment Practices Liability Insurance.¹⁰² Much of the development of employment litigation over the last twenty years has been “due in large part to the introduction and subsequent popularity” of such insurance.¹⁰³ The top end of the scale for general damages in discrimination complaints in California can be in the hundreds of thousands of dollars if a matter ends up in court, and general damages can be high even in the administrative context.¹⁰⁴ In this light, and in light of the fact that statutory lawyers’ fees are at play, many members of the bar are willing to take on discrimination cases.¹⁰⁵ This may result in a more equal playing field as between complainants and respondents than is found in Canada.

3. DISCUSSION

(a) **Remedies and Representation: Is Forum Important?**

Canadian commentators have expressed concern over the last few years about the legislative rearranging (and in some cases, the legislative abolition) of various provincial human rights bodies and administrative processes.¹⁰⁶ Some of this concern arises from a recognition that upholding the fundamental values embodied in human

101 See note 79, *supra*.

102 Barber, *supra* note 49 at 1.

103 *Ibid.*

104 See, for example, the decision of the (former) Fair Employment and Housing Commission in California in *Department of Fair Employment and Housing v Air Canada*, *supra* note 78.

105 Cheng, *supra* note 50

106 See, for example, Shelagh Day, “Canada’s Human Rights Institutions At Risk,” 28 July 2010, online: Women’s Court of Canada, <<http://www.womenscourt.ca>>; Ken Norman, Mary Eberts & Alex Neve, “The Wrong Moves for Saskatchewan Human Rights” (June 2012) 13:4 Human Rights Digest, online: Canadian Human Rights Reporter, <<http://www.cdn-hr-reporter.ca>>; and articles linked to the website for Social Rights in Canada: A Community-University Research Alliance Project (CURA), online: <<http://www.socialrightscura.ca>>, including Shelagh Day, “Time To Go Into Worry Mode” (March 2010) 11:2 Human Rights Digest.

rights legislation is important to the public interest and to society as a whole. In that sense, anti-discrimination dispute resolution is fundamentally different from private disputes that play themselves out in the civil courts.¹⁰⁷

When commenting in 2002 on proposed changes to British Columbia's human rights system which abolished the Human Rights Commission and implemented direct access to adjudication, Shelagh Day wrote:

The community as a whole has a fundamental interest in human rights, and human rights complaints cannot be equated with a dispute between private parties.¹⁰⁸ Stewardship over this public interest is essential. It can be provided in different ways. But changes that move the human rights system closer to a private dispute resolution system will necessarily raise questions about whether the character of human rights is being respected. And changes that shift the burden of enforcing human rights law on to the individual who alleges discrimination will re-create the very unfairness that comprehensive human rights legislation was designed to correct.¹⁰⁹

Administrative bodies in the United States that are equivalent to Canadian human rights commissions continue to carry forward a public interest mandate both in and out of court. And if a particular American employee's right to go to court has not been foreclosed by an arbitration agreement, the employee has the option of obtaining a "right to sue" letter and pursuing a claim in court. Would the addition of the option of going to court to access human rights remedies in Canada take away from the public nature of disputes over discrimination and breaches of human rights legislation? Would the possibility of lawsuits and enhanced individual remedies for employment discrimination encourage more people in Canada (both individuals and groups) to seek to vindicate their rights by pursuing complaints?

The recent changes in California have maintained and expanded the body that is equivalent to Canadian human rights commissions (the Department of Fair Employment and Housing, or DFEH), and have led to the disappearance of the body that is roughly equivalent to

107 Shelagh Day, "Rolling Back Human Rights in BC: An Assessment of Bill 53 — The Government of British Columbia's Draft Human Rights Legislation," Canadian Centre for Policy Alternatives, Policy Brief (September 2002), online: <<https://www.policyalternatives.ca>>.

108 Referring to *Scowby v Dieter*, [1986] 2 SCR 226, 32 DLR (4th) 161.

109 Day, *supra* note 107 at 9 [notes omitted].

Canadian human rights tribunals (the Fair Employment and Housing Commission, or FEHC). Phyllis Cheng, Director of the DFEH, has said the following about the reasons for these developments:

The changes . . . are consistent with the evolution and maturation of the [*Fair Employment and Housing Act — FEHA*] over the past 53 years. The *FEHA* permits complainants to opt out of the administrative process and file civil suits after exhausting their administrative remedies with the DFEH. When the department asks for emotional distress damages or administrative fines, employers can also elect to leave the commission and defend their cases in court. These provisions have spurred the growth of the private employment bar, such that half of all administrative complainants today elect to file suit in court. Even the DFEH prosecutes nearly half of its cases in court. As employment discrimination litigation matured and flourished in court, the gap widened between the prosecution and adjudication sides of state civil rights enforcement.¹¹⁰

One of the main reasons why (in Cheng's words) employment discrimination litigation "matured and flourished" in California courts was the level of damages available to plaintiffs and the corresponding willingness of the plaintiff bar to go to court. The possibility of high monetary remedies and statutory lawyers' fees, together with the growth in the Employment Practices Liability Insurance market, gives lawyers a financial incentive to represent employment discrimination plaintiffs. That is not to say that no lawyers are motivated by the desire to build a non-discriminatory society: many in the California bar have made the decision to take lower salaries, and to work *pro bono*, because they believe in the importance of human rights and social justice. But realistically, like anyone else, lawyers need to make a living.¹¹¹

110 Cheng, *supra* note 50.

111 See Day, *supra* note 107 at 15, on the desirability of setting up a clinic to provide legal services to human rights complainants: "The legal aid tariff provided minimal billing hours and low hourly fees for those representing human rights claimants and respondents. Because of this, the tariff system did not encourage the development of expertise. A private law practice focussed on representing human rights claimants was simply unaffordable. Some B.C. claimants have been fortunate to find experienced lawyers, who are committed to human rights, who have provided services despite the inadequacy of the legal aid tariff. However, a clinic could hire and train staff so that they did have expertise in the human rights area, and complainants could expect improved quality of representation."

The private bar has, however, not been the only legal actor in employment discrimination claims before the U.S. courts. For example, in California the DFEH has also chosen to prosecute such matters in court, and has enjoyed considerable success:

Since 1980, the DFEH has investigated, conciliated or prosecuted nearly half a million discrimination, harassment and retaliation complaints. The department typically wins or settles about 1,000 cases per year, whereby on average only 7.4 cases per year are adjudicated by the commission. The department's largest \$6 million settlement in an employment class action and \$1 million settlement in a single-complainant housing case, along with nearly all of its six-figure cases, were litigated in court rather than before the commission.¹¹²

In Canada, although the development of employment discrimination law has generally been limited to administrative forums, complainants and their lawyers do seem to have put a lot of energy into trying to have complaints heard in court. As discussed above, in the years between *Bhadauria* in 1981¹¹³ and *Honda* in 2008,¹¹⁴ litigants and lawyers looked for ways to distinguish *Bhadauria* and to devise innovative ways to bring the facts and effects of discrimination before the courts.¹¹⁵ One of the most promising was to use the facts that allegedly constituted employment discrimination in the particular case as evidence of an "independently actionable wrong," which would enable a court to consider awarding punitive damages against the defendant employer.¹¹⁶

In 2008, *Honda* arguably put the brakes on the gathering momentum to distinguish the Supreme Court decision in *Bhadauria*. Although much of the discussion prior to *Honda* was about a possible tort of discrimination, Justice Bastarache pointed out in the majority

112 Cheng, *supra* note 50.

113 *Supra* note 18.

114 *Supra* note 19.

115 Elizabeth Adjin-Tettey, "Picking Up Where Justice Wilson Left Off: The Tort of Discrimination Revisited" in Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press 2009); Jessica Connell, "Independent Cause of Action vs. An Independent Actionable Wrong -- A Distinction Without A Difference? Damages for Discrimination in the Civil Courts," Continuing Legal Education Society of British Columbia, (April 2008), online: <<https://www.cle.bc.ca>>.

116 *Ibid.*

judgment in *Honda* that the potential economic effects of such a tort underlay the Court's reasoning in *Bhadauria*:

Keays argued in cross-appeal before this Court that the decision in *Bhadauria* should be set aside and that a separate tort of discrimination should be recognized. In *Bhadauria*, Laskin C.J., writing for the Court, held that the plaintiff was precluded from pursuing a common law remedy because the applicable human rights legislation (the Code) contained a comprehensive enforcement scheme for violations of its substantive terms. The subtext of the *Bhadauria* decision is a concern that the broad, unfettered tort of discrimination created by the Court of Appeal would lead to indeterminate liability. Laskin C.J. wrote . . . :

It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation — one in no sense analogous to a duty of care in the law of negligence — to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection¹¹⁷

Justice Bastarache also referred to intervenors' submissions in *Honda* to the effect that "a tort of discrimination does not contain an effective limiting device," and concluded that "the concern in *Bhadauria* that recognition of a tort of discrimination would be inconsistent with legislative intent is still real."¹¹⁸ He referred as well to the concern raised by the Canadian Council of Disabilities that "recognition of a tort of discrimination may undermine the statutory regime which, for many victims of discrimination, is a more accessible and effective means by which to seek redress."¹¹⁹

Despite that concern, the U.S. experience might lead one to wonder whether the public and the private could indeed co-exist, to the benefit of both society and individual complainants. In the U.S., systemic remedies and generous monetary remedies live side-by-side; the possibility of a large quantum of damages in individual remedies does not appear to have eliminated the ability to seek and obtain

117 *Supra* note 19 at para 65.

118 *Ibid.* However, Justice Bastarache also said (*ibid* at para 67): "[T]here is no need to reconsider the position in *Bhadauria* in this case and deal with Keays' request for recognition of a distinct tort of discrimination. There was no evidence of discrimination to support a claim under s. 5 of the Ontario *Human Rights Code*, therefore no breach of human rights legislation serving as an actionable wrong"

119 *Ibid* at paras 65 & 66.

systemic remedies. The more public, administratively enforced side of the Canadian system could arguably live alongside the availability of a court action (whether grounded in tort or in a statutory breach) which would provide meaningful compensation to an employee who had experienced discrimination in the workplace. Given a conducive legislative framework, systemic remedies could also be pursued in both the administrative and judicial forums.

On the other hand, legislative change raising (or eliminating) caps on compensatory and punitive human rights damages awarded by administrative tribunals, and giving those tribunals the authority to award costs to successful complainants, might be enough to encourage more private-bar representation of employees who pursue discrimination claims. Maybe a greater choice of forum is not as important as enhanced remedies, and the increase they might bring in the availability of effective legal representation.

Access to legal information and to effective and affordable legal representation is a preoccupation of many judicial and legal actors in Canada today.¹²⁰ Pursuing a complex employment discrimination case, especially one that involves emerging issues of human rights law, is extremely difficult for an unrepresented claimant.¹²¹ A recent report of the National Action Committee on Access to Justice in Civil and Family Matters Working Group on Legal Services reviews many innovative ways to improve access to legal services and information.¹²² As Canadians become more aware of the right to a workplace

120 In particular, Chief Justice Beverley McLachlin has "warned that the barriers Canadians face in finding solutions to their legal problems must be removed 'to keep our legal system, and our democracy, strong and healthy.'" See Cristin Schmitz, "Access to Justice Initiative Builds: Committee creating blueprint for change," *Lawyers' Weekly* (24 August 2012) at 3, quoting the Chief Justice's speech to the Canadian Bar Association Council on 11 August 2012), online: <<http://www.lawyersweekly.ca>>

121 Froc, *supra* note 90, referring to the Canadian Bar Association's factum in *Mowat*.

122 That committee is broadly representative of the legal community and stakeholders from across Canada, and includes members of "the judiciary, the CBA, the Federation of Law Societies of Canada, provincial, territorial and federal governments, pro bono organizations, legal aid organizations, public legal education organizations, the public, and the [Canadian Forum on Civil Justice]." It has formed a steering committee, chaired by Justice Cromwell of the Supreme Court of Canada, as well as working groups (including one on legal services).

free from discrimination, the conversation on access to justice could include the recognition that both courts and administrative bodies have roles to play in facilitating redress for employment discrimination. For example, grievance arbitration has had significant success in providing unionized employees with effective remedies for workplace discrimination.¹²³ As more employees in the United States become obliged to seek redress for such discrimination in an arbitral forum rather than in court, it will be interesting to observe whether they obtain meaningful remedies. However, it may be difficult to gather data in that regard; when American employment discrimination disputes are resolved in private arbitration rather than in court, the outcomes are often not made public.¹²⁴

No matter what the forum, the possibility of higher damages makes it more likely that insurance companies will become more prominent actors in the realm of employment discrimination complaints. Whether this is a good or bad development, it needs to be taken into account in contemplating changes to remedies for discrimination.

(b) The “Capillary Action” of Human Rights and the Search for Efficiency: Is a Move to Court Actions Part of these Trends?

Human rights commissions and tribunals used to have a “monopoly” in processing and adjudicating human rights complaints in Canada. There were good reasons for this, and, as discussed above, they are related to the public nature of human rights. However, that monopoly no longer exists. As explained earlier in this paper, important Supreme Court of Canada decisions,¹²⁵ as well as legislative

123 Shilton, *supra* note 3 at 506ff.

124 Adriaan Lanni, “Protecting Public Rights in Private Arbitration: *Cole v. Burns International Security Services*” (1997) 107 *Yale LJ* 1157 at 1160-1162.

125 Those decisions include the following: *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970, 95 DLR (4th) 577; *Parry Sound*, *supra* note 44; *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667; *Council of Canadians with Disabilities v Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650; *Figliola*, *supra* note 46.

changes,¹²⁶ have extended concurrent jurisdiction over human rights claims to a wide range of boards and tribunals.¹²⁷ Given the quasi-constitutional nature of human rights statutes, administrative tribunals may subject their own constituent statutes to scrutiny through a human rights lens, possibly refusing to apply provisions that are inconsistent with human rights legislation.¹²⁸

I would argue that this gradual incursion of human rights law and principles into many administrative forums demonstrates the increasing importance of the principles and values that are at the foundation of human rights legislation. This development represents a sort of "capillary action." When the corner of a cloth is dipped in water and taken out, the water will gradually spread through the cloth. Similarly, the work done by human rights commissions and tribunals creates a human rights culture that gradually pervades the fabric of Canadian society. Human rights law has taken its place in grievance arbitration, before labour relations and workers' compensation boards, and in a myriad of other dispute resolution forums. Employers are using human rights principles in conducting internal investigations. Could a move of employment discrimination matters into court further the spread of those principles into the mainstream of Canadian law? Would it be an indication that the public was permeating the private?

126 See, for example, *Public Service Labour Relations Act* (SC 2003, c 22, s 2), ss 208, 210, 215, 217, 220, 222, 226.

127 See also *Grogan*, *supra* note 21 at paras 44ff, referring to the "emerging legislative and judicial trend of diversion of Code issues into the courts and other forums besides the Tribunal."

128 *Tranchemontagne*, *supra* note 45. But see recent case law from the Federal Court of Appeal and the Canadian Human Rights Tribunal that could arguably narrow the circumstances in which a tribunal may make a finding of discrimination on the basis of inconsistency between human rights legislation and other legislative provisions. *Public Service Alliance of Canada v Canada Revenue Agency*, 2012 FCA 7 (available on CanLII), leave to appeal to SCC refused (File No 34706); *Matson et al v Indian and Northern Affairs Canada*, 2013 CHRT 13 (available on CanLII); and *Andrews et al v Indian and Northern Affairs Canada*, 2013 CHRT 21 (available on CanLII). The Canadian Human Rights Commission has applied for judicial review of the latter two cases. They are scheduled to be heard in the Federal Court in August 2014.

In contrast to what happened after the Supreme Court decision in *Bhadauria*, courts have been reluctant to distinguish *Honda*. However, an exception is found in a Quebec Superior Court case referred to above, *Picard*,¹²⁹ which involved an application to certify a class action by persons with disabilities who claimed that they were discriminated against when Air Canada and WestJet required them to pay for additional seats on flights. Rejecting the airlines' argument that the matter was within the exclusive jurisdiction of the Canadian Human Rights Commission, Justice Catherine La Rosa refused to dismiss the discrimination allegations. Justice La Rosa referred to section 46.1 of the Ontario *Human Rights Code*,¹³⁰ suggesting that it constituted recognition that it is sometimes inefficient and contrary to the effective administration of justice to force different aspects of a claim to be adjudicated in different forums. In the employment context, unionized employees theoretically have access both to the grievance process and to the human rights system, but in practice their workplace claims (including discrimination allegations) are mostly heard only in one forum — grievance arbitration.¹³¹

Although the Supreme Court of Canada has found that human rights screening bodies and adjudicative bodies have concurrent jurisdiction with other administrative forums to deal with allegations of discrimination,¹³² the Court has also stressed the importance of not permitting the same matter to be readjudicated in a second forum unless "justice demands fresh litigation."¹³³ In the employment context, this is particularly relevant to unionized employees, who at least

129 *Supra* note 20.

130 *Supra* note 9.

131 Shilton, *supra* note 3.

132 *Morin*, *supra* note 47.

133 *Figliola*, *supra* note 46 at para 1. See also the subsequent Supreme Court case of *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125, where the majority judgment (at paras 31ff) seems to expand on the idea of when "justice demands fresh litigation" and to apply the framework for issue estoppel set forth in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460, without referring at all to *Figliola*, *supra* note 46. The dissenting judgment in *Penner* argues (at paras 75ff) that the majority decision is largely contrary to *Figliola* and to recent developments in the law of judicial review.

in theory have access to two adjudicative forums.¹³⁴ In most Canadian jurisdictions, non-unionized workers have access only to the human rights forum.

It is still unclear how section 46.1 of the Ontario *Human Rights Code* will work in practice, but it may play a key role in allowing claimants to have all causes of action arising from employment heard in the same place. Importantly, it should allow allegedly discriminatory treatment by employers to be placed before the courts, thus potentially influencing damages awards. In the result, going to court with a statutory cause of action grounded in discrimination may increase a plaintiff's monetary remedies.

In the years since the Ontario *Human Rights Code* was amended and section 46.1 was added, very few court decisions have awarded remedies under that section for breach of the *Code*. In a recent Ontario Small Claims Court case,¹³⁵ the plaintiff succeeded in her claims alleging constructive dismissal and employment discrimination (sexual harassment). The Court relied on HRTO decisions in setting the quantum of damages, awarding the plaintiff \$15,000 as compensation for violation of her human rights (in contrast to wrongful dismissal damages of \$2,500). In a recent wrongful dismissal/human rights case in the Superior Court, the plaintiff employee successfully argued that her dismissal was related to her disability,¹³⁶ and she was awarded \$20,000 under section 46.1. In arriving at that amount, the Court referred¹³⁷ to the 2008 Divisional Court decision in *ADGA Group Consultants Inc. v. Lane*:

This court has recognized that there is no ceiling on awards of general damages under the Code. Furthermore, Human Rights Tribunals must ensure

134 However, as Shilton (*supra* note 3) points out, in practice most employees in a unionized setting have their employment discrimination complaints heard by an arbitrator. Shilton makes the case that this works well and is to the benefit of employees.

135 *Berkhout v 2138316 Ontario Inc.*, [2013] OJ No 1125 (QL).

136 *Wilson v Solis Mexican Foods Inc.*, 2013 ONSC 5799 (available on CanLII). This case was tried through a summary procedure, on the basis of affidavits. The parties chose not to exercise the right, which they had under the summary procedure, to call oral evidence. At paras 26-30, the Court expressed dissatisfaction with that choice, and with the "thin" evidentiary record.

137 *Ibid* at para 87.

that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the Code by effectively creating a “licence fee” to discriminate

Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self-respect; dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment¹³⁸

Cherolyn Knapp, in surveying federal and Ontario human rights damages awards in 2011-2012, noted that the promise of section 46.1 had not yet been fulfilled. When section 46.1 was enacted, she observed, there was an expectation that it would result in higher damages awards for plaintiffs who brought their discrimination claims to court along with other causes of action.¹³⁹ We will have to wait for more decisions to see what effect section 46.1 will have in opening another route for employees to seek remedies for employment discrimination.

Perhaps, as has been happening with the nascent tort of “intrusion upon seclusion,”¹⁴⁰ lawyers and courts will once again seek to develop the common law by attempting to introduce a tort of discrimination. The words of Justice LeBel in his dissent in the Supreme Court in *Honda* are relevant in this regard. He agreed with the majority that it was not necessary in the particular circumstances to reconsider *Bhadauria*. Nevertheless, expressing the view that the decision in *Bhadauria* “went further than strictly necessary,”¹⁴¹ he stated:

The main thrust of the decision was that Ms. Bhadauria did not have a legally protected interest at common law that had been harmed by the defendant’s allegedly discriminatory conduct However, rather than stop there, Laskin C.J. went on to hold that the Ontario *Human Rights Code* “foreclose[s] any civil action based directly upon a breach thereof [and] also excludes any

138 (2008) 91 OR (3d) 649 at paras 153 & 154, 295 DLR (4th) 425. *Lane* has been questioned by the Federal Court but on a separate issue — the Court’s findings on a procedural duty to accommodate. *Canada (AG) v Cruden and the Canadian Human Rights Commission*, 2013 FC 520 at paras 74-75 (available on CanLII), aff’d 2014 FCA 131 (available on CanLII).

139 Cherolyn Knapp, “Update on Human Rights Tribunal Remedies and Human Rights Activity in Ontario’s Civil Courts 2011-12” in *Annual update on human rights: keeping on top of key developments* (Toronto: Ontario Bar Association, Continuing Legal Education, 2012), Tab 5 at 1.

140 *Jones v Tsige*, 2012 ONCA 32, 346 DLR (4th) 34.

141 *Honda*, *supra* note 19 at para 118.

common law action based on an invocation of the public policy expressed in the Code" These conclusions imply (and have been interpreted to mean) that any allegations resembling the type of conduct that is prohibited by the Code cannot be litigated at common law. The Code covers a broad range of conduct in promoting the goal of equality. Yet the conduct at issue in *Bhadauria* was limited to the facts of that case. It would have been sufficient to simply conclude that the interest advanced by Ms. Bhadauria was not protected at common law. It was not necessary for this Court to preclude all common law actions based on all forms of discriminatory conduct.

The development of tort law ought not to be frozen forever on the basis of this *obiter dictum*. The legal landscape has changed. The strong prohibitions of human rights codes and of the *Charter* have informed many aspects of the development of the common law.¹⁴²

This passage was cited by Justice La Rosa of the Quebec Superior Court in the *Picard* case.¹⁴³ It will be interesting to see whether that decision foreshadows further attempts to bring discrimination complaints to court in Canada, and more willingness by courts to accept jurisdiction over them. Perhaps other provinces will follow Ontario's legislative lead, and give complainants an option to pursue their discrimination allegations in court, if those allegations relate to another cause of action arising out of the same factual situation. Such a development could well render moot attempts to develop new civil causes of action based on discriminatory conduct.

4. CONCLUSION

My goal in this paper has been to ask some questions about aspects of the Canadian and Californian systems of addressing claims of discrimination in employment. The objective of achieving respect for human rights in the workplace is reflected in both state and federal legislation in California and in both federal and provincial legislation in Canada.

Employees in California now have less access to courts for human rights complaints than they used to have, because arbitration agreements are being more frequently upheld. However, individual and systemic discrimination complaints are still heard in court. Public and private remedies co-exist, and often lead to significant damages

142 *Ibid* at paras 118-119.

143 *Supra* note 20.

being awarded to complainants. In Canada, the important public character of our human rights system might also be able to coexist with a system that allowed greater individual remedies for discrimination complainants, whether in an administrative forum or in court.

As we consider whether access to court proceedings for remedies for employment discrimination could provide more access to justice for Canadian human rights complainants, we should look at the advantages and disadvantages of the California system of combating discrimination. With the enactment of section 46.1 of the Ontario *Human Rights Code*, we also have an opportunity to look at domestic developments in individual remedies through court actions that allege breaches of human rights statutes. As human rights and anti-discrimination law matures and moves steadily through the fabric of Canadian society, it will be useful to reflect on whether the courtroom may be an appropriate additional forum for employment discrimination cases.