British Columbia Law Institute
Workplace Dispute Resolution Project

Report to the Ministry of Labour and the Ministry for the Attorney General

October 31, 2010

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Executive Summary

At the request of the Ministry of Labour, the British Columbia Law Institute (BCLI) undertook a brief study of the merits of establishing a Workplace Tribunal for British Columbia. The essence of the concept put forward by the Ministry is that a single tribunal would deal with all employment-related disputes now adjudicated by the Labour Relations Board (LRB), the Employment Standards Tribunal (EST), and the Human Rights Tribunal (HRT). For the purpose of this study, the Ministry provided the BCLI with a specific model for integrating the three tribunals. This proposed model included a Workplace Services Branch and a Workplace Tribunal with the following features:

A Workplace Services Branch would be formed within the Ministry and be given a broad mandate including the following functions:

(a) Investigation of employment standards complaints and human rights complaints under ss. 11-14 of the *Human Rights Code* originating in non-unionized workplaces in order to establish the facts and issues underlying disputes;

(b) Providing informal mediation, settlement meetings and other dispute resolution services to employers and employees to resolve disputes concerning employment standards and human rights matters arising in non-unionized workplaces;

(c) Making determinations in employer-employee disputes concerning employment standards or human rights matters if a settlement cannot be reached;

(d) Conducting compliance audits and investigations aimed at enforcement of legislation, primarily targeted at high-risk sectors and vulnerable categories of workers;

(e) Possibly assuming the responsibility for providing mediation services under collective agreements that are now provided by the LRB; and

(f) Carrying out public education programs to inform employers and employees of statutory requirements, rights, and responsibilities and to promote compliance with legislation governing employment.

A Workplace Tribunal would replace the LRB and the EST and assume jurisdiction over workplace human rights complaints. The Tribunal would:

(a) Exercise the same powers in relation to applications and complaints under the *Labour Relations Code* and other labour relations legislation as the LRB now does, including such matters as certification and decertification applications, fair representation complaints, essential services designations, and orders in respect of strikes, lockouts and picketing;

(b) Decide appeals from grievance arbitration awards on the same basis as the LRB now does under section 99 of the *Labour Relations Code*;

(c) Decide appeals from determinations by the Workplace Services Branch with respect to employment standards and human rights matters.

The Workplace Tribunal would have a limited power to reconsider its own decisions on specified grounds. There would be no appeal from the Workplace Tribunal, but its decisions would be subject to judicial review under the *Judicial Review Procedure Act*. The grievance arbitration system would remain intact.

As per the terms of the Ministry's reference to the BCLI, the two major components of the BCLI project involved (1) international comparative research into existing workplace dispute resolution systems, and (2) a targeted consultation of BC stakeholders selected jointly by the Ministry and the BCLI. In terms of methodology, the comparative research included both a review of legislation and secondary sources as well as telephone interview with leading practitioners or experts in a number of the key jurisdictions. The BC consultation involved a series of group consultation sessions facilitated by the BCLI and a few individual meetings with participants associated with existing tribunals.

This report summarizes the results of the BCLI's research and consultation, and addresses the following questions that were put to the BCLI in the Ministry's reference:

1. What are the merits of establishing a unified Workplace Tribunal as proposed?

2. What legal and other issues are raised by the proposal to replace the current system with the Workplace Tribunal?

3. What is the experience in other jurisdictions where a comparable approach has been implemented?

4. Does the experience in those jurisdictions suggest other and better ways to achieve some or all of the objectives?

5. What findings and conclusions can be made from the research, analysis and consultation?

The findings section of this study paper is lengthy and this executive summary is not able to outline all of our findings but rather highlights some key findings and puts forward our general conclusion. In brief, the BCLI's comparative research did not uncover any existing system for workplace dispute resolution significantly similar to the proposed model. The UK appears to have a system with the greatest similarity to the proposed model. The UK is the only jurisdiction we studied in which the employment tribunal has exclusive jurisdiction over almost all disputes arising from both unionized and unionized workplaces, including discrimination complaints. However, differences in employment, labour and human rights law between the UK and BC make comparisons unreliable.

Collective agreements and trade unions play a unique role in each country. In the UK, collective agreements are not legally enforceable, all claims are individual and the individual worker directs the case. The union does not own the grievance and tribunals enforce statutory, not contractual, rights. This is very different from BC, where collective agreements are legally enforceable contracts and the union, not the worker, owns the grievance and decides whether the worker's grievance will be pursued.

Moreover, it is questionable how successful the UK system has been in terms of addressing human rights in the workplace. Statistics of the Employment Tribunal present a very low discrimination claim success rate of 2-3%. However, although the UK does not have a specialized domestic human

rights tribunal, a worker may still possess a right of appeal for breach of the *European Convention on Human Rights* to the European Court of Human Rights, provided all domestic remedies have been exhausted.

While theoretically the concept of a Workplace Tribunal for BC has some merit, the proposed model leaves too many key features of the system unclear to permit a full analysis of the strengths and weakness of the Workplace Tribunal:

- Is the Workplace Services Branch to be a part of the Workplace Tribunal or the Ministry of Labour or neither?

- What body would be first decision-maker where the human rights violation involved a union as a true respondent or where the union was conflicted by circumstances such as a promotions grievance or an allegation of discrimination by one worker?

- Would the Tribunal be an expanded LRB or a separate and distinct and differently specialized tribunal?

- Would the grounds and forum for review in a union and non-union context be different?

- Would a "determination" involve a hearing?

- Who would be empowered to make determinations?

The answers to the above questions are directly relevant to the merits of the proposed model and whether the Workplace Tribunal concept has the capacity to address the objectives underlying reform and respond adequately to contemporary workplace disputes.

One of the premises of the Workplace Tribunal is that it would concentrate workplace dispute resolution in a manner that is not currently possible because workplace human rights are currently adjudicated in several fora. In particular, one of the concerns underlying the reference to the BCLI is the overlap in jurisdiction over workplace discrimination complaints involving unionized employees between labour arbitrators and the HRT. While the proposed model would appear to integrate decision-making to some degree, it would also fragment human rights adjudication in BC. This outcome renders the case for the Workplace Tribunal somewhat less compelling. At the consultation participants raised a number of alternative solutions to the issue of overlap in jurisdiction. These alternatives merit consideration if further reform is considered. That said, there was significant disagreement amongst participants over whether the existing overlap in jurisdiction was problematic.

The BCLI consultation revealed dissatisfaction with the current system in BC. However, dissatisfaction was not universal and was characterized by serious divisions among the stakeholder sectors. One vision of a Workplace Tribunal envisages a newly created, well-funded tribunal, with efficient costs and experienced and proficient members. However, it is not clear that creating a new entity will result in improved funding, better efficiency and greater experience and that existing problems will not be imported into the new tribunal.

It is clear that the fate of the HRT will have a significant impact on British Columbians and that stakeholders hold strong and polarized opinions about reforms in this area. If the Ministry intends to pursue any reform of jurisdiction over human rights complaints arising out of the workplace, we recommend further consultation in a more public manner. Consultation should be informed by a detailed, publicly available discussion paper. This recommendation flows both from the consultation carried out as part of this study, which was necessarily limited by time and the terms of reference, and from our comparative analysis. In each jurisdiction that we studied, the success of significant reform in the area of employment and labour law appears connected to the extent to which the government provided stakeholders with an opportunity for meaningful consultation.

I. Introduction

A. Reference from Ministry of Labour

In June 2010 the Ministry of Labour requested the British Columbia Law Institute (BCLI) to undertake a brief study of the merits of establishing a Workplace Tribunal for British Columbia. The essence of the concept is that a single tribunal would deal with all employment-related disputes now adjudicated by the Labour Relations Board (LRB), the Employment Standards Tribunal (EST), and the Human Rights Tribunal (HRT). The Ministry of Labour provided the BCLI with a specific model for integrating the three tribunals for consideration. This proposed model is described in the second part of this introduction and serves as a linchpin for analysis, discussion and critique.

A major purpose of the BCLI study paper is to provide international comparative research to determine if other jurisdictions have taken similar approaches to integrating workplace dispute resolution. The BCLI was asked to identify insights to be gained from the experience of other jurisdictions, including elucidating alternative approaches that might achieve some or all of the objectives underlying the proposed model for a Workplace Tribunal. The objectives underlying the proposed model include: greater integration of workplace decision-making; avoiding duplication of proceedings; consistency of workplace decision-making; limiting overlap in jurisdiction; efficiency in dispute resolution; timeliness of remedy; appropriate expertise; independence of decision-makers; and a more affordable tribunal system. Although our research did not identify a system sufficiently similar to the proposed model to predict the impact of implementing a Workplace Tribunal in BC, the comparative investigation hopefully offers information that will contribute to consideration of reform in this complex area of law.

As part of this study the BCLI was asked to consult with key stakeholders selected by the Ministry and the BCLI. The consultation participants reflected various affected sectors, such as organized labour, employers, human rights organizations, and organizations advocating on behalf of unorganized workers – sectors expected to reflect a representative cross-section of opinion on the issues at stake.

This brief report summarizes the results of the BCLI's research and consultation, and addresses the following questions that were put to the BCLI in the Ministry's reference:

1. What are the merits of establishing a unified Workplace Tribunal as proposed?

2. What legal and other issues are raised by the proposal to replace the current system with the Workplace Tribunal?

3. What is the experience in other jurisdictions where a comparable approach has been implemented?

4. Does the experience in those jurisdictions suggest other and better ways to achieve some or all of the objectives?

5. What findings and conclusions can be made from the research, analysis and consultation?

This report is organized as follows:

I. Introduction
    A. Reference by Ministry of Labour
    B. Proposed Unified Workplace Tribunal Model
II. Current Workplace Dispute Resolution System in BC
III. Comparative Research
    A. International
    B. Canada
IV. Consultation with BC Stakeholders
V. Findings and Conclusions

B. The Proposed Model: the Workplace Tribunal

1. General

The proposed model for resolution of workplace-related disputes that the Ministry of Labour asked the BCLI to evaluate and discuss involves a Workplace Tribunal with jurisdiction over employment standards, labour relations, and human rights matters under sections 11-14 of the *Human Rights Code* that are now adjudicated by the HRT. The existing system of private grievance arbitration under collective agreements would be preserved essentially unchanged. The right of employees not subject to a collective agreement to sue in the civil courts for unjust dismissal at common law would also not be affected.

The separate components of the Workplace Tribunal model as described by the Ministry of Labour are outlined below.

2. Grievance Arbitration

Private grievance arbitration under collective agreements would continue unchanged. Labour arbitrators would continue to hear and decide grievances based on alleged breaches of the collective agreement, employment standards (to the extent applicable under the collective agreement), and violations of sections 11-14 of the *Human Rights Code*.

Arbitration awards would be subject to appellate review on the same basis as at present under sections 99 and 100 of the *Labour Relations Code*. An award could be appealed to the Workplace Tribunal on grounds of inconsistency with the *Labour Relations Code* or denial of a fair hearing. Appeals from arbitration awards on grounds of general law would go to the Court of Appeal.

3. Workplace Services Branch

A Workplace Services Branch would be formed within the Ministry of Labour and be given a broad mandate including the following functions:

(a) Investigation of employment standards complaints and human rights complaints under ss. 11-14 of the *Human Rights Code* originating in non-unionized workplaces in order to establish the facts and issues underlying disputes;

(b) Providing informal mediation, settlement meetings and other dispute resolution services to employers and employees to resolve disputes concerning employment standards and human rights matters arising in non-unionized workplaces;

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(d) Conducting compliance audits and investigations aimed at enforcement of legislation, primarily targeted at high-risk sectors and vulnerable categories of workers;

(e) Possibly assuming the responsibility for providing mediation services under collective agreements that are now provided by the LRB; and

(f) Carrying out public education programs to inform employers and employees of statutory requirements, rights, and responsibilities and to promote compliance with legislation governing employment.

4. The Workplace Tribunal

The Workplace Tribunal would replace the LRB and the EST and assume jurisdiction over workplace human rights complaints. The Workplace Tribunal would:

(a) Exercise the same powers in relation to applications and complaints under the *Labour Relations Code* and other labour relations legislation as the LRB now does, including such matters as certification and decertification applications, fair representation complaints, essential services designations, and orders in respect of strikes, lockouts and picketing;

(b) Decide appeals from grievance arbitration awards on the same basis as the LRB now does under section 99 of the *Labour Relations Code*;

(c) Decide appeals from determinations by the Workplace Services Branch with respect to employment standards and human rights matters.

The Workplace Tribunal would have a limited power to reconsider its own decisions on specified grounds. There would be no appeal from the Workplace Tribunal, but its decisions would be subject to judicial review under the *Judicial Review Procedure Act*.

II. Current Workplace Dispute Resolution System in BC

A. General

The present statutory and administrative structure for the resolution of workplace disputes in BC consists of three separate but partially overlapping systems: one applies to non-unionized employment (the "employment standards" system), another to unionized employment (the "labour relations" system), and the third is the system for resolving complaints under the *Human Rights Code*

through the HRT. Matters may come before the HRT from both the unionized and non-unionized sectors.

The jurisdiction of the HRT overlaps with that of decision-makers in the labour relations system with respect to complaints of employment-related discrimination under sections 11 to 14 of the *Human Rights Code*. There is no overlapping jurisdiction between the HRT and decision makers in the employment standards system.

B. Non-Unionized Workplaces: The "Employment Standards" System

1. The *Employment Standards Act*[1]

Dispute resolution in non-unionized workplaces is governed by the *Employment Standards Act*, which also imposes minimum standards for hours of work, wages, overtime, annual vacation, leaves, termination pay and other terms of employment. The Act applies generally to all employees under provincial legislative jurisdiction except those specifically exempted by regulation.[2] Employees who are governed by a collective agreement can effectively contract out of the minimum standards set out in the Act (e.g., hours of work, statutory holidays, annual vacation, layoff and termination) where the terms of a collective agreement contain provisions that cover these terms of employment;[3] if a collective agreement is silent regarding these minimum standards then the provisions of the *Employment Standards Act* that deal with those minimum standards are deemed part of the collective agreement.[4]

The Act provides a procedure for adjudicating complaints of a breach of the Act by the Director of Employment Standards and also establishes the EST as a body to which first-level decisions by the Director of Employment Standards may be appealed.[5]

2. The Purpose of the *Employment Standards Act*

Section 2 of the *Employment Standards Act* characterizes the purpose of the statute as follows:

> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
> (b) to promote the fair treatment of employees and employers;
> (c) to encourage open communication between employers and employees;
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
> (f) to contribute in assisting employees to meet work and family responsibilities.

3. Employment Standards Branch

The Employment Standards Branch (ESB) of the Ministry of Labour deals with complaints of a breach of the Act arising in a non-unionized workplace.[6] Where a complaint regarding deemed minimum standards arises in the context of a workplace governed by a collective agreement, the grievance arbitration process discussed below applies.[7] Employees normally must approach their

employers with the complaint using a "self-help kit" available online from the Ministry and attempt an informal private resolution before the ESB will intervene, unless the employees belong to a class of workers the Ministry considers to be especially vulnerable.[8] If the matter is not resolved through the "self-help process," the employee can complain to the ESB, which is empowered to conduct investigations and mediate settlements.[9] If a complaint is not settled, the director of the ESB can issue a written decision called a determination, which is binding on the employer and employee.[10] The director has a power of reconsideration, and may vary or cancel a determination, whether or not it has been appealed.[11] If it has been appealed, however, the director can only exercise the power of reconsideration within 30 days after receiving a copy of the appeal request.[12]

4. Employment Standards Tribunal

Appeals from a determination by the Director of the ESB are decided by the EST.[13] The Chair of the EST is appointed by Cabinet and the other members by the Minister of Labour after a merit-based process and, in the case of members, after consultation with the Chair.[14] In addition to regular members, the Minister of Labour may appoint "representative members" experienced in representing employers' and employees' interests.[15] If representative members are appointed, the number appointed from each side must be equal.[16] Panels of the EST comprising any representative members must include an equal number from the employers' and employees' sides.[17]

A determination may be appealed on the grounds of error in law, failure by the director to observe principles of natural justice, or that evidence has become available that was not available when the determination was made.[18] Appeal requests and submissions to the EST must be in writing.[19] The appeal is on the basis of the record provided by the Director of Employment Standards and the parties' submissions.[20]

The EST has discretion as to how it conducts appeal hearings, and may hold oral hearings in person or by telephone, or by written submissions, or by any combination of these methods.[21] Hearings are usually conducted on the basis of written submissions.[22]

The EST may affirm, vary, or cancel the determination on an appeal.[23] Its decisions on a matter within its exclusive jurisdiction are final in the sense there is no appeal from the EST.[24] The decisions of the EST are nevertheless subject to judicial review.[25] The EST is classified as an expert tribunal for the purpose of judicial review.[26] This means that its decisions within the area of its exclusive jurisdiction can only be set aside if they are found to be patently unreasonable under the definition of patent unreasonableness in the *Administrative Tribunals Act,* or if the EST is found to have proceeded unfairly.[27]

5. No Jurisdiction Over Human Rights Complaints

Neither the ESB nor the EST has jurisdiction to apply the *Human Rights Code*.[28] As a result, they cannot deal with complaints of discrimination in violation of sections 11 to 14 of the *Human Rights Code*.

C. Unionized Workplaces: The "Labour Relations" System

1. The *Labour Relations Code*[29]

Workplaces governed by a collective agreement are subject to the *Labour Relations Code*, which regulates union-management relations comprehensively. The *Labour Relations Code* covers the certification and decertification of bargaining agents, the collective bargaining process, strikes and lockouts, picketing, maintenance of essential services, unfair labour practices, and dispute resolution.

The labour relations system has two tiers of decision-makers for resolving disputes between employers and employees: labour grievance arbitrators and the LRB.

Certain categories of provincial government and provincial Crown agency employees are subject to the *Public Service Labour Relations Act* (*PSLRA*); however, the *Labour Relations Code* applies where it does not conflict with the *PSLRA*.[30] Labour relations in federally regulated industries (e.g. chartered banks, port facilities, telecommunications and aviation) are governed by the *Canada Labour Code*.[31]

2. The Purpose of the Labour Relations Code

The *Labour Relations Code* does not contain a specific preamble or statement of guiding principles. However, section 2 of the law does contain the following statement of duties, which appear to reflect the statute's underlying principles and purposes:

> The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
>
> (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
> (b) fosters the employment of workers in economically viable businesses,
> (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
> (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
> (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
> (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
> (g) ensures that the public interest is protected during labour disputes, and
> (h) encourages the use of mediation as a dispute resolution mechanism.

3. Grievance Arbitration

Collective agreements must include a provision for final and conclusive settlement without stoppage of work of all disputes arising between the parties with respect to their interpretation, application, operation, or alleged violation.[32] While the Code says this may be "by arbitration or other means," the almost universally preferred mechanism for dispute resolution under collective agreements is arbitration, although informal mediation may also take place, sometimes in the course of arbitration.

Arbitrators are private individuals appointed by agreement between the parties, namely, the union and the employer. Arbitrators hear and decide all manner of grievances under collective agreements, relating both to the rights of individual workers and the bargaining unit as a whole or a segment of it.[33] As a result of the union's exclusive right to represent the employees within the bargaining unit, the union rather than the employee controls whether a grievance relating to that individual employee is pursued to arbitration. The cost of arbitration is borne equally by the parties to the collective agreement: the employer and the union.[34]

Arbitrators deciding grievances under a collective agreement have the authority and the duty to consider and apply all laws relevant to a dispute, including the *Human Rights Code*.[35]

A decision of an arbitrator may be appealed to the LRB on the ground that a fair hearing was denied or that the arbitrator's decision is inconsistent with the *Labour Relations Code* or another enactment dealing with labour relations.[36] An appeal from an arbitrator's decision based on grounds of general law apart from labour relations is made to the Court of Appeal.[37] A discrimination grievance may give rise to a matter of general law, unless the arbitrator's findings are based on an interpretation of the language of the collective agreement and applying well-established principles of human rights.[38]

4. Labour Relations Board

The LRB has a very broad jurisdiction over matters covered by the *Labour Relations Code*. This includes the power to certify and decertify unions as bargaining agents, to delineate bargaining units, to determine whether a contravention of the Code has occurred, and to regulate, restrain or prohibit strikes, lockouts and picketing.[39]

The LRB's jurisdiction is exclusive and final in the sense that there is no direct appeal from a decision of the LRB,[40] although the LRB has a wide power to reconsider its own decision on a single occasion on application by an affected party.[41] While the LRB is subject to judicial review, it is classified as an expert tribunal and therefore its decisions within its exclusive jurisdiction will only be set aside if they are found to be patently unreasonable or procedurally unfair under the *Administrative Tribunals Act*.[42]

The LRB also has the appeal jurisdiction with respect to grievance arbitration decisions noted above. While the LRB can apply the *Human Rights Code* in a matter within its jurisdiction, it is specifically empowered to decline to do so.[43]

D. The Human Rights Tribunal

1. The Jurisdiction of the Human Rights Tribunal

The HRT hears and decides complaints of discrimination on grounds prohibited by the *Human Rights Code*[44]. Sections 11 to 14 of the *Human Rights Code* deal with prohibited discrimination in the context of employment and union membership, namely discrimination with respect to employment advertisements, wages, hiring and terms of employment, and union membership. The jurisdiction of the HRT extends to complaints of violations of sections 11 to 14 arising in both unionized and non-unionized settings, but overlaps with that of labour grievance arbitrators in the case of complaints originating in unionized workplaces.

There is nothing to prevent an employee from filing an individual complaint with the HRT even though the employee's union is pursuing a discrimination-based grievance based on the same facts under the arbitration provisions of a collective agreement, unless the collective agreement requires the employee to choose one forum or the other.

The *Human Rights Code* addresses overlapping jurisdiction by empowering the HRT to defer a complaint if "another proceeding is capable of dealing appropriately with the substance of the complaint," until the outcome of the other proceeding, and to dismiss the complaint if it has been appropriately resolved in the other proceeding.[45] The possibility exists, however, for the HRT to proceed with a complaint after the other proceeding is concluded because the HRT finds that the other decision-making body has not dealt with the substance of the complaint appropriately.

The majority (approximately 57% in 2008) of the complaints that come before the HRT are employment-related.

2. The Purpose of the *Human Rights Code*

Section 3 of the *Human Rights Code* sets out the following purposes:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
> (c) to prevent discrimination prohibited by this Code;
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

3. Human Rights Tribunal Process

The HRT conducts its own intake and screening of complaints for acceptance. The HRT makes alternative dispute processes, including mediation, available to the parties at any point after a compliant is filed, including after a hearing has commenced. A substantial proportion of complaints are resolved through mediation without a formal hearing. The HRT decision-making process includes pre-hearing disclosure and an oral hearing including an opportunity to present evidence and conduct cross-examination. Hearings are conducted by an individual member or panels designated by the Chair of the HRT.[46]

4. Judicial Review of Human Rights Tribunal decisions

The HRT is not classified as an expert tribunal for the purpose of judicial review.[47] The reviewing court may therefore set aside a decision of the HRT on a question of law if it holds the decision to be merely incorrect.[48] Findings of fact by the HRT may be set aside on judicial review only if there is no evidence to support them or if they are unreasonable in light of all the evidence.[49] A discretionary decision by the HRT, such as the decision to defer or dismiss on the basis that the complaint will be appropriately dealt with in another proceeding, will only be set aside if it is found to be patently unreasonable under the *Administrative Tribunals Act*.[50] A decision of the HRT could

also be set aside if the reviewing court found that the HRT had proceeded in an unfair manner in the matter.[51]

E. Civil Actions for Unjust Dismissal

Employees who are not subject to a collective agreement have a right at common law to sue for damages for unjust dismissal in the civil courts (provided they are not restricted by private contract to another forum). Actions for unjust dismissal based on the common law are outside the statutory scheme for workplace dispute resolution outlined above. By contrast, the unjustified termination of an employee included in a bargaining unit under a collective agreement would be an arbitrable grievance and the employee's remedy is through the grievance arbitration system.

III. Comparative Research

Our international review included the UK, Australia, New Zealand, South Africa, Japan, Germany, France and Sweden, as well as a number of Canadian jurisdictions. This research did not reveal any system identical to the proposed unified model.

This summary of comparative research emphasizes jurisdictions where (1) the workplace dispute resolution system was sufficiently similar to the proposed model to offer some insights into its potential effectiveness and (2) the overall legal and labour relations framework is sufficiently similar to BC that the comparison would be helpful. For this reason Commonwealth nations proved to be most useful to our enterprise. That said, as will emerge from our review, even in the Commonwealth jurisdictions we cover in the international review below, namely, the UK, Australia and New Zealand, the labour relations context is significantly different from BC.

A. International

This section contains a summary of the workplace dispute resolution systems in the UK, Germany, Sweden, Australia and New Zealand. We also provide an overview of the European Court of Human Rights, as this body has jurisdiction over violations of the *European Convention on Human Rights* and thus forms part of the workplace dispute resolution systems of European countries that are members of the Council of Europe.

1. The United Kingdom

(a) Overview of the UK Dispute Resolution System

Based on our review, the country with the workplace dispute resolution system most similar to the proposed unified model is the UK. The major similarity is that the country has an Employment Tribunal system that has jurisdiction over a significant aspect of workplace disputes arising out of both unionized and non-unionized workplaces, including claims of discrimination in employment. The Employment Tribunal, which is discussed below, has jurisdiction over all employment discrimination claims, and all non-work-related discrimination matters go to the county courts. There is no specialized human rights tribunal in the UK, although in some instances discussed below, individuals would have recourse to the European Court of Human Rights. This body is a specialized human rights tribunal with jurisdiction broader than that of Canadian human rights

tribunals in terms of both the nature of the disputes and the countries that are captured by the court's jurisdiction. The European Court of Human Rights is discussed in section 4.

The main decision-making bodies that deal with workplace dispute resolution in the UK are:

i. The Advisory Conciliation and Arbitration Service (ACAS)
ii. Employment Tribunals
iii. The Central Arbitration Committee (CAC)
iv. The Certification Officer
v. The Employment Appeal Tribunal (EAT)

(i) Advisory Conciliation and Arbitration Service

ACAS is a non-departmental body, largely funded by the Department for Business Innovation and Skills.[52] ACAS has the statutory duty to offer mediation services, called conciliation in the UK, once a claim has been filed with the Employment Tribunal.[53] ACAS may also conduct informal voluntary binding arbitration on unfair dismissal and flexible working claims.[54] ACAS provides advice on a wide range of employment and industrial relations matters to employers and their associations, workers and trade unions, and the public.[55] Until recently all aspects of this service were free; however, ACAS does now charge for some of its training activities and advisory publications. ACAS arbitration decisions are final and binding: appeal is only permitted with respect to law and in relation to the *European Convention on Human Rights* and matters under the *Human Rights Act 1998*, the UK equivalent to the *Canadian Charter of Rights and Freedoms*.[56]

(ii) Employment Tribunals

The Employment Tribunal system was established in 1964.[57] (It was originally called the Industrial Tribunal system and was renamed the Employment Tribunal in 1998).[58] Employment Tribunals have jurisdiction over disputes involving statutory employment rights of both unionized and non-unionized employees, including employment human rights disputes grounded in claims of discrimination made pursuant to any of the many UK discrimination statutes.[59] The Employment Tribunal is an independent judicial body.[60] Tribunals are tripartite with a barrister or solicitor sitting as chair and two lay members drawn from lists of employee and employer representatives who are appointed by the Lord Chancellor.[61]

The constitution and procedures of employment tribunals are governed by the *Employment Tribunals Act* 1996 and associated regulations.[62]

(iii) The Central Arbitration Committee

The CAC is a separate, independent decision-making body that deals with applications for statutory recognition or de-recognition of a trade union, as well as a number of other less common collective bargaining disputes, through both voluntary agreement or adjudication.[63] The CAC is composed of a chairman, a deputy chairman, and other members appointed by the Secretary of State.[64]

(iv) The Certification Officer

The Certification Officer is an independent officer with statutory responsibility for a range of matters including determining complaints about unions, and ensuring observance of statutory requirements governing mergers between trade unions and between employers' associations.[65]

(v) Employment Appeal Tribunal

Decisions of the Employment Tribunal are appealable only on points of law to the EAT, thereafter to the Court of Appeal and then the Supreme Court of the UK.[66] The Employment Appeals Tribunal was established by the *Employment Protection Act* 1975. Human rights matters may be further pursued with the European Court of Human Rights for breach of the convention, provided all domestic remedies have been exhausted. The EAT also has jurisdiction to hear appeals of some decisions of the Certification Officer and the CAC on points of law.[67] The EAT has a tripartite composition, consisting of a judge and non-lawyer members who have special knowledge or experience of industrial relations, either as representatives of employers or of workers.[68]

See Diagram A for a visual overview of the workplace dispute resolution system in the UK.

(b) Key Differences between BC and the UK

There are a number of key differences between the UK and BC. The first three relate to the slightly different role collective bargaining plays in the UK.

1. Collective agreements are not legally enforceable unless expressly stated by the parties.[69] In the UK it is rare for the parties to decide that collective agreements are to be enforceable contracts.[70] So although the Employment Tribunals deal with the unionized sector, they are not charged with interpreting and applying the terms of a collective agreement. Rather, Employment Tribunals deal with the interpretation and application of statutory employment and human rights.

2. Possibly, in part as a consequence of the first point, although some collective agreements set out dispute resolution processes, employees and employers are not required to make use of these processes and may proceed directly to the Employment Tribunal.[71] So the closest parallel in the UK system to BC's labour arbitration system is not a mandatory component of workplace dispute resolution for the unionized sector.

3. Under UK employment law the union does not own the grievance and so the individual employee has carriage of the case regardless of union membership.[72] The parties before the Employment Tribunals are always the employer and the employee, although the union may have a presence by providing legal representation or assistance to the worker.[73] It is not possible under the system to put forward group complaints.[74] The system deals with conflicts between individuals.

4. Union support of employee grievances appears to be less assured in the UK than in BC, and there are a great number of individuals appearing before the Employment Tribunals without representation.[75] In this sense the differences between the unionized and non-unionized employement context is less pronounced in the UK compared to BC, with the exception that even in the UK the unionized employee has greater potential for increased access to justice and legal

representation. The imbalance of power between employee and employer is exacerbated by the reality that most employers will have lawyers and most employees will not.[76]

5. The UK has maintained equality commissions since the 1970s.[77] The current body, namely the Equality and Human Rights Commission (EHRC), has a statutory duty to promote, enforce and monitor human rights, and works in partnership with ACAS in some instances.[78] EHRC's services and activities includes the following:

- Offering free conciliation services;
- Bringing forward critically important cases on behalf of groups of individuals:
- Running a legal advice helpline;
- Funding innovative human rights projects and organizations;
- Conducting official inquiries and formal investigations to enforce human rights;
- Intervening in select human rights cases;
- Offering legal advice and policy development guidance to government, individuals and organizations; and
- Publishing best practices guides and human rights research.[79]

The above suggests a broad mandate. In practice, the EHRC is increasingly under-resourced and intervening in fewer and fewer cases than previously, about 20-30 annually, whereas about 20,000-25,000 discrimination claims are filed before the Employment Tribunal annually.[80] However, the EHRC is quite visible in terms of public education concerning equality and discrimination in the UK.[81]

(c) Discussion of Similarities with the Proposed Model

1. The UK Employment Tribunal deals with both the union and non-union sector.[82] No expert we spoke with perceived that to be a weakness of the system. However, as noted above, in the UK the union does not own the grievance and all claims are individual claims.

2. Although parties are not currently required to make use of private arbitration processes set out in a collective agreement, the UK did explore and reject making such arbitration mandatory. The *Employment Act 2002 (Dispute Resolution) Regulations* came into force in October 2004.[83] The Regulations required all employers to follow minimum statutory procedures in dealing with dismissal, disciplinary action and grievances in the workplace. The three steps that had to be followed in respect of dismissal and disciplinary action were a written explanation of a grievance, a discussion, followed by a hearing.[84]

In the case of an unfair dismissal claim, an Employment Tribunal would check that the employer had followed the three step procedure. If the employer had not done so, the Employment Tribunal had to make an automatic finding of unfair dismissal. Similarly, in most cases an Employment Tribunal would not accept a claim if an employee had not first complied with the grievance procedure.

The Regulations were introduced because it was felt that too many issues were being referred to Employment Tribunals without efforts being made to resolve them in the workplace. The Regulations were ultimately repealed because they were counterproductive:

- They formalized disputes that could have been better dealt with informally. This often meant that problems escalated, taking up more management time. The main cause of this was the strong link between the internal procedures and tribunal proceedings.[85]

- They were criticised for their complexity. Problems included establishing what constituted a grievance letter and ensuring that documentation, timings and meetings fulfilled the requirements of the procedures. The complexity generated a huge number of additional cases for Employment Tribunals.[86]

- They applied to situations in which they were not relevant such as agreed departures, termination of fixed contracts and redundancy, creating an unnecessary burden.[87]

- Far from reducing the number of cases coming before a tribunal, the statutory dispute procedures had the opposite effect of generating additional cases and increasing public costs.[88]

The *Employment Act 2008* has now replaced the statutory dispute resolution procedures with a new ACAS Code of Practice.[89] The Code explains the principles of good practice when there is a dispute at work. There is no requirement to follow the three step procedure; however, Employment Tribunals are able to apply financial penalties if the Code is not observed.[90]

It has been suggested to us that one of the lessons the UK learned from this experience is that curtailing choice over forum can have the negative consequence of creating significant new litigation regarding jurisdiction.[91] A possible unintended consequence of granting BC labour arbitrators exclusive jurisdiction over human rights conflicts arising in the unionized workplace is increased litigation. Individuals may aggressively defend a perceived right to choice of forum.

3. The impact of fragmentation of jurisdiction over human rights between Employment Tribunals and county courts is in some respects hard to assess as the UK has followed this approach ever since it first passed domestic human rights legislation. A few observations may be worth making. First, although there is a significant amount of equality litigation in the UK, the country is perceived by some to be lagging behind Canada in terms of recognition of human rights. Employment Tribunals have built up expertise in the area of equality law as discrimination claims are common in that forum; in contrast, arguing discrimination outside the Employment Tribunal system appears challenging because the county courts have little experience applying UK equality law and not all judges possess expertise in that area.[92] That said, the fragmentation does not appear to have produced discordant jurisprudence in the two forums.[93]

However, the Employment Tribunal is accused of adopting narrow interpretations of human rights[94] law and winning a discrimination case is rare. According to statistics from the UK annual reports, the Employment Tribunal disposed of 92,018 claims between April 1, 2008 to March 31, 2009.[95] Of those claims, approximately 21,000 involved some form of discrimination. Of those, the number and percentage of successful claims are as follows:

i. Sex discrimination - 341 or approximately 3%
ii. Race discrimination - 129 or approximately 3%
iii. Disability discrimination - 177 or approximately 3%
iv. Religious belief discrimination - 19 or approximately 3%

v. Sexual orientation discrimination - 13 or approximately 2%
vi. Age discrimination - 53 or approximately 2%.[96]

(d) Criticisms of the UK System

The UK system appears to suffer the following weaknesses:

- Lack of access to the system for workers who do not have union support or funding for legal counsel as a result of the complexity of the tribunal process and underlying law;[97]
- Tribunal members are often taxed with playing the dual role of adjudicating a claim and assisting an unrepresented worker. The Tribunal adopts a more inquisitorial style in the presence of an unrepresented party;[98]
- Lack of access to mediation and alternative dispute resolution before a claim is filed with the Employment Tribunal;[99]
- Absence of a process more simple than the tribunal for resolving less legally complex matters involving straightforward statutory interpretation such as holiday pay and redundancy pay provisions;[100]
- Monetary remedies are often too low as tribunals are subject to a statutory monetary limit;[101]
- The tribunal has no enforcement powers so a party must go to county court to seek enforcement;
- Employment tribunals are often reluctant to consider and apply the *European Convention on Human Rights*;[102]
- Too many weak or vexatious claims get into the system;[103]
- Inability to deal with group claims. Even if a worker is unionized, only individual claims are possible.[104]

2. Germany

(a) Overview of the German Workplace Dispute Resolution System

There are three significant components of the German system. They are:

i. Labour Courts
ii. Labour arbitration
iii. The Works Council system.

There is also the European Court of Human Rights, discussed below in section 4.

(i) German Labour Courts

Germany has a hierarchy of Labour Courts with jurisdiction over disputes between employers and individual employees, as well as those arising under collective agreements, in which the parties are unions and employers. The jurisdiction over the labour courts does not extend to employment-related disputes in the public service, however.[105]

The hierarchy consists of local Labour Courts and two levels of appellate Labour Courts. The first appellate level is the state (*Land*) Labour Court and the second is the Federal Labour Court. The local and state Labour Courts are composed of three-member panels consisting of one professional judge and two lay judges, one representing the employer side and the other the employee side.[106] The Federal Labour Court consists of panels comprised of three professional judges and a lay member from each of the employer and employee sides.[107]

The Labour Courts have exclusive jurisdiction (vis-à-vis other civil courts) over the following kinds of disputes:

(a) between parties to a collective agreement, or between these parties and a third party, that arise out of the collective agreement or that concern whether a collective agreement is in effect

(b) grievances relating to prohibited practices in regard to industrial action, freedom of association, or the rights of unions;

(c) disputes arising out of a contract of employment or that concern whether or not a contract of employment exists;

(d) disputes relating to prohibited practices in connection with employment.[108]

Regular hearings in the Labour Court are preceded by a conciliation session aimed at settlement.[109]

(ii) Labour Arbitration

The parties to a collective agreement can agree to submit disputes between them to arbitration instead of the Labour Court.[110] The parties to a collective agreement may also agree to submit disputes connected with individual employment relationships governed by the collective agreement to arbitration if the workforce consists predominantly of workers in specified occupations.[111]

An application can be made to a Labour Court to set aside an arbitration award for lack of jurisdiction or error of law.[112]

(iii) The Works Council System

A unique feature of the German system in terms of the countries we reviewed as part of this study is its Works Council System. While the jurisdiction of the Labour Courts is exclusive vis-à-vis the general civil courts, employer-employee disputes may be resolved in the extrajudicial system established under the *Works Constitution Act.*[113]

The Works Council System centres on the role of works councils. The *Works Constitution Act* requires each enterprise with more than five employees, at least three of whom are over age 18, to put in place a works council consisting of elected employees.[114] The works council is separate from the union that may be the collective bargaining representative for the employees of the enterprise. The requirement for a works council does not depend on whether a collective agreement is in effect for the workplace in question.

An employee who believes he or she has been discriminated against, unfairly treated, or otherwise aggrieved has a right to complain to the "competent authority" in the enterprise, either individually or with the aid of a works council member.[115] The employee also has a concurrent right to lodge a complaint with the works council. If the works council believes the complaint to be justified, it must take action to induce the employer to correct the problem.[116]

If the employer and works council cannot agree on resolution of the employee's grievance, the works council may submit the dispute to a Conciliation Committee (sometimes translated as "Arbitration Committee").[117] A Conciliation Committee is composed of an equal number of representatives chosen by the employer and the works council, plus a neutral president jointly appointed by the employer and works council.[118] The decision of the Conciliation Committee is binding if the dispute concerns "interests" as opposed to legal rights. If the dispute concerns legal rights, its decision is non-binding. The employee then still has the right to pursue the matter in the Labour Court, to which he or she could also have gone directly.[119]

The statutory procedure outlined in the *Works Constitution Act* may be supplemented by additional provisions in a collective agreement or an agreement between the employer and the works council.[120] An enterprise has the option of setting up a standing Conciliation Committee[121] rather than relying on ad hoc ones, or a standing Grievance Committee to serve the same function as a Conciliation Committee.[122]

(b) Discrimination in the Workplace

The German *General Act on Equal Treatment* of 2006 prohibits direct and indirect discrimination on grounds of race, ethnicity, gender, religion or belief, disability, age and sexual orientation.[123] This law applies in the context of employment relationships as well as other social contexts.

The Act gives a person who has been a victim of discrimination the right to seek an injunction against continuation of the discrimination and also a right to claim monetary compensation apart from economic loss. [124]

An employee alleging discrimination in the workplace would have the option of seeking redress exclusively in the Labour Court against the employer, or could pursue redress through the works council under the *Works Constitution Act* scheme while simultaneously bringing a claim for monetary compensation in the Labour Court. The worker might also be able to take the violation to the European Court of Human Rights.

(c) Summary

The German system has the appearance of centralizing a great deal of jurisdiction over workplace disputes in the Labour Courts, particularly as the use of arbitration to resolve individual employee grievances is somewhat restricted. Nevertheless, there is significant overlap in jurisdiction except

with respect to very small enterprises: in most contexts, apart from claims for monetary compensation for workplace discrimination, both the works council and the Labour Courts will have jurisdiction over a workplace dispute. The German system is so different from both the current BC labour, employment and human rights systems and the proposed model that this review of Germany offers little by way of assistance with law reform in BC.

3. Sweden

(a) Overview of the Swedish Dispute Resolution System

Although lack of access to English language materials hampers research into the Swedish system for workplace dispute resolution, the framework appears to involve the following key components:

i. Private bilateral alternative dispute resolution
ii. Arbitration
iii. The Labour Court
iv. Civil courts

Which court has original jurisdiction depends on whether or not the workplace is governed by a collective agreement.

(i) Private Bilateral Alternative Dispute Resolution

Before a case reaches the Labour Courts, there must have been failed attempts at a local or sectoral level to resolve the dispute. Indeed, most disputes are handled directly (bilateral negotiations) between parties, primarily at a local company level. In general, due to the fact that ADR is often directly between the parties, there are no independent experts in conciliation, mediation or arbitration involved in disputes procedures in the Swedish system.[125]

(ii) Arbitration

Not all matters may be arbitrated. In particular, disputes based on discrimination are not arbitrable under arbitration clauses in collective agreements and must go before the Labour Court directly.[126] When a case reaches the Labour court it is possible to use arbitration in place of a full hearing[127] and before the Labour court 'opens' a case, negotiations or arbitration takes place (there are no formal rules as to how arbitration should be carried out). Many cases are resolved at this point.

(iii) Court jurisdiction

Sweden has a specialized Labour Court (Arbetsdomestolen) with final jurisdiction over disputes arising from collective agreements and disputes between employers and individual employees whose workplace is covered by a collective agreement.[128] Unions have the right to prosecute grievances of individual employees before the Labour Court.[129] This jurisdiction includes claims of discrimination in the workplace on a ground prohibited by the *Discrimination Act* of 2008 (sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age).[130] The regular civil courts have concurrent jurisdiction in first instance with the Labour Court over many kinds of workplace disputes, but their judgments can be appealed to the Labour Court.[131]

Disputes between a non-unionized employee and an employer normally must be pursued in the non-specialized district court. In the case of discrimination claims, however, it appears that a non-unionized employee has the right to seek the aid of the Equality Ombudsman to pursue the claim on behalf of the employee. If the Equality Ombudsman decides to pursue the claim, the action is commenced in the Labour Court.[132] The Equality Ombudsman may also pursue a unionized employee's discrimination-based claim in the Labour Court, but only if the union has refused to do so.[133] The Equality Ombudsman is a public authority financed by the state. The Ombudsman does not mediate between parties, but represents complainants who have reported discrimination or harassment in the Labour court, or assists in arbitration, free of charge.[134]

(b) Summary

Sweden appears to have consolidated a considerable extent of jurisdiction in the Labour Court over workplace disputes in the unionized sector and also over discrimination-based workplace disputes in both unionized and non-unionized settings. Sweden does not have a fully integrated model, however, because jurisdiction over disputes between non-unionized workers and their employers across the broad spectrum of employment law continues to rest with non-specialized district courts.

4. The European Court of Human Rights and the Convention on Human Rights

(a) The Convention on Human Rights

The European Convention on Human Rights was drafted in 1950 by the Council of Europe and came into force on 3 September 1953.[135]

The Convention consists of three parts. The main rights and freedoms are contained in Section I. Section II sets up the European Court of Human Rights and its rules of operation. Section III contains various concluding provisions. The Convention does not specifically protect against discrimination in the context of employment. The rights protected by the convention include the right to life, the right to liberty and security of the person, the right to a fair trial, and the right not to be tortured or inhumanly or degradingly treated or punished. The Convention contains other protections that could ground an employment discrimination allegation such as Article 8: Right to respect for private life and family life, which states in section 1 that "Everyone has the right to respect for his private and family life, his home and his correspondence". Article 9 protects freedom of thought, conscience and religion and Article 10 protects freedom of expression. Article 14: Prohibition of discrimination states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Member states undertake to secure these rights and freedoms to everyone within their jurisdiction.

(b) The Council of Europe

All Council of Europe member states are party to the convention and new member states are expected to ratify the convention as soon as possible. The Council of Europe was founded in 1949

by Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom.[136] Greece, Turkey, Iceland and Germany joined shortly afterwards and were signatories of the original Convention.[137] The Council now has 47 member states.[138] The Council was set up following the atrocities of the Second World War with the aim of achieving greater unity between European states and to promote democracy, fundamental human rights and freedoms.[139]

Unlike the European Union, where member states transfer national legislative and executive powers to the European Commission and the European Parliament in specific areas under European Community Law, Council of Europe member states maintain their sovereignty but commit themselves through conventions to co-operate on the basis of common values and common political decisions.

(c) The European Court of Human Rights

In order to ensure the observance of the Convention, the European Court of Human Rights in Strasbourg was set up in 1959. The European Court of Human Rights functions as the highest European Court for human rights. It deals with individual and inter-state petitions. The Court can also give advisory opinions concerning the interpretation of the Conventions and the protocols. Where a member state has violated one of more of the convention rights and freedoms, the Court delivers a judgment that is binding on the country concerned.

In order to bring a claim to the ECHR, the applicant must complete an application form providing brief information about the claim, including details of the alleged violation. The Court Registry will then assign the case either to a preliminary committee to assess admissibility of the claim, or directly to a Chamber. A Chamber consists of seven judges, who can determine both admissibility and the merits of a claim. In order for a claim to be admissible:

- the applicant must have exhausted all domestic remedies;
- the application must be made within six months from the final domestic judicial decision;
- the complaint must be based on the European Convention; and
- the applicant must have suffered a significant disadvantage.[140]

A Chamber may invite the parties to submit further evidence and written observations. It may also decide to hold a hearing on either admissibility or the merits of the case, although hearings are only held in a minority of cases. Chambers decide by majority vote.[141]

A party can request that the case be referred to the Grand Chamber within three months of the judgment if it raises a serious question of interpretation or application or a serious issue of general importance. A Chamber may also at anytime relinquish jurisdiction in favour of the Grand Chamber where a case raises a serious question of interpretation of the Convention or where there is a risk of departing from existing case law. [142]

If the Court finds that there has been a violation, damages can be awarded plus costs for the expenses incurred by the applicant in presenting the case. An applicant will not be required to pay any costs incurred by the respondent State if the court finds that there has been no violation.[143]

Individuals are able to present their own claim initially but legal representation is normally required once an application has been communicated to the respondent Government. Legal aid is available in certain circumstances for applicants with insufficient means.[144]

In the UK, the *Human Rights Act 1998* (HRA) aims to "give further effect" in UK law to the rights contained in the European Convention on Human Rights. The Act makes it unlawful for a public body to act in a way that is incompatible with the Convention.[145] It also requires UK judges to interpret legislation as far as possible in a way that is compatible with the Convention.[146]

5. New Zealand

(a) Overview of the New Zealand Dispute Resolution System

Key aspects of the workplace dispute resolution system in New Zealand are:

i. The Department of Labour mediation services
ii. Labour Inspectors
iii. The Employment Relations Authority (ERA)
iv. Human Rights Review Tribunal.

(i) Department of Labour

The Department of Labour provides a free mediation service, and although mediation is not statutorily required, the ERA will not consider a matter if mediation has not been attempted and will refer matters back to mediation.[147] In this sense mediation is compulsory and publicly-funded in New Zealand. The *Employment Relations Act 2000* identifies mediation as the "primary problem solving mechanism" (s. 3(a)), the government has a statutory duty to provide mediation services (s. 144) and duty to consider mediation (s. 159).[148] At the request of the parties the mediator can make a final and binding decision enforceable by the ERA and the Employment Court.[149]

A notable difference from BC is the absence of private arbitration in the unionized sector. Unionization is at a record low in New Zealand (9% in the private sector), and very few collective agreements contain dispute resolution mechanisms.[150] Mediation is also heavily subsidized by the state through the Department of Labour, which is consistent with the state emphasis on ADR.

(ii) Labour Inspectors

Labour inspectors provide information about employment rights and employer and employee obligations on minimum standards such as the minimum wage, holiday pay, wage deductions and parental leave.[151]

Labour inspectors also investigate complaints about possible breaches of employment standards on behalf of employees. During the course of any investigation, labour inspectors provide guidance to employers to ensure wage records and systems, holiday records, employment agreements and policies meet at least the minimum required by law.[152]

A labour inspector has the right to inspect and take copies of wages and time records, investigate cases impartially and speak to all parties before making a decision. Labour inspectors can take prosecution or enforcement action if necessary, such as recovery of payment in relation to

employees' entitlements to minimum wages, holiday pay, unlawful deductions and parental leave (s. 229 of the *Employment Relations Act 2000*).[153]

However, labour inspectors do not have the power to deal with general disputes about employment agreements, pay rates (outside of minimum wage), or employment matters relating to anything above minimum standards.[154]

(iii) Employment Relations Authority

The ERA is an independent body established under the *Employment Relations Act 2000* to adjudicate employment disputes arising in both unionized and non-unionized sectors.[155] The ERA deals with personal grievances. The ERA is often described as an informal investigative body.[156] The hearing style is inquisitorial, with the member running the hearing as opposed to counsel.[157] Members of the ERA tend not to be legally-trained.[158] The hearing is informal in the sense that everyone sits around a table and there are no rules of procedure and cross-examination is not permitted.[159] Although the hearing process is informal, in practice lawyers are very common at both the ERA and mediation.[160] Access to justice for marginalized or unrepresented workers is unclear.[161]

Decisions of the ERA may be appealed to the Employment Court on points of law.[162] The Employment Court also has jurisdiction to issue injunctions in respect of strikes and lockouts and hear wrongful dismissal claims.[163] The Employment Court is a true court with judicial appointments.

(iv) Human Rights Review Tribunal

The New Zealand Human Rights Commission:[164]

- offers a dispute resolution service;
- makes public statements on human rights;
- publishes guidelines and voluntary codes of practice;
- brings proceedings and intervenes in court on human rights issues;
- provides a service to deal with enquiries and complaints about discrimination;
- offers legal representation at the Human Rights Review Tribunal; and
- inquires into infringements of human rights.

The Human Rights Review Tribunal (HRRT) is an independent quasi-judicial body that has the power to conduct hearings and issue remedies.[165] The Chairperson and members are appointed by the Governor General, on recommendation from the Department of Justice.[166]

In terms of discrimination and harassment in the context of employment, there is an overlap in jurisdiction between the HRRT and the ERA, as the ERA has jurisdiction over personal grievances, which are defined to include discrimination and harassment (s. 103).[167] An election of forum is required.[168] However, the individuals we interviewed from New Zealand suggested that very few discrimination cases get to the ERA and that the human rights route is more commonly utilized.

(b) Recent Developments

The governing party of New Zealand recently announced a package of 32 changes to the *Employment Relations Act 2000* in relation to personal grievances.[169] The trade union community was not happy

with the proposed changes and has initiated protest activities.[170] Given that New Zealand currently has a coalition government there is some speculation that this government action may cause the defeat of the current government.[171]

6. Australia

(a) Overview of the Australian Dispute Resolution System

The *Fair Work Act 2009*[172] created a new national, publicly-funded workplace dispute resolution framework. Australia is a federation and in the past employment and labour law were addressed at both the federal and state level. *Fair Work* creates some unity by virtue of integrating aspects of employment and labour law previously addressed under multiple statutes in each jurisdiction. The Act applies to private sector employees throughout Australia as well as public sector employees in some of the states and territories.[173] The system, which took effect January 2010,[174] covers all workplace disputes other than workplace health and safety and some civil remedies. Although the government promoted Fair Work as a one-stop shopping approach to resolution of workplace disputes,[175] in practice the *Fair Work Act* creates different dispute resolution mechanisms for different kinds of problems and there remains significant fragmentation and overlap especially with respect to jurisdiction over discrimination in the workplace and accommodation.

There are four key decision-making bodies under Fair Work:

i. Fair Work Ombudsman (Ombudsman)
ii. Fair Work Australia (FWA)
iii. Fair Work Division of the Federal Court
iv. Fair Work Division of the Federal Magistrates Court

The Ombudsman and FWA are the first points of access for employees and employers with workplace disputes. The two agencies have jurisdiction over a mix of employment and labour problems arising in unionized and non-unionized settings as well as access to different processes. The division of jurisdiction appears at first glance arbitrary, but is apparently rooted in a number of barriers including constitutional limitations (the regulating and decision-making bodies must be separate) and past upper level court decisions (federal tribunals are not regarded as courts and so they cannot exercise judicial powers; making a decision on discrimination is an exercise of a judicial power).[176]

(i) Fair Work Ombudsman

The Ombudsman may deal with individual, union and employer complaints involving:

- pay slip and time and wages record-keeping requirements;
- freedom of association;
- right of entry by unions;
- underpayments of wages and entitlements, including entitlements related to terminating an employee;
- coercion, undue influence or pressure and misleading and deceptive conduct in agreement making;
- transfer of business;

- sham contracting arrangements;
- unprotected industrial action; and
- discrimination.[177]

The agency conducts investigations but not hearings.[178] The Ombudsman conducts investigations on matters involving discrimination and investigates and enforces contravention of FWA orders made under ss. 418-420 to stop industrial action. Mediation is available.[179] The Ombudsman also conducts public education campaigns and targeted campaigns of investigation such as in industries where violations of statutory rights are common and workers are particularly vulnerable or marginalized.[180]

The Ombudsman adopts a proactive approach, conducting audits and records reviews even in the absence of a complaint being filed.[181] The Ombudsman can initiate legal action against a party in order to enforce the law where the party is not meeting its statutory obligations or go to court to stop industrial action such as work stoppages.[182] The Ombudsman can also fine non-compliant parties subsequent to an investigation.[183] An employee dissatisfied with the Ombudsman's determination may take a complaint to the Commonwealth Ombudsman or go straight to the Fair Work Division of the Federal Court or Federal Magistrates Court but has no right to take the matter directly to the employment tribunal, which is FWA.[184] In the context of the Ombudsman's process the complainant is a key witness, but does not own the grievance.[185]

(ii) Fair Work Authority

FWA has jurisdiction over:

- collective bargaining;
- modern awards (see description below);
- industrial action;
- termination of employment; and
- unfair dismissal.[186]

The concept of modern awards refers to a recent consolidation of past industrial relations tribunal decisions on minimum standards and minimum pay.[187] FWA consolidated past awards to create a smaller body of modern awards setting out minimum standards in various industries.[188] (The Ombudsman enforces these standards in its investigations.)[189] These minimum standards are effectively standards created through arbitration in a unionized context that have now become standards for unionized and non-unionized employees.[190]

FWA conducts informal hearings and will assist unrepresented parties. FWA offers mediation, conciliation and arbitration.[191] FWA has the power to issue orders to terminate industrial action, order reinstatement or compensation.[192]

One grey area in terms of the jurisdiction of FWA and the Ombudsman is wrongful dismissals. There is a distinction between unfair dismissal (dismissal without just cause or due process) and unfair termination claims (dismissals breaching the statute, which includes discrimination). Unfair dismissal claims go to FWA.[193] Unfair termination claims go to FWA or the Ombudsman.[194] Complaints about dismissals involving discrimination may also be brought to a federal, state or territorial human rights commission.[195]

A key difference between the Ombudsman and human rights commissions is that, as the Ombudsman is the regulator, if its investigation concludes that discrimination has occurred, the Ombudsman has the jurisdiction to enforce rights on behalf of the complainant and in such an instance the complainant does not have control over the case and is rather a key witness.[196] A party who chooses the human rights route can apply for public funding for legal representation but assistance is not provided to everyone.[197]

Ultimately, significant forum shopping is possible under the system in terms of discrimination, especially if the offence occurred in the context of a dismissal. The forum decision must be made very quickly as the limitation periods for filing are short (FWA: 14 days for unfair dismissal; FWA and Ombudsman: 60 days for unlawful termination).[198] If the Ombudsman decides that no violation occurred then the complainant can still choose to pursue a remedy in court or a human rights commission.[199] In practice, the Ombudsman will not get involved in a case if the complainant has already filed a human rights complaint with a commission.[200]

Diagram B is a flow chart that portrays the overlap and fragmentation of jurisdiction with respect to claims that involve both allegations of discrimination under a prohibited ground and an unfair dismissal.

Collective or enterprise agreements sometimes have dispute resolution clauses. The trend is for these clauses to nominate FWA as the arbitrator or conciliator.[201]

(iii) Fair Work Division of the Federal Court and Federal Magistrates Court

The Fair Work Divisions of the Federal Court and Federal Magistrates Court are the review bodies for some matters that originated with the Ombudsman or FWA. The *Fair Work Act* confers jurisdiction on the Federal Court in relation to any civil or criminal matter arising under the Act.[202] The Act confers jurisdiction on the Federal Magistrates Court in relation to any civil matter arising under the Act.[203] The Federal Magistrates Court also has jurisdiction over the small claims mechanism, which has a monetary limit of $20,000.[204]

In some instances, eligible state and territorial courts may hear civil matters arising under the Act.[205]

(b) Statutory Reform Process

The precursor to Fair Work Australia was Work Choices. The *Work Choices Act*[206] also represented significant changes to workplace dispute resolution mechanisms and employee rights. The Act was strongly criticized by a number of sectors and ultimately was replaced in part as a result of the trade union sector running a successful and aggressive campaign to highlight the weaknesses of the law.[207] The process that resulted in the *Fair Work Act* was different, involving review by the Committee on Industrial Relations and an ad hoc group of stakeholders brought together by government to suggest revisions.[208]

B. Canada

1. Overview

Most jurisdictions in Canada currently address labour and employment matters through a single tribunal. Nova Scotia, Prince Edward Island and BC are the only jurisdictions that maintain distinct employment and labour tribunals. The Department of Labour and Workforce Development of Nova Scotia recently released a discussion paper on a three-phase process to consolidate a number of tribunals, including the province's 4 labour relations boards, the Labour Standards Tribunal (which has jurisdiction over the non-union sector) and the Occupational Health and Safety Appeal Panel.[209] The consolidation plan does not include the provincial human rights tribunal. Every jurisdiction in Canada currently maintains a distinct human rights tribunal.

2. Ontario

(a) Ontario Labour Relations Board (OLRB)

The OLRB is an independent quasi-judicial body with a mandate to mediate and adjudicate various employment and labour relations matters under the *Labour Relations Act 1995*.[210] The OLRB also has limited jurisdiction to hear certain types of applications under the following statutes:

- *Colleges Collective Bargaining Act* [211](duty of fair representation; employee status);
- *Smoke Free Ontario Act* [212] (unlawful reprisals);
- *Environmental Protection Act*[213] (unlawful reprisals;
- *Environmental Bill of Rights Act* [214] (unlawful reprisals);
- *Public Service Labour Relations Transition Act* [215] (determination of bargaining rights);
- *Crown Employees Collective Bargaining Act* [216] determination of essential services).

The OLRB also handles the administration of appeals under *Employment Standards Act* [217] and *Occupational Health and Safety Act*[218] previously heard by the Office of Adjudication of the Ministry of Labour.

In the fall of 1996 the Ministry of Labour consolidated the former Office of Adjudication, which heard appeals of Office and Inspector's orders under the *Employment Standards Act* and the *Occupational Health and Safety Act*, with the OLRB.[219] The *Economic Development and Workplace Democracy Act 1998* made further changes to *Labour Relations Act* (i.e. gave legislative endorsement to administrative merger of the Office of Adjudication with the OLRB).[220] The OLRB acquired authority to mediate and adjudicate appeals under the *Employment Standards Act* and *Occupational Health and Safety Act*.[221] As a result of these changes the OLRB became the appellate body for matters under the *Employment Standards Act* and the *Occupational Health and Safety Act* in addition to being the first line decision maker for a number of matters in relation to collective bargaining and labour activity.

The transfer of the review powers over employment standards complaints to the OLRB reflects a consolidation that bears some similarities to the proposed model being considered in this report. In Ontario the OLRB is the review body for employment matters in the non-union sector; in the unionized context the OLRB is the first line decision-maker over some matters and has review jurisdiction over others.

Based on our review, it appears that this merger has presented a few problems. First, at the OLRB there are problems of balance where a party is unrepresented.[222] The OLRB, being created to respond to work situations where both parties commonly had representation, experiences challenges in dealing with reviews of employment standards cases where the parties may not have counsel. There is a danger of pressure on the mediator and the tribunal member to assist parties, which can be problematic, resulting in a blurring of roles.

Second, historically, the OLRB has perceived its role as being one of settling disputes, with no policy constraints on the content of a settlement, providing the parties are satisfied.[223] The *Employment Standards Act* sets out basic minimum standards out of which a non-union employee cannot contract.[224] The pure settlement model may not be appropriate where, as noted in the previous point, non-union workers may not have representation and may be part of social groups that experience various barriers to access to justice, such as language barriers or recent immigration. We understand that the OLRB has applied an aggressive settlement philosophy to the mediation and resolution of reviews of employment standards disputes and does not interfere where parties appeared willing to settle for less than their statutory rights.[225]

(b) Ontario's Unified Workplace Tribunal Proposal: Looking Forward (2001)

In 2001 the Ontario Ministry of Labour issued a discussion paper[226] on a proposal to create a unified workplace tribunal that included human rights. At the time a high percentage of the Human Rights Tribunal's caseload was employment-related. This proposal was not implemented and the Ministry of Labour withdrew the proposal without publishing its reasons. The decision of the government to not implement the proposal may be linked to a number of the following criticisms that were levied against the proposal:

1. It was not clear that the proposal would result in cost savings.[227]

2. The proposal was not grounded in adequate research.[228]

3. In particular, in terms of research, the move toward greater amalgamation of tribunals did not reflect any assessment of whether amalgamation to date, such as the OLRB acquiring appellate jurisdiction over employment standards matters, had been successful.[229]

4. The proposal's stated purposes were not convincing. The very brief proposal did not explain how the intended reform would achieve its ostensible objectives, such as elimination of multiple remedies, increased effectiveness of tribunals and one-window access.[230]

5. The inconsistency of the proposal with specialized jurisdictions, one of the special advantages of the administrative justice system, was not addressed.[231]

6. The brevity of the proposal invited speculation as to the government's motivations for reform, including the possibility that the proposal was motivated by a desire to undermine the independence of decision makers.[232]

7. The content of the brief proposal was very general and failed to address a number of critical issues:

   (i) How the dilution and specialization of expertise inherent in the proposal would be addressed;
   (ii) How the proposal's call for standardized processes could be reconciled with the administrative justice system's need for flexible processes responsive to the particular needs of each tribunal's particular mission;
   (iii) How the proposal would deal with the conflicting standards of review currently applicable to decisions of the various targeted tribunals;
   (iv) Whether there would be an objective selection process for identifying those existing adjudicators who would and would not be appointed to the new tribunal (the failure to address this issue raised further concerns as to how the integrity of the system would be impacted).
   (v) Failure to guarantee the new tribunal's 30-50 adjudicators would be appointed from the ranks of approximately 150 incumbents;
   (vi) Failure to provide transitional provisions to ensure the continued independence of incumbent adjudicators over the months.[233]

8. The "Insubstantial and private nature of the proposal's development process, coupled with the surprising shortness of the public consultation process (less than three months) gave the impression of a government rushing to judgment." [234]

9. Either in addition to or as a result of the above problems, the proposal did not have the support of key stakeholders.[235]

(c) Summary

In terms of our study of workplace dispute resolution models, the Ontario experience is interesting for at least two reasons:

i. In recent years it underwent some consolidation of employment and labour dispute resolution; and
ii. The province considered and then did not pursue further consolidation involving its human rights tribunal.

Our study revealed some problems with the first phase of consolidation. Further review may be worthwhile to consider the success of this consolidation in a manner that accounts for the similarities and difference between the social context of labour and employment relations in Ontario and BC.

IV. Consultation with BC Stakeholders

A. Overview of the Consultation

The BCLI consultation was brief and targeted to a relatively small number of people, though broadly-based in terms of involving stakeholders and experts from a number of primary affected

sectors, including labour, employment and human rights, and involving members from both the trade union and employer communities. In order to solicit feedback from stakeholders in such a compressed time frame the BCLI facilitated a series of group consultation sessions. Participants were each invited to attend a single group session. The BCLI also held individual meetings with a few participants who were associated with existing tribunals.

At some sessions participants noted that they had concerns about the consultation process in terms of a lack of inclusivity or transparency as well as inadequate time being provided to reflect on complex issues. These participants did not want their agreement to participate in the consultation to be interpreted as an endorsement of the process.

No consensus on the strengths and weakness of either the proposed unified model or the existing system emerged from this consultation. Feedback tended to be polarized, with comments we received on various aspects of the existing workplace dispute resolution system at some stakeholder sessions conflicting starkly with the remarks provided during other sessions. Although the discussions and consultation questions addressed the ESB, the EST, the LRB and the HRT, many of these sessions focused on the HRT, in terms of the comments participants provided about existing workplace dispute mechanisms in BC.

The following section identifies key themes that came up in the consultation. The BCLI agreed to communicate the results of our consultation without attributing specific comments to individuals. We do at times attribute comments to groups, such as employer counsel or human rights stakeholders.

B. Key Consultation Feedback

1. What is the Problem the Proposed Model is Intended to Solve?

Many participants questioned: why is the Ministry of Labour is considering reform at this time and what is the rationale for the proposed model? It was suggested that a particular solution was being proposed without first identifying or adequately investigating the nature of the problems with the existing workplace dispute resolution system. For example, participants asked:

a) Is the problem exclusively duplication of proceedings and overlap in jurisdiction? If so, there are simpler solutions than massive restructuring through implementation of the proposed model.

b) Is the objective simplification or integration of the systems to facilitate access to services for the public? If so, services to workers could be integrated without merging or dismantling tribunals.

c) Is the problem rooted in criticisms of the efficiency, timeliness and costs associated with any of the tribunals? If so, it is not clear merger will address those problems and it may be worthwhile to focus on and address specific deficiencies with particular tribunals. Most consultation participants identified weaknesses of particular tribunals as a far more pressing concern than overlap in jurisdiction and concurrency of proceedings.

d) Is the concern a perceived lack of expertise in dispute resolution skills, such as mediation, or alternatively, subject matter expertise? If so, the solution may lie in appointment processes or training for decision-makers.

e) Is the overall goal to achieve cost-savings to the government? If so, it is not clear that a properly resourced Workplace Tribunal will save the government money, especially given the anticipated large short-term transition costs associated with reform and change, and the anticipated litigation resulting from confusion over and clarification of the new jurisdictional boundaries. Moreover, given that feedback from the consultation suggests that the existing tribunals and the ESB are inadequately resourced at present, and access to justice is impeded by lack of publicly funded legal representation, it is not clear that the overall goal of reducing expenditures in this area is supported by stakeholders.

2. Concern over Missing Details about the Proposed Model

A number of participants expressed frustration about being asked to comment on a model lacking sufficient detail, stating that it was difficult to assess the strengths and weakness of a model when a number of key features remained unclear. Although some details may be further specified if the Ministry decided to pursue the model further, some unanswered questions relate directly to the capacity of the proposed model to effectively respond to contemporary employment, labour and human rights disputes. As one participant stated, "the devil is in the details".

In particular, there was confusion over the following significant features:

a) What would the relationship be between the Workplace Services Branch and the Workplace Tribunal? Is the Branch to be a part of the Tribunal? Some participants expressed concern that it would be problematic for the Branch to be a part of the Ministry of Labour, as many employees filing claims are government employees. In these circumstances there could be either a general lack of independence in the first line of decision-making or a particular conflict of interest in terms of government employees making decisions over matters that could potentially impact on their own work conditions. Other participants insisted that the tribunal must be separate from the original decision-maker in the context of an Employment Standards claim. Still others suggested that separating the mediative and adjudicative function in the context of collective bargaining disputes would undermine existing efficiencies within the LRB.

b) What would be the body with jurisdiction over workplace human rights matters where the union was alleged to be violating the human rights of an individual member? Most participants pointed out that in this instance the arbitration route would be inappropriate. What if an allegation of discrimination arose in the context of a decertification of a trade union? What if the collective agreement may itself be discriminatory? Participants raised many examples that highlighted contexts in which it might be especially problematic for there to be a lack of HRT jurisdiction even though the worker was a member of a trade union.

c) Would the Workplace Tribunal be an expanded LRB or a new separate and distinct tribunal? A number of representatives from the employer community identified the possible rejuvenation of the LRB as being a potential strength of the proposed unified model,

assuming that the new tribunal would be more of an expanded LRB. Others pointed out that since the Court of Appeal has review jurisdiction over the decision of arbitrators with respect to human rights matters, unlike labour arbitrators, the LRB cannot be said to possess significant expertise in the area of human rights law.

d) What would be the grounds for review and would they be the same in a unionized and non-unionized context? Some participants commented that if the grounds for review under the *Labour Relations Code* remained unchanged (sections 99 and 100) but also only limited review was permitted under the *Judicial Review Procedure Act,* there could be different review paths in a union and non-union context. Is that appropriate? Deference to LRB is a policy decision of the courts, now affirmed in the *Administrative Tribunals Act* (s. 58(1)), in recognition of LRB expertise over labour relations.

e) What is a "determination" and would it involve a hearing? If not then it may be that unionized employees would have greater access to justice. Is it appropriate to resolve the bulk of human rights complaints that do not involve a union without access to an oral hearing characterized by full disclosure, cross-examination, and an opportunity to tell one's story in person? What impact could the lack of precedential decision-making in the area of human rights have on the development of human rights law?

f) Are determinations to be made by an officer? Is this appropriate insofar as human rights is a complex area of law involving quasi-constitutional rights?

3. Overlap in Jurisdiction over Workplace Human Rights and Duplication of Proceedings

The overlap in jurisdiction was discussed at every consultation session and solicited varied responses. Employer counsel indicated that employees usually file both a grievance and a human rights complaint. Although there are processes for deferral and dismissal of the human rights complaint, and the grievance arbitration will usually run its course first, for the employer there are still significant financial costs associated with responding to a human rights complaint and seeking deferral or dismissal. Some participants complained of forum-shopping, indicating that when the union backs a member before the HRT the union is essentially re-arguing the case.

A significant number of stakeholders indicated that the overlap in jurisdiction rarely resulted in duplication of proceedings. They argued that the *Human Rights Code* contemplates the overlap in jurisdiction and sets out mechanisms for avoiding duplication: section 25 permits applications to defer consideration of a complaint where the HRT determines that another proceeding, such as arbitration, is "capable of appropriately dealing with the substance of a complaint"; section 27 permits the HRT to dismiss all or part of a complaint at any time if, amongst other thing, "the substance of the complaint or [that] part of the complaint has been dealt with in another proceeding". Stakeholders expressed very polarized views on how effectively these powers are exercised by the HRT. During the consultation the only data that was provided to us indicated that in 2008-2009 all applications to defer were successful and the trend in previous years has been in showing increasing deference to alternative proceedings. Statistics also indicate that additionally in 2008-2009 30% of applications to dismiss were successful. However, a number of stakeholders complained that the application to dismiss process is inadequate because it is too expensive to the parties.

A number of participants advocated for a "simpler" fix to the problem of overlap in jurisdiction than merging various tribunals. Stakeholders suggested alternatives such as:

> (a) That exclusive jurisdiction over workplace human rights disputes in the unionized sector be granted to labour arbitrators; or
>
> (b) That parties be required to elect a forum and effectively choose between pursuing a discrimination claim through the HRT or a labour arbitrator.

A large number of participants rejected the election model as being problematic either because it undermined the exclusive bargaining authority of the union or because grievors often are not fully informed of the implications of pursuing the different routes.

One union representative pointed out that their master collective agreement embodies the election model: it contains a clause to prohibit duplication of proceedings; a member must choose to pursue a matter through the HRT or grievance arbitration.

Some participants emphasized that even in the union context it is important to have access to the HRT, so that people can go to the HRT when the union cannot solve the problem. The union owns the grievance and determines which grievances to put forward. The person who experiences discrimination does not decide if the case goes forward in this context, especially in a time of decreasing resources. Stakeholders pointed out a number of scenarios where the union may become a problematic gatekeeper of human rights:

- What if the discrimination was perpetrated by a co-worker, thereby conflicting the union?
- What if accommodation is offered and the worker wants to accept but the union will not settle?
- What if the allegation of discrimination involves a promotion, thereby conflicting the union?
- What if the discrimination lies in the collective agreement?
- What if the allegation of discrimination is linked to the grievance process itself?
- What if the union decides not to proceed with the grievance at all?

They also cautioned that at times a union can be a true respondent to a grievance. Some participants noted that distinguishing "workplace" human rights problems from other human rights problems would not be a simple matter; others felt the line was very clear. At the human rights consultation the following scenarios were presented as raising unanswered questions about the jurisdiction of the Workplace Tribunal:

- What if the worker works where she or he lives (e.g., resident caretaker)?
- What about a case like *Hutchinson*, which was framed from the daughter's perspective as a public services claim and framed from the father's perspective as an employment claim?[236]

A number of human rights stakeholders emphasized that one finding of the La Forest report[237] on the federal human rights commission was that people wanted full control of their human rights cases and did not like interference of the federal Human Rights Commission.

Some labour counsel cautioned that a significant change to jurisdiction will create temporary jurisdictional confusion over which forum to direct complaints. Where it is possible to make a jurisdictional challenge lawyers will do so, causing further cost and delay. There is already a large body of jurisprudence on whether a matter falls under a collective agreement – this is a not a simple issue. Whether a matter is a workplace human rights question may not be a simple distinction to draw. If this area proves to be grey, the result will be confusion, delay and cost to the system.

One submission stressed recognition of the importance of human rights tribunals under international law, citing the Paris Principles adopted by the United Nations, which "recognized the importance of having an institution 'vested with competence to promote and protect human rights'".

4. Tribunal Specialization and Expertise

(a) Subject Matter Expertise: Human Rights versus Workplace Expertise

There was much discussion and disagreement about whether there is such a thing as "human rights expertise" and over whether human rights tribunal members possessed an adequate understanding of the contemporary workplace.

Participants pointed out that labour arbitrators are familiar with human rights law and the duty to accommodate, and have been making decisions on these matters for years. Many participants emphasized that a number of key human rights decisions made by the BC Court of Appeal and the Supreme Court of Canada were appeals of decisions of arbitrators. Some employer counsel suggested that, in workplace conflicts, arbitrators are more experienced in dealing with discrimination than the HRT.

Employer counsel expressed a concern that human rights tribunal members do not adequately understand workplaces and the role of exclusive bargaining agency and collective agreements, resulting in impractical decisions that do not take account of the implications of an order on other employees. Stakeholders who supported the unified workplace tribunal concept asserted the need for a tribunal with subject matter expertise on the workplace. There was a concern that HRT decision-making on disability accommodation was uni-dimensional, removing the problem from the workplace context. Some proponents also argued that in workplace disability cases the duty of accommodation raised a different sort of argument and required a different problem-solving approach (a balancing of interests) that is dissimilar from the classic human rights violation, and was best addressed in the arbitral context. They asserted that there is no such thing as "human rights expertise". As evidence of this proposition they pointed to the lack of deference the courts show the decisions of the HRT. Other stakeholders attributed this lack of deference to the quasi-constitutional status of human rights.

A great number of stakeholders felt equally strongly that human rights is an area of expertise. These same participants stated that if the workplace is an area of expertise then HRT members possess this expertise: the biographies of quite a few members of the HRT include a background in labour; over

60% of the HRT caseload involves making decisions that involve workplaces. They insisted that accommodation comes up in many contexts involving grounds other than disability. These participants characterized HRT decisions as pragmatic.

All stakeholders agreed that human rights is a complex and dynamic area of law.

Some human rights stakeholders cautioned that only some arbitrators have human rights expertise.

(b) Expertise and the Workplace Tribunal

Merging tribunals presents a risk of diluting expertise because decision-makers must possess a broader knowledge base. An ostensible purpose of administrative tribunals is to increase subject matter expertise; combining tribunals and granting a broad mandate may be counter-productive in terms of increasing subject matter expertise.

A few participants expressed concern over a potential loss of curial deference if tribunals are merged to form a tribunal with a broader jurisdiction over employment and labour issues. Curial deference is rooted in judicial appreciation of subject matter expertise possessed by specialized tribunals. Would the jurisdiction of the Workplace Tribunal be too broad to attract significant deference? An unintended consequence of merging tribunals could be increased judicial review.

Proponents of the unified model indicated that developing a client services model that will work for parties to labour, employment and human rights conflicts, including employees with or without representation, unions, large and small employers, is a substantial challenge.

5. The Human Rights Tribunal

The following assertions were made at the consultation sessions:

a) The HRT has an inadequate intake process, such that too many unmeritorious and inappropriate complaints proceed through the system.

b) There is a perception of institutional bias against employers — a bias that the complaint must have some foundation — such that too many unfounded or weak complaints get to a hearing. Other consultation participants described HRT decisions as fair, balanced and reasonable.

c) Tribunal members act as though their role is to protect individuals. This may be a function of limited access to publicly funded representation, such that parties require more assistance to make out their case, especially given the complex nature of human rights law. This may result in a perceived blurring of the role between adjudicator and advocate. Other participants claimed that HRT members approached their decision-making from a policy perspective whereas decision-makers should be neutral.

d) Although HRT processes have been designed to ensure a perception of fairness and protection for individual rights, in practice the processes are described as bureaucratic and overly formal. The process is litigious and paper-driven and therefore expensive for parties. Decisions can be as long as 300 pages and hearings can take weeks. Other participants

stated that the HRT writes simple decisions that unsophisticated clients are able to understand, that it is rare for a hearing to last longer than 2-3 days, that there is no backlog of cases at the HRT, and the HRT accepts cases and delivers final decisions in a timely manner.

e) Length of a hearing or decision can be a function of the complexity of the case but can also result in inordinate preliminary applications. Delay and formalism are driven by the parties and are not endemic to the system. The process was formalized to some extent to create greater transparency for the parties who may be unfamiliar with legal processes. However, this process has become a tool for delay.

f) Some participants stated that the HRT does not provide a forum for speedy decision-making and indicated that speed is crucial in the workplace context. Others argued that arbitration is not more expeditious: in both the HRT and arbitration context it takes about 12-14 months to get to a full hearing on the merits.

g) Whereas a labour arbitration is a "tough, adversarial environment" the HRT is "gentle, kind and patient". The latter approach is appropriate for dealing with the parties to a human rights case. Further, the tribunal does an excellent job making the process accessible to parties who are not knowledgeable about legal processes as well as accommodating the particular needs of parties, including significant mental health issues. A number of participants commented that unrepresented human rights complainants can be very demanding but that the HRT handles these individuals appropriately and sensitively.

h) There is inadequate public funding of representation for small employers for whom a human rights complaint, regardless of merit, is a huge cost. Too often, due to the cost associated with a human rights complaint, even an application to dismiss, employers feel pressured to settle claims that have little merit.

i) The process is not sufficiently solution-focused. Critics of the HRT stressed that the HRT focuses on rights at the expense of dispute resolution and suggested that the HRT should move from an adjudicative model to a dispute resolution model. Other participants expressed the view that the HRT has skilled members, including the previous Chair, but needs to experience a cultural shift in order to be more effective. Still others claimed the view that the HRT is not results and problem-solving oriented is outdated.

j) Some participants suggested that HRT members are not skilled mediators. Others stated that human rights mediation is effective, resulting in a high proportion of cases settling prior to a hearing and succeeding in bringing government to the table to craft creative remedies to systemic problems.

k) There was general disagreement about how appropriately the HRT exercises its discretion to accept cases covered by a collective agreement. Some stakeholders described the application to dismiss process as an expensive affidavit war. Other participants stated that the HRT deals well with the overlap in jurisdiction utilizing sections 25 and 27 of the Code. Another participant expressed concern that respondents were filing applications to dismiss even when the applications had little merit, resulting in pre-mature one-sided disclosure of the complainant's case as well as premature dismissal of cases with merit.

l) Human rights are quasi-constitutional rights; it is not appropriate to grant exclusive authority over an area of human rights decision-making to arbitrators, who are privately appointed individuals, not independent, quasi-judicial appointments.

m) While arbitrators apply human rights law, they are also inherently conservative because they must rely on future appointments in order to earn a living. Some opponents of the proposed model cited benefit plans that excluded same sex couples as an example of a form of discrimination that was consistently ignored in the arbitral context until the matter came before human rights tribunals. Tribunal members have greater independence.

n) A number of human rights stakeholders cautioned that the direct access human rights system is only now just getting off the ground. While it might be an appropriate time to review the operation of the HRT and identify areas for improvement, it is premature to explore dismantling the tribunal, especially given how much change the human rights system has seen throughout the past decades. At the same time a number of stakeholders advocated for the re-creation of a human rights commission with a mandate to engage in public education and intervene in select cases, but no role in investigation or intake of complaints.

o) There was some discussion as to whether it would be appropriate for the HRT to be able to award costs in some instances, for example, against a respondent in the context of an unsuccessful application to dismiss. A concern was expressed that legal costs can absorb most if not all of an injury to dignity award, resulting in an ineffective remedy going to a successful complainant. Other participants cautioned that the threat of costs could also have a "chilling effect" on the willingness of individuals to file complaints, thereby undermining access to justice in the area of human rights protection.

6. Labour Relations Board

Comments made during the consultation regarding the LRB chiefly related to financial under-resourcing of the LRB, the appointments process, and appropriate salary levels for vice-chairs. Appointments to the LRB should be made with input from the labour relations community. The importance of appropriate salary levels for appointees was repeatedly emphasized as being necessary to attract candidates with the proper knowledge and experience.

Supporters of the workplace tribunal concept argued that its implementation would in effect rejuvenate the LRB as an entity, provided that the new tribunal was adequately staffed and resourced, appointments were made in a manner that enjoyed the confidence of the labour relations community, and salary levels were competitive.

7. The Employment Standards Branch and Tribunal

The major concern expressed about the ESB related to inadequate resources since the ESB was re-designed in 2001. The self-help kit and model were criticized by almost every participant who commented on the ESB.

Participants complained that:

a) There is a lack of enforcement of employment standards: more officers are required to fulfill the mandate of the ESB.

b) There may be issues with access to justice. Following the changes made to the legislation in 2002, complaints initially dropped by 40%, which most participants attributed to the introduction of the self-help kit. Although the policy of the ESB is that vulnerable workers, including agricultural workers, domestic workers, garment/textile workers and workers with language barriers, are exempt from the requirement to utilize the self-help kit, the perception remains that those most in need of a remedy and those possessing the least sophistication about legal processes may be having difficulty producing the required written submissions.

c) Workers are required to approach the employer for a resolution before filing with the ESB; however, this may not be helpful in some instances, such as where the employment relationship has been severed.

d) Investigations can take up to two years and by then the employer may be bankrupt or out of business and a marginalized worker may have left the country.

e) The first point of access to the ESB is now electronic and this is not working well for marginalized and vulnerable workers with language and cultural barriers to understanding their rights.

f) While the intent is that there be separation of roles as between the mediator, adjudicator and investigator, in practice there can be an impression of little separation and significant information-sharing, and this is viewed as problematic by some.

g) 90% of cases are resolved through mediation but mediation itself is not professional or adequate.

h) Decisions take too long to be written up: it can take a year.

The Employment Standards Tribunal was the subject of very few comments. One stakeholder cautioned that, compared to the LRB, the EST is a small efficient tribunal that makes use of long-term part-time appointments but deals also with a small caseload. There is a danger that in merging the EST with other tribunals some of these efficiencies would be lost.

8. The "Unity" of Workplace Dispute Resolution

Many stakeholders expressed a concern that describing the proposed model as unified was misleading. In the words of one participant, the unified tribunal is a "fiction". First, many workplace issues, such as wrongful dismissal and workplace safety, are not covered by this model. In this sense the model represents selective coverage of workplace issues. Second, the model is not "unified" insofar as human rights would be fragmented between the Workplace Tribunal, the Human Rights Tribunal and labour arbitrators. The model reflects rather a redistribution of jurisdiction. Whether the approach is unified or fragmented depends on what area of law is emphasized.

At the human rights consultation it was submitted that the fragmentation of human rights was a feature of earlier legislative regimes that had not responded effectively to human rights (*Fair Employment Practices Act 1956*). Fragmentation was linked to confusion about where to go to enforce your rights as well as inconsistent processes. Exclusive jurisdiction going to labour arbitrators may also be an inappropriate privatization of adjudication over human rights complaints.

A number of participants stressed that some characteristics of human rights and labour might make the mix problematic, such as:

a) The EST and the HRT have an individual rights focus whereas in the labour context there is a focus on group rights. Organized labour has a hard time responding to individual concerns and arbitrators have been known to encourage grievors not to push for recognition of their human rights. Other participants replied that the individual focus is not the right approach even in the human rights context where accommodation, a multi-party process, is a key aspect of problem-solving in responding to allegations of discrimination and a key question of fact before tribunals.

b) The labour sector involves two powerful parties; human rights and employment standards complaints involve vulnerable parties who face systemic disadvantages and have limited or no access to legal representation.

c) The parties to arbitration and the lawyers and decision-makers involved in a case often know each other. In contrast, the parties to a human rights complaint are often new to the process.

d) In the EST and human rights context the employment relationship is usually over and the issue is one of compensation. In the union context there is usually a continuing organized relationship.

e) The arbitration route and the HRT route have different processes, remedies and approaches and the person who experiences discrimination should be entitled to identify the most suitable forum for them. People need options.

f) The goals of labour and human rights may be different and incompatible. The goal of arbitration is dispute resolution and labour peace; the fundamental goal of human rights is promoting equality and identifying and eliminating systemic disadvantage, and HRTs exist to protect vulnerable and historically disadvantaged groups. One human rights stakeholder commented that a human rights administrator of a previous BC regime once claimed he would "sell anyone down the river for a settlement." Is that attitude appropriate in a human rights context, especially where the person who has alleged that his or her rights were violated was not entitled to choose the forum to hear the complaint?

g) Human rights law looks out for the interest of the minority, whereas union representation is the embodiment of the will of the majority.

Separateness may be a fundamentally good tension, with the courts playing the role of review body. Discriminatory values are still entrenched in the workplaces and an institution with specialized expertise in human rights is required to oversee the development of human rights law. In this

respect, some participants argued, the application to defer and dismiss framework gives appropriate powers of oversight to the HRT.

Some employer counsel stated that employment related disputes are quite distinct and different from other human rights claims, dealing often with accommodation of a disability in the workplace and so parsing these cases off to arbitrators makes sense.

Other participants questioned the wisdom of addressing human rights and employment standards under a single system, noting that human rights generally involves more complex legal issues.

9. The Significance and Pre-eminence of Human Rights

A number of stakeholders emphasized the pre-eminence or quasi constitutional status of human rights law and characterized the proposed model as reflecting a general tenor of de-valuing human rights protection. They stated that there is a public interest in the resolution of human rights complaints beyond the impact on specific complainants reflected in the reality that human rights complaints give rise to both individual and systemic issues. There was a concern that addressing workplace human rights exclusively outside of the context of a specialized human rights tribunal, and in the unionized context through privately appointed arbitrators taxed with addressing workplace conflict, would undermine the capacity of human rights legislation to address broad systemic and public policy issues in relation to discrimination against vulnerable populations.

10. Appointments

The appointment process is crucial to both independence and performance of a tribunal. In relation to the HRT and LRB a number of participants argued that the current salaries are inadequate to attract seasoned experts. It was suggested that the broad jurisdiction of the proposed tribunal might attract applications from more skilled and experienced individuals, but this would only be the case if salaries were competitive. Security of tenure is key to a tribunal's independence and working at the pleasure of the government is problematic. Participants who spoke on this issue advocated for a merit-based appointment process. It was also suggested that reappointments should be based on merit in order to enhance independence of decision-makers. It was suggested that the current capacity of the government to remove adjudicators without cause undermines independence.

11. Consultation Process

A number of stakeholders pointed out that process is key to legitimacy in terms of reform in labour and human rights law. Many consultation participants perceived that even prior to initiating this small consultation, which has been the subject of criticism, the Ministry of Labour had already decided to proceed with reform in order to create the proposed unified workplace tribunal. A brief consultation with only 20-30 individuals and without broad public participation was characterized as inadequate.

12. Alternatives to the Proposed Model

Stakeholders suggested the following alternatives to the proposed model that could address some of the objectives underlying the Ministry of Labour's proposal to reform the current system:

(a) Universal Intake: Aspects of the employment, labour and human rights system could be unified to create greater efficiency and access to justice without amalgamating all workplace disputes under a single tribunal. One-stop, first point of access to intake and information about your rights could be helpful. This approach could permit some sharing of administrative costs and other resources, such as space.

(b) Blend mediation services: At another session participants wanted to see greater access to skilled mediation and suggested that merging mediation services might facilitate this goal. A good mediator should be able to mediate any dispute, regardless of the area of law or the nature of the parties. Participants who deal regularly with vulnerable workers at the ESB pointed out that the separation in terms of human rights and employment standards is somewhat artificial in that as a part of a settlement the employer will often seek release from all causes of action, including human rights, and so effectively ESB mediation will resolve both claims.

(c) Cross-appointments: At one session it was suggested that labour and human rights cultures may be unnecessarily separate. For example, at the arbitration and tribunal level there is a lack of cross-citation between the LRB and grievance arbitrators on one hand and the HRT on the other. Cross-appointments could increase the availability of appropriate broad expertise and encourage further integration of the development of the law in the area of workplace human rights.

(d) Dialogue: At one session it was suggested that if employer counsel has concerns about the HRT a more effective and less costly solution would be dialogue amongst various human rights and labour stakeholders over how to improve services and hearings at the HRT. One submission referred to "creative re-visioning of the tribunals processes and procedures."

(e) Extension of limitation period: Parties file human rights complaints and grievances concurrently in part to preserve a right of action. The limitation period set out in the *Human Rights Code* is six months, which is often inadequate time to resolve a matter though arbitration. If the limitation period were extended to two years then it is possible grievors would delay filing and parties would no longer have to bear the costs of as many applications to dismiss or defer. No other jurisdiction in Canada other than Manitoba has a six-month limitation period. One year is the most common time frame.

V. Findings and Conclusions

At the beginning of this paper we outlined the following questions that the Ministry of Labour asked the BCLI to address in our study paper on the Workplace Tribunal:

1. What are the merits of establishing a unified Workplace Tribunal as proposed?

2. What legal and other issues are raised by the proposal to replace the current system with the Workplace Tribunal?

3. What is the experience in other jurisdictions where a comparable approach has been implemented?

4. Does the experience in those jurisdictions suggest other and better ways to achieve some or all of the objectives?

5. What findings and conclusions can be made from the research, analysis and consultation?

For the sake of completion and ease of reference, we have clustered our findings under headings that correspond to the above questions. However, we note that some findings correspond to multiple questions, and in those instances, the categorization is somewhat arbitrary.

A. Findings

1. What are the merits of establishing a unified Workplace Tribunal as proposed?

(a) The potential advantages of a unified Workplace Tribunal include:

i. A single forum for the resolution of a large proportion of employer-employee disputes;

ii. Reduction in case-splitting between labour and employment law issues on one hand and a human rights issue arising from the same facts and parties;

iii. Elimination of some potentially duplicative processes, whether parallel or successive;

iv. Elimination of the possibility of re-litigation of a human rights matter, with the double jeopardy for the respondent that it entails and the possibility of inconsistent outcomes;

v. Reduction of the likelihood that divergent lines of authority on the interpretation of Sections 12 and 13 of *Human Rights Code* will develop in different fora;

vi. Reduction of the volume of applications for deferral and dismissal of complaints under the *Human Rights Code* and their attendant expense;

vii. Greater assurance that proper relative weight will be given to labour and employment law principles and human rights principles in adjudication of a legally complex dispute;

viii. An opportunity to bring a fresh and comprehensive approach to investigation, mediation, and hearing processes brought for the resolution of workplace disputes;

ix. An opportunity to provide enhanced training and achieve a uniform standard of knowledge and skill among tribunal staff involved with intake and mediation.

(b) The merits of a Workplace Tribunal cannot be properly assessed until further details of the concept are fleshed out. Some important questions arose in the context of the consultation and the answers to these questions bear a direct impact on the potential effectiveness of a more "unified" approach. Key questions that came up during consultation sessions include:

- Is the Workplace Services Branch to be a part of the Workplace Tribunal or the Ministry of Labour or neither?

- What body would be first decision-maker where the human rights violation involved a union as a true respondent or where the union was conflicted by circumstances such as a promotions grievance or an allegation of discrimination by one worker?

- Would the Tribunal be an expanded LRB or a separate and distinct and differently specialized tribunal?

- Would the grounds and forum for review in a union and non-union context be different?

- Would a "determination" involve a hearing?

- Who would be empowered to make determinations?

2. What legal and other issues are raised by the proposal to replace the current system with the Workplace Tribunal?

(a) One of the premises of the Workplace Tribunal is that it would concentrate workplace and human rights issues in a manner that is not currently possible because human rights are handled in several places. However, the proposed model would also fragment human rights adjudication in BC. This outcome renders the case for a workplace tribunal somewhat less compelling.

(b) Human rights is a complex and dynamic area of law, and adjudication of such claims requires sophisticated decision-makers with knowledge of human rights principles and jurisprudence, and ongoing engagement with the evolving case law. However, there was profound disagreement amongst consultation participants over whether "human rights" is an area of expertise and whether arbitrators or HRT members possess greater expertise in this area in terms of applying human rights law to the workplace context.

(c) Employment, labour and human rights law all involve significant areas of expertise. It is not clear that dividing or combining bodies in any particular fashion will, by itself, promote better expertise or better administrative justice in any one area. As well, for some of the issues identified, there may be less drastic changes that could solve the issues.

(d) It is not clear how effectively a Workplace Tribunal would handle dual jurisdiction over conflicts in the unionized and non-unionized sector without losing other efficiencies and curial deference.

(e) Reforms that remove individual control over employment or human rights may have an impact on obligations pursuant to international human rights and labour conventions to which Canada is signatory. This is a research question that was not investigated in this study but merits further exploration.

3. What is the experience in other jurisdictions where a comparable approach has been implemented?

(a) The only jurisdiction we were able to identify that granted exclusive jurisdiction over workplace human rights to an employment tribunal is the UK. The UK does not have a specialized human rights tribunal. Other equality matters, such as discrimination in the context of a public service, go to the county courts. It is questionable how successful this system has been in terms of addressing human rights in the workplace. Statistics of the Employment Tribunal present a very low discrimination claim success rate of 2-3%.

(b) The UK experience with the *Employment Act 2002 (Dispute Resolution) Regulations* suggests that curtailing choice over the dispute resolution forum and making fundamental changes to jurisdiction can have the negative consequence of creating significant new litigation regarding jurisdiction. A possible unintended consequence of granting BC labour arbitrators exclusive jurisdiction over human rights conflicts arising in the unionized workplace is increased procedural litigation, resulting in further delays and increased costs to the public and parties. This concern also emerged out of our consultation sessions. Individuals may aggressively defend a perceived right to choice of forum.

(c) While it is rare for an employment tribunal to be granted exclusive jurisdiction over workplace discrimination, a great number of Canadian and other jurisdictions deal with some or all employment and labour disputes through a single tribunal. However, on the international front, we caution that collective agreements and trade unions play a different role in other jurisdictions. For example, in the UK, collective agreements are not legally enforceable, all claims are individual and the individual worker directs the case. The union does not own the grievance and tribunals enforce statutory, not contractual, rights. Therefore the tribunal is not taxed with dealing with an excessively heterogeneous set of cases, as could be the case in BC, where circumstances are quite different. Moreover, although the UK does not have a domestic human rights tribunal, grievors also have a right to appeal the matter to a specialized human rights tribunal, namely, the European Court of Human Rights, for breach of the *European Convention on Human Rights*, provided all domestic remedies have been exhausted. Caution must be exercised with respect to consideration of approaches taken in other jurisdictions that appear at first glance to reveal greater integration of workplace dispute resolution. Indeed, our research revealed that dispute resolution approaches reflect unique social histories and legal frameworks to a great extent.

(d) In terms of processes informing law reform, the experience in New Zealand, Australia and Ontario confirms that labour is a delicate area for reform and that meaningful and inclusive consultation has a direct bearing on the potential success of a new regime for dispute resolution.

4. Does the experience in those jurisdictions suggest other and better ways to achieve some or all of the objectives?

(a) A feature of a number of jurisdictions (the UK, New Zealand, Australia, Germany) is a division of court that exclusively reviews employment and labour decisions. If one of the problems with the existing system is a risk of divergent jurisprudence on discrimination and accommodation coming from labour arbitrators and human rights tribunal members, one solution might be to create a division of court through which all reviews and appeals of tribunal decisions would be followed. Under the existing system, judicial review of tribunal decisions goes to the Supreme Court, whereas

decisions of arbitrators are appealed to the Court of Appeal on a matter of general law, which can be the case in a workplace discrimination grievance.

5. What findings and conclusions can be made from the research, analysis and consultation?

(a) It is not clear from our research and consultation that the overlap in jurisdiction between the HRT and the labour arbitration system over workplace human rights disputes is resulting in either conflicting jurisprudence or concurrent cases running in multiple fora. Only a few examples were referenced during the consultation to suggest that this is an existing problem of the current system. Rather, although the BCLI did not conduct a quantitative analysis of this question, data presented at the consultation suggested that duplication of proceedings is rare in terms of the merits of a discrimination allegation being heard before both the HRT and a labour arbitrator, either concurrently or sequentially. That said, concerns were raised about the costs and other matters associated with filing an application to dismiss — one of the primary processes set out in the *Human Rights Code* for addressing the overlap in jurisdiction.

(b) If the problem is purely the overlap in jurisdiction, regardless of duplication of proceedings, there are a number of alternatives to the proposed model that would address overlap, such as legislative reform that either granted arbitrators exclusive jurisdiction over workplace human rights disputes in the unionized sector, or rules that require parties to elect a forum and effectively choose between pursuing a discrimination claim through the HRT or a labour arbitrator. Both of these options could be accomplished with less complex reform to the current workplace dispute resolution framework than is required to implement the proposed model. Further research and analysis is required to properly consider these options, which met mixed responses from stakeholders.

(c) While quick and efficient decision-making is of value, an approach that emphasizes speed may not be appropriate in all contexts. Rather, some complex cases may well merit appropriate processes and analysis to ensure the protection of individual rights and the appearance of fairness. While these processes may appear protracted and overly formalistic to some individuals, these formalities may be appropriate in the human rights context, where parties may not be well known to each other and may be unsophisticated with respect to legal proceedings. At the same time, it is recognized that where there are ongoing workplace relationships, the resolution of disputes by means that are speedy, efficient and that take collective or other interests into account, is usually very important for all parties. It is not so clear that the same processes are suited to both the labour and human rights contexts. The current overlap in jurisdiction may facilitate the identification of the most appropriate process and forum in each instance.

(d) A recurring theme of the consultation sessions was feedback that the ESB does not have adequate resources to fulfill its mandate with respect to workplace minimum standards for the non-unionized sector. Most participants described the self-help forms and approach as ineffective, and as imposing additional barriers to access to justice, especially for vulnerable and marginalized workers such as immigrants and people for whom English is a second language.

(e) All three current areas of dispute resolution — human rights, labour and employment standards — would benefit from greater public funding to enhance the quality of mediation services. The consultation revealed significant lack of public confidence in publicly-funded mediation.

(f) There are concerns that the ideology of human rights and labour relations are founded on different goals and values: labour is ultimately concerned with collective rights and labour peace whereas the fundamental purpose of human rights legislation is to promote equality and protect historically disadvantaged and vulnerable groups and individuals who have experienced a human rights violation. Many stakeholders expressed concern that this ideological disconnect made the proposed model problematic.

(g) A number of alternative approaches to addressing the current weaknesses of the overall workplace dispute resolution framework included incorporating rules of proportionality into the HRT rules or extending the time limit for filing a human rights complaint. Both of these solutions would require further study to determine their merits. Alternatives to merging tribunals that would allow for sharing of resources or expertise are shared intake and investigation or blended mediation services. Cross-appointments between the tribunals would be another way to address concerns about tribunals taking divergent legal approaches and also allow for sharing of expertise.

(h) If the Ministry of Labour intends to pursue any reform of jurisdiction over human rights matters arising out of the workplace, either through the creation of a Workplace Tribunal or legislative changes that grant labour arbitrators exclusive jurisdiction over workplace human rights questions in the unionized sector, then we recommend further consultation with stakeholders regarding the merits of such reform. The fate of the HRT is a matter over which consultation participants expressed both strong opinions and divergent views. Greater consultation is required with vulnerable communities potentially impacted by proposed reforms. Any such consultation should be open to the public and informed by a detailed, publicly available discussion paper. This finding flows both from the consultation and from our comparative analysis. In each jurisdiction that we studied, the success of significant reform in the area of employment and labour law appears connected to the extent to which the government provided stakeholders with an opportunity for meaningful consultation.

B. Conclusion

Overall, it is premature to make a general conclusion on the merits of a Workplace Tribunal for British Columbia.

Our comparative research did not uncover an existing system for workplace dispute resolution significantly similar to the proposed model. The UK appears to have a system with the greatest degree of concentration of jurisdiction over workplace disputes, but differences in employment, labour and human rights law between the UK and BC make comparisons unreliable.

While theoretically the concept of a Workplace Tribunal for BC has some merit, the proposed model leaves too many key features of the system unclear to enable a full analysis of the strengths and weakness of the Workplace Tribunal. One vision of a Workplace Tribunal envisages a newly created, well-funded tribunal, with efficient costs and experienced and proficient members. However, it is not clear that creating a new entity will result in improved funding, better efficiency and greater experience and that existing problems will not be imported into the new tribunal.

Employment, labour and human rights law all involve significant areas of expertise. It is not clear that dividing or combining bodies in any particular fashion will, by itself, promote better expertise or

better administrative justice in any one area. At the same time, it does not necessarily mean that these areas should be administered in discrete silos. A range of solutions might address the problems identified by consultation participants. The Workplace Tribunal is only one possible solution. Other solutions mentioned in the previous section would involve a lesser degree of legislative change and may be less polarizing.

Our research identified some of the legal issues raised by the proposal to merge employment, labour and human rights adjudication in BC, but many questions merit further examination and debate. The further exploration of any reform should ideally succeed or be embedded within a process that involves first an investigation of the problems with the existing system. The consultation process revealed dissatisfaction with the current system in BC. However, dissatisfaction was not universal and was characterized by serious divisions among the stakeholder sectors. Any significant legislative change in the institutional structure for the resolution of workplace disputes should not be undertaken without full, open, and informed public consultation.

Diagram A The United Kingdom

Overview of Workplace Dispute Resolution System

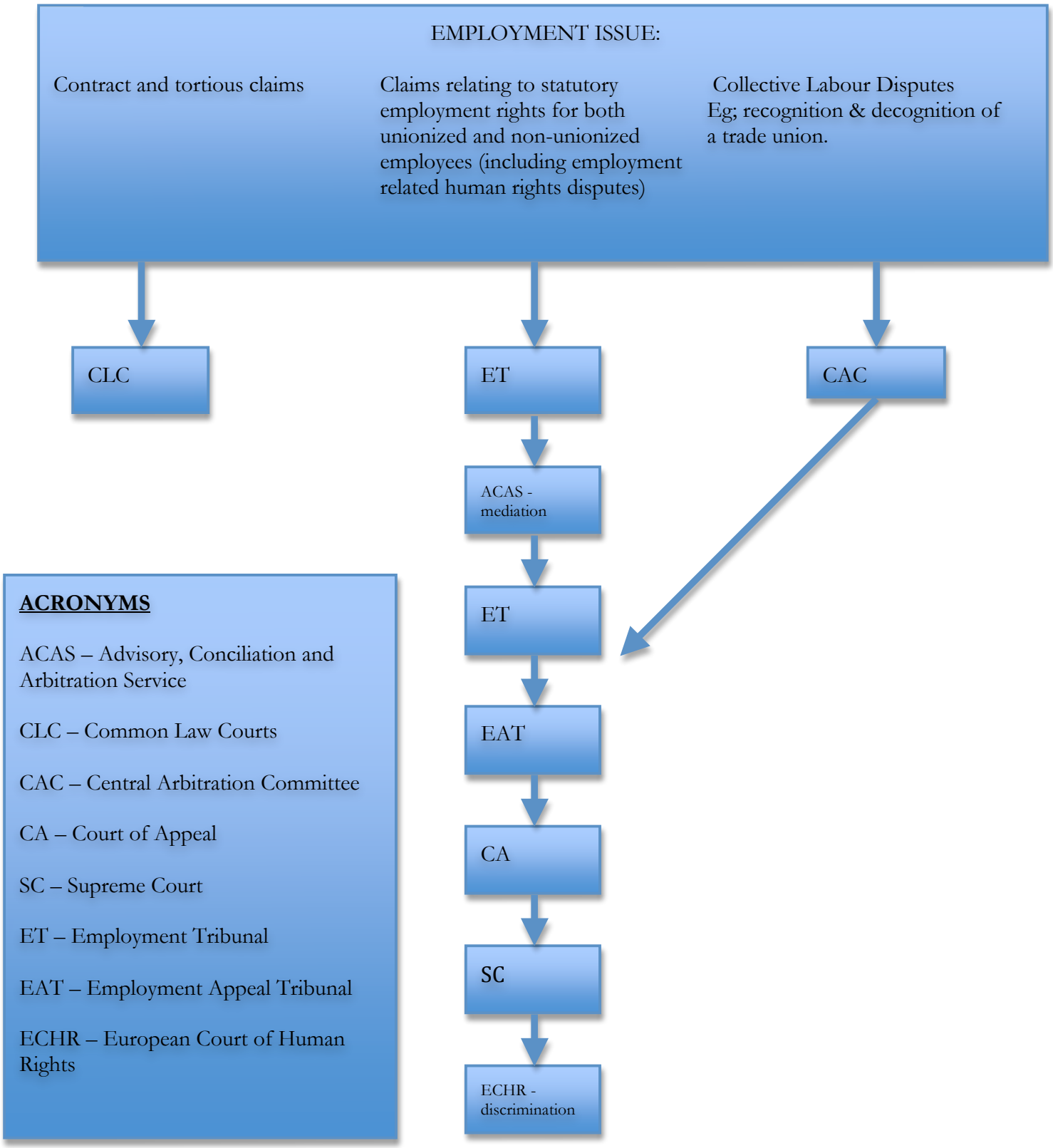
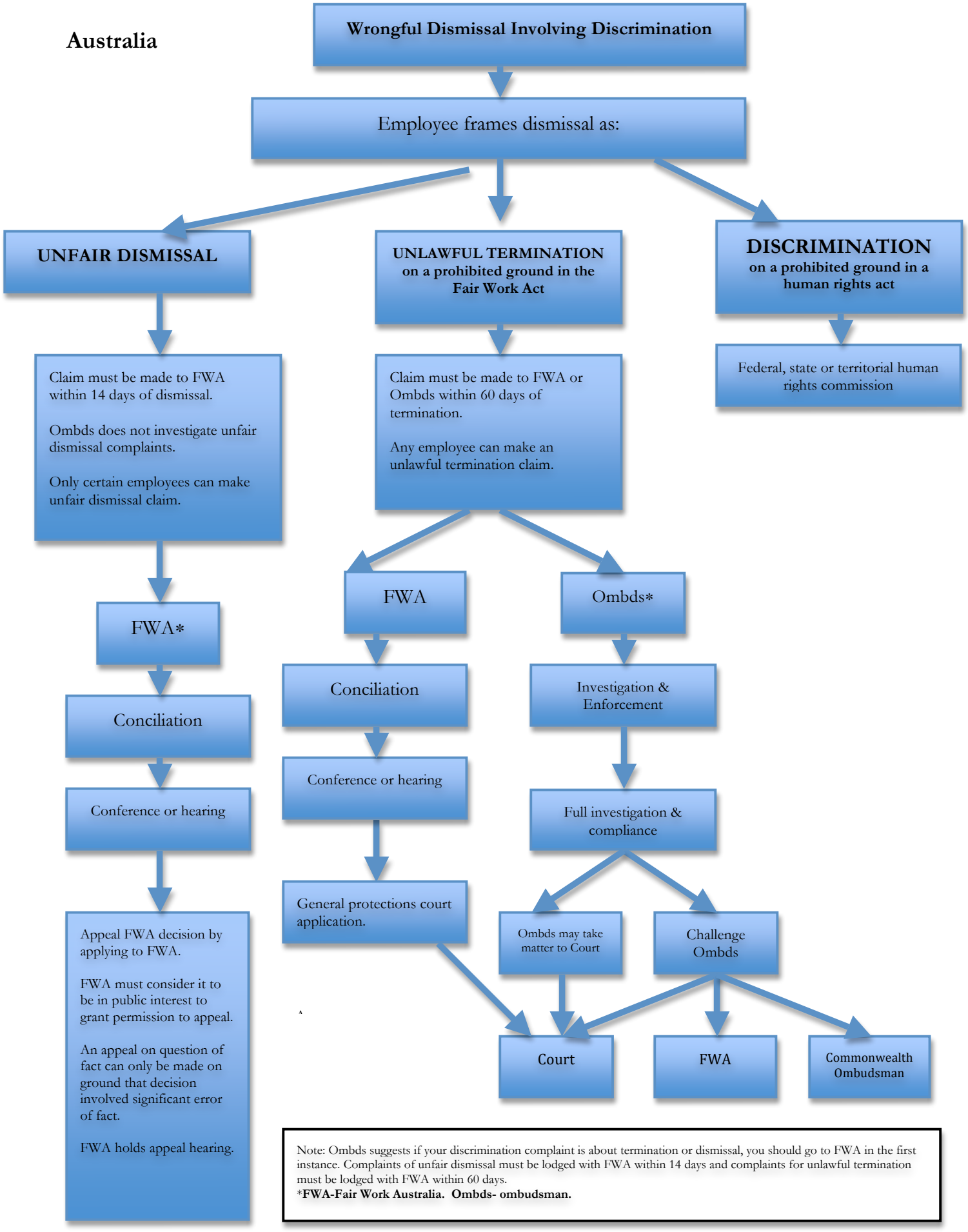


Diagram B - Overlap in Jurisdiction Over Human Rights

Australia



Note: Ombds suggests if your discrimination complaint is about termination or dismissal, you should go to FWA in the first instance. Complaints of unfair dismissal must be lodged with FWA within 14 days and complaints for unlawful termination must be lodged with FWA within 60 days.

*__FWA-Fair Work Australia. Ombds- ombudsman.__

[1] *Employment Standards Act*, R.S.B.C. 1996. c. 113.
[2] *Ibid.*, s. 3(1). See *Employment Standards Regulation*, B.C. Reg. 396/95.
[3] *Employment Standards Act*, *supra* note 1, s. 3(2).
[4] *Ibid.*, s. 3(3).
[5] *Ibid.*, parts 10 and 12.
[6] *Ibid.*, s. 74.
[7] *Ibid.*, s. 3(7).
[8] See Ministry of Labour, Employment Standards Act, Self-Help Kit, online <http://www.labour.gov.bc.ca/esb/self-help/self_help_kit.pdf>.
[9] *Employment Standards Act*, *supra* note 1, ss. 76 and 78.
[10] *Ibid.*, s. 79.
[11] *Ibid.*, s. 86(1).
[12] *Ibid.*, s. 86(2).
[13] *Ibid.*, ss. 110 and 112.
[14] *Ibid.*, s. 102.
[15] *Ibid.*, s. 102(c).
[16] *Ibid.*
[17] *Ibid.*, s. 106(4).
[18] *Ibid.*, s. 112(1).
[19] *Ibid.*, s. 112(2)(a)(i).
[20] *Ibid.*, s. 112(2)(a).
[21] Employment Standards Tribunal, Rules of Practice and Procedure, July 2, 2008, Rule 17(1), online <http://www.bcest.bc.ca/rules_July 2, 2008.pdf>.
[22] *Ibid.*, Rule 17(2).
[23] *Employment Standards Act*, *supra* note at 1, s. 115.
[24] *Ibid.*, s. 110.
[25] *Judicial Review Procedure Act*, R.S.B.C. 1996, s. 5.
[26] *Employment Standards Act*, *supra* note 1, s. 110; *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58.
[27] *Administrative Tribunals Act*, *ibid.*, ss. 58(2) and (3).
[28] *Employment Standards Act*, *supra* note at 1, ss. 86.2 and 103; *Administrative Tribunals Act*, *ibid*, s. 46.3.
[29] *Labour Relations Code*, R.S.B.C. 1996, c. 244.
[30] *Public Service Labour Relations Act*, R.S.B.C. 1996, c. 388, s. 23.
[31] *Canada Labour Code*, R.S.B.C. 1985, c. L-2.
[32] *Ibid.*, s. 84(2).
[33] *Ibid.*, s. 89.
[34] *Ibid.*, s. 90.
[35] *Parry Sound (District) Social Services Administration Board* v. *O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157 at para 54.
[36] *Labour Relations Code*, *supra* note 29, s. 99.
[37] *Ibid.*, s. 100.
[38] *Communications, Energy & Paperworkers' Union of Canada (CEP), Local 789* v. *Domtar Inc.,* 2009 BCCA 52 at para. 34.
[39] *Labour Relations Code*, *supra* note 29, ss. 136 and 139.
[40] *Ibid.*, s. 138.

[41] *Ibid*., s. 141.
[42] *Ibid*., s. 138; *Administrative Tribunals Act*, *supra* note 26, s. 58.
[43] *Administrative Tribunals Act*, *ibid.* ss. 46.1 and 46.2; *Labour Relations Code*, *supra* note 29, s. 115.1.
[44] *Human Rights Code*, R.S.B.C. 1996, c. 210.
[45] *Ibid*., s. 25.
[46] *Ibid*., s. 27.1.
[47] *Administrative Tribunals Act*, *supra* note 26, ss. 58 and 59; *Human Rights Code*, *supra* note 44, s.32.
[48] *Ibid*., s. 59(1).
[49] *Ibid*., s. 59(2).
[50] *Ibid*., s. 59(4).
[51] *Ibid*., s. 59(5).
[52] Advisory Conciliation and Arbitration Service. About us, online <http://www.acas.org.uk/index.aspx?articleid=1342>.
[53] *Employment Protection Act 1975* (U.K.), 2000, c.71, Part 1.
[54] Advisory Conciliation and Arbitration Service. "The ACAS Arbitration Scheme", online <http://www.acas.org.uk/index.aspx?articleid=2006>.
[55] Simon Deakin & Gillian S. Morris: *Labour Law,* fifth ed. (Oregon: Hartford Publishing, 2009) at 84 [Deakin and Morris].
[56] Advisory Conciliation and Arbitration Service. "ACAS Arbitration Scheme Q & A", online <http://www.acas.org.uk/index.aspx?articleid=2007>.
[57] House of Commons. *Employment Tribunals*, Research Paper 03/87 (9 December 2003), online http://www.parliament.uk/documents/commons/lib/research/rp2003/rp03-087.pdfat. at 5.
[58] Deakin and Morris, *supra* note 55.
[59] *Ibid.*
[60] Tribunals Service: Employment, online <http://www.employmenttribunals.gov.uk/>.
[61] Deakin and Morris, *supra* note 55 at 68.
[62] See *The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004*, S.I. 2004/1861*; The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004*, S.I. 2004/2351*; The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) (No. 2) Regulations 2005*, S.I. 2005/1865*; The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008,* S.I. 2008/3240.
[63] The CAC was established by the *Employment Protection Act* 1975. See also Deakin and Morris, *supra* note 55 at 86.
[64] *Ibid.*
[65] *Ibid.* at 87.
[66] *Ibid.* at 74.
[67] *Ibid.*
[68] *Ibid.* See also *Employment Tribunals Act* 1996, s. 22.
[69] Deakin and Morris, *supra* note 55 at 61.
[70] *Ibid.*
[71] Telephone correspondence with Karon Monaghan, QC (23 September 2010) [Monaghan].
[72] Telephone correspondence with Simon Deakin (7 September, 2010) [Deakin].
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid*; Monaghan, *supra* note 71.
[76] Monaghan, *ibid.*

[77] Telephone correspondence with Colm O'Cinneide (23 September 2010) [O'Cinneide].
[78] Deakin and Morris, *supra* note 55 at 88.
[79] Equality and Human Rights Commission, online <http://www.equalityhumanrights.com>.
[80] O'Cinneide, *supra* note 77.
[81] *Ibid.*
[82] Deakin and Morris, *supra* note 55 at 67.
[83] *The Employment Act 2002(Dispute Resolution) Regulations 2004* S.I. 2004/752.
[84] *Employment Act 2002* (U.K.), c. 22, Sch. 2, Parts 1 and 2.
[85] *Better Dispute Resolution A Review of employment dispute resolution in Great Britain* (The Gibbons Report), online: http://www.berr.gov.uk/files/file38516.pdf at 25.
[86] *Ibid* at 26.
[87] *Ibid.*
[88] *Ibid* at 25.
[89] *Employment Act 2008* (U.K.), 2008, c. 24, ss. 1 & 3.
[90] Advisory, Conciliation and Arbitration Service. *Disciplinary and Grievance Procedures,* online <http://www.acas.org.uk/index.aspx?articleid=2174>.
[91] Monaghan, *supra* note 71.
[92] *Ibid* and O'Cinneide, *supra* note 77.
[93] *Ibid.*
[94] O'Cinneide, *ibid.*
[95] See *Employment Tribunal and EAT Statistics (GB) 1 April 2008 to 31 March 2009*, online: <http://www.employmenttribunals.gov.uk/Documents/Publications/ET_EAT_Stats_0809_FINAL.pdf>.
[96] *Ibid.*
[97] *See Better Dispute Resolution A Review of employment dispute resolution in Great Britain,* online:<http://www.berr.gov.uk/files/file38516.pdf> at 9 [Gibbons Report]; Monghan, *supra* note 71. See also Anna Pollert, "The Lived Experience of Isolation for Vulnerable Workers Facing Workplace Grievances in 21st-Century Britain" (2010) 31 Economic and Industrial Democracy at 62.
[98] O'Cinneide, *supra* note 77.
[99] Gibbons Report*, supra* note 97, at 23.
[100] See Dr David Renton, "Deliver us from Employment Tribunal Hell?: Employment Law, Industrial Relations And The Employment Bill", online: <https://uhra.herts.ac.uk/dspace/bitstream/2299/1632/1/S87.pdf>
[101] *Ibid.*
[102] *Ibid.*
[103] Gibbons Report, *supra* note 97 .
[104] Deakin, *supra* note 72.
[105] *Labour Court Act* of 3 September 1953, as amended, s. 5(2).
[106] *Ibid.*, ss. 16(2), 35(2).
[107] *Ibid.*, s. 41(2).
[108] *Ibid.*, s. 2(1).
[109] Weiss, Manfred, *Labour Law and Industrial Relations in the Federal Republic of Germany* (Deventer, Neth.: Kluwer, 1987) at 98. (Note: later editions of this book have been published but were not accessible.)
[110] *Labour Court Act*, *supra* note 105, s. 101(1).
[111] *Ibid.*, s. 101(2).

[112] *Ibid.*, s. 110(1).
[113] *Works Constitution Act* of 15 January 1972, as amended.
[114] *Ibid.*, s. 1(1).
[115] *Ibid.*, s. 84(1).
[116] *Ibid.*, s. 85(1).
[117] *Ibid.*, s. 85(2)
[118] *Ibid.*, s. 76(2)
[119] Weiss, *supra*, note 109 at 103.
[120] *Ibid.*, s. 86.
[121] *Ibid.*, s. 76(1).
[122] *Ibid.*, s. 86.
[123] *General Act on Equal Treatment* of 14 August 2006, s. 1.
[124] *Ibid.*, s. 21(1) (right to injunction), 21(2) (claim for monetary compensation).
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[126] *Labour disputes (Judicial Procedure) Act* (1974:371), ch. 1, s. 3.
[127] Purcell, *supra* note 125.
[128] *Labour disputes (Judicial Procedure) Act*, *supra* note 126, at ch. 2, ss. 1,4.
[129] *Ibid.*, ch. 5, s. 4.
[130] *Discrimination Act*, 2008: 567, ch.1, s. 1 and ch. 6, s. 2.
[131] *Labour Disputes (Judicial Procedure) Act, supra* note 126, at ch. 2, s. 3.
[132] *Discrimination Act* (2008: 567), ch. 6, s. 2.
[133] *Ibid.*
[134] Purcell, *supra* note 125.
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[138] "Member States", *supra* note 136.
[139] *Ibid.*
[140] European Court of Human Rights. "Basic Information on Procedures", online <http://www.echr.coe.int/echr/Homepage_EN>.
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid.*
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[145] *Human Rights Act 1988* (U.K.), c. 42, s. 6.
[146] *Ibid.*, s. 3.
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[150] Interview with Rob Towner (24 August 2010) [Towner].
[151] New Zealand Department of Labour, "Role of Labour Inspectors", online, <www.dol.govt.nz>.
[152] *Ibid.*
[153] *Ibid.*
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[155] Employment Relations Authority, "The Employment Relations Authority", online: <http://www.era.govt.nz/>.
[156] *Ibid.*
[157] Towner, *supra* note 150.
[158] *Ibid.*
[159] *Ibid.*
[160] *Ibid.*
[161] Interview with Erling Rasmussen (19 August 2010) [Rasmussen].
[162] See New Zealand Department of Labour, "Employment Relations Act 2000 Review of Part 9: Personal Grievances," (March 2010), online: <http://www.ers.govt.nz/law/reviews/index.html>.
[163] *Ibid.*
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